THE SUFFOLK LAWYER

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June 2013

INSIDE...
JUNE 2013
FOCUS ON
ELDER LAW

Celebrating the right of free speech begins

By Laura Lane

The Suffolk County Bar Association's 105th Annual Installation Dinner Dance, "We the People," held on June 7, 2013, will no doubt go down in history as the most unique event of its kind and a whole lot of fun too.

Coined as an event "celebrating the right of free speech in the 21st century," the installation gala did just that with a heartfelt performance by the Suffolk County Police Officer's Emerald Society Pipe Band, a two page discussion in the program of the First Amendment of our Constitution by Scott Mishkin, Esq., the introduction of a fabulous new venue - the Cold Spring Country Club - and exceptional entertainment by Grammy Award winner, Terrance Simien & the Zydeco Experience.

Dennis R. Chase became the new president of the SCBA, sworn in by the Hon. A. Gail Prudenti, New York's Chief Administrative Judge. Unfortunately, tropical storm Andrea created a deluge of rainfall unlike any other installation, but Prudenti said the rain should not be seen as negative. It was instead, she said, a sign of good fortune. Prudenti shared with everyone something that is probably not common knowledge. When she was married so many years ago it was also pouring. She assured Chase that his year as president would be a success as her marriage has continued to be.

"Dennis has given his heart and his soul," said Prudenti. "He is a great guy."

The evening's festivities included several awards. This year's Directors' Award was presented to Past President Barry Smolowitz, who remains an active and important part of the SCBA. The award was also given posthumously to Wende A. Doniger who passed away this year. SCBA Immediate Past President Arthur E.

(Continued on page 14)

Hon. A. Gail Prudenti, New York's Chief Administrative Judge, swears in the new Suffolk County Bar Association president, Dennis R. Chase on June 7, at the Annual Installation Dinner Dance held in Huntington.

Annual Meeting celebrates SCBA contributors

The Suffolk County Bar Association Annual Meeting celebrated those who help make the bar the professional organization that it continues to be including the SCBA Directors whose terms expired that included from left, Michael J. Miller, Hon. William B. Rebolini and Wayne J. Schaefer who were recognized by SCBA President Art Shulman. (See article and more photos on page 9)

Photo by Barry Smolowitz

PRESIDENT'S MESSAGE

Take the non-conformist oath!

Dennis R. Chase

By Dennis R. Chase

Repeat after me... I promise to be different! I promise to be unique! I promise not to repeat things other people say! Good! (Steve Martin, 1978 Wild and Crazy Guy).

Thinking outside the box is a metaphor meaning to think differently, unconventionally, or from a new perspective. The phrase often refers to novel or creative thinking. The term is thought to derive from management consultants in the 1970's and 1980's challenging their clients to solve the "nine dots" puzzle, whose solution requires some lateral thinking. The catchphrase, or cliché, has become widely used in business environments, especially by management consultants and executive coaches and has been referenced in a number of advertising slogans. To think outside the box is to look farther and to try thinking not of the obvious things, but to try thinking beyond them.

Sometimes, thinking outside the box means you may need to abandon the manner in which problems have been addressed before, moreover, thinking outside the box requires an open mind; a willingness to listen objectively to points of view one may not hold dear. My approach for the coming year is not to address what the bar can do for you... but what we can accomplish together as a team. The concept, hopefully, is designed to reach outside the governing body of the Association, the Board of Directors, and outside the existing committee structure, as well. By thinking *laterally*, we can accomplish goals previously set with the best of

(Continued on page 24)

BAR EVENTS

Annual Surrogate Court Committee Dinner
Wednesday, June 12, 6 p.m.
La Strada, Hauppauge
For further information, call Marion at the SCBA

Tri-County Elder Law Committee Dinner
Tuesday, June 25, 6 p.m.
Westbury Manor, Westbury
Seating is limited. No walk-ins
For further information, call Marion at the SCBA

Annual Outing
Monday, August 12
Golf Outing at Port Jefferson Country Club, Belle Terre
11 a.m. launch, 1 p.m. shotgun
Fishing aboard the Ospry Five
7:30 a.m.
For further information call the Bar Association.

FOCUS ON
ELDER LAW
SPECIAL EDITION

Suffolk County Bar Association

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Board of Directors 2013-2014

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

JUNE 2013

4 Tuesday Commercial & Corporate Law meeting, 6:00 p.m., Board Room.

5 Wednesday Appellate Practice meeting, 5:30 p.m., Board Room.

7 Friday SCBA's Annual Installation Dinner Dance, Cold Spring Harbor Country Club, $135 per person. Call Bar Center or Register on line.

12 Wednesday District Court Committee meeting, 8:00 a.m., Cohalan Court Complex, Attorney's Lounge, Central Islip. Education Law meeting, 12:30 p.m., Board Room. Surrogate's Court Committee Dinner, $55 per person, Café LaStrada Restaurant, Hauppauge. Call Bar Center or Register on line for reservations.

15 Saturday 10 am to 4 pm - 5th Annual Dog Day Afternoon Agility Expo & Pet Fair (Raindate: Sunday, 6/16) St. Joseph's College Patchogue, NY. $10 per Car. Call 631-265-0155 for information.

25 Tuesday Tri-County Elder Law year end dinner, Westbury Manor. ($55 pp/$48pp for Court staff). Mail checks payable to Lisa Petrocelli, Event Chairperson, 21 Canterbury Road #14, Great Neck, NY 11201. RSVP by June 11, 2013.

JULY 2013

AUGUST 2013

12 Monday SAVE THE DATE- SCBA Annual Golf & Fishing Outing, Port Jefferson Country Club, Port Jefferson, NY. Further information forthcoming.

SEPTEMBER 2013

23 Monday The Annual Ira P. Block Memorial Golf Classic sponsored by the SCBA Lawyer Assistance Foundation honoring Barry L. Warren, Westhampton Country Club, Westhampton Beach, NY. Further details forthcoming.

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."

Gene J. O'Brien, Humanitarian

On May 18, 2013, at the 23rd Annual Lawyer Assistance Program Spring Retreat, past president Eugene J. O'Brien was honored, posthumously, with the Raymond P. O'Keefe Memorial Award. Gene's wife, Nancy O'Brien accepted the Award, giving the audience of 100 attorneys a humorous recounting of Gene's life and contributions to the field of Lawyers Helping Lawyers.

Gene was very active in the SCBA, serving as its President in the 2000-2001 fiscal years, and he was one of the founding members of what was formerly named the Lawyers Committee on Alcohol and Drug Abuse, now known as the Lawyers Helping Lawyers Committee. Gene was the recipient of many recognition awards, but one he was most proud of was the special tribute paid to him in 1997 by the Suffolk Coalition to Prevent Alcohol & Drug Dependencies where he received the Humanitarian Award. ~LaCova

The SCBA Scholarship Fund

Donor:

Ilene S. Cooper	Sons Alexander & Jared Cooper
Ilene S. Cooper	In memory of Dr. Albert Sherwyn
Ilene S. Cooper	In memory of Gloria Sherwyn

The generosity of our members allows us to offer scholarships to students like our recent SCBA high school essay scholarship winner, Megan M. Finn.

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

Thomas More Group Twelve-Step Meeting

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

LAWYERS COMMITTEE HELP-LINE: 631-697-2499

THE SUFFOLK LAWYER

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Editor-in-Chief

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Walking into the next century with SCBA's new leader, Dennis R. Chase

By Laura Lane

Dennis R. Chase, 49, the Suffolk County Bar Association's new President, has many plans. He is passionate about these plans and if anyone can move them forward it is Chase. Always respectful of others, generous, keenly intelligent, and kind, he is a *think outside the box* kind of guy and for Chase, the glass is always half full.

"It's not my way or the highway," said Chase. "I believe I will be an effective leader because of my willingness to listen to opposing viewpoints and my ability to have a rational conversation with people with whom I may not necessarily agree. I've been running a business for 23 years. In these challenging times, with this economy, you really need to maintain a good business plan."

Chase was born in Mineola and lived in Nassau County until his first year in high school. That's when he moved to Hauppauge. He never left.

SCBA's new president went to St. John's Law School at the suggestion of a college friend. Being an attorney was not something he'd ever considered.

"My parents had groomed me my entire life for medical school but it was not what I wanted to do," said Chase, who is the managing partner at The Chase Sensale Law Group. "I developed my burning passion for the law after I started practicing. I love what I do."

He will bring this love of the law to his position as the Association's new president. Chase has several goals in mind for the upcoming year.

Joining other past presidents, Chase's primary objective is continuing the efforts to create greater diversity within the Association, but he's taking the issue one step further. "One of my most important goals is to ensure that the leaders within the Association are diverse, and truly represent the members we serve." Chase is open to any ideas that may change the ways in which the Association selects its leaders.

A close second, is his desire to make numerous technological changes at the SCBA. "We can't efficiently use the database we now employ," he explained. "I'd like to not only replace our existing database, but carefully evaluate our hardware needs, as well. Right now, we rely *solely* upon one person, Barry Smolowitz, who is one of the most dedicated and knowledgeable attorneys I know. A successful business model, however, does not allow for the Association to *solely* depend upon any one person."

His plan is to have an experienced IT person (employed by his own firm) completely evaluate the Association's current hardware and software and make recommendations for change in the future to allow staff members to work more efficiently. While this would ordinarily be a costly endeavor, Chase will provide the service at no cost to the Association. He will then begin the process of planning the upgrade of the entire system, and hopefully, during his term, see at least a portion of his plan implemented. He recognizes the changes in technology will be big, but he is hopeful. "I just want to get the ball rolling," he said. "There's no quick fix to our dilemma. The upgrade will be a herculean task."

Another goal Chase hopes to accomplish

Dennis R. Chase

is the creation of an effective liaison between local law schools (and not just Touro), which he said the Association has not successfully accomplished thus far. The SCBA has attempted outreach by offering student receptions, which Chase says were well intended but, unfortunately, ineffective.

"Maybe we can take the Association to the schools," he considered. "We want to find a way to reach students earlier in their legal education so they understand the importance and value of membership in our Association. Membership can be instrumental to their future success. Law school students need to comprehend *the big picture*."

Chase would also like to see the Association's carbon footprint significantly reduced, which he successfully accomplished in his own office. Chase's staff members work from home, telecommuting to work each day. Further, he maintains a completely paperless environment and the firm strives to be as green as possible in all of its endeavors. "I'd love for the Association to evaluate our carbon footprint and then take the necessary steps to successfully reduce it."

Anyone taking on the job of President knows there will be challenges. Chase is no different. One hurdle he acknowledged is the ever declining membership. This may be due to the aging population of the established members, the economy (which Chase believes to be slowly improving), and the shifting attitudes among law school students - what these attorneys of tomorrow find important.

"We still need to pay for the Association's basic necessities, including providing members' quality legal programs and keeping members abreast of current changes in the law and associated trends," said Chase. "We should be a meaningful conduit for the ideas of our members and need for our membership to be not only inclusive of younger attorneys, but diverse ethnically, as well. Currently the Association does not necessarily represent our incredibly diverse legal population."

Another challenge Chase said he will encounter is an aversion to change. "Lawyers may be most adverse to change because they tend to be very obsessive in their thought process," he explained. "They are reluctant to change, especially if they have enjoyed prior success."

Meet Your SCBA Colleague

Maureen Liccione, a municipal litigator, was the first woman in her family to attend college and the first professional. When she worked part time for NYS Senator John Dunne as an undergraduate, she never guessed the experience would lead her to someday become a lawyer.

Meet Your SCBA Colleague

By Laura Lane

What career path did you pursue while attending Siena College as an undergraduate? I had planned to be a social worker. I even went to grad school for a year, which is when I decided that social work wasn't for me.

But being an attorney still did not occur to you. What did you do next? I had worked part time for Senator Dunne in my junior and senior year in college and during my year in grad school. When I left grad school I heard there was a full time opening in his office in constituent services. I worked for him for two years during which time I decided to go to law school.

Why did you decide to go to law school? While working as his legislative aid I helped Senator Dunn with legislation he sponsored to allow a disabled student to play school sports. I helped him get it passed and that experience led me to my interest in law. I decided to go to law school.

How did you end up at the New York City Law Department? I made my own way through law school. The summer after my first year at St. John's I got a work study grant to work at Corp Counsel which was a godsend; it ended up getting me my first job as a lawyer. That Sept., as I started my second year of law school, I went onto their payroll as a part time student legal specialist. I remained a full term student while working 18-20 hours a week which I was able to do by taking some night and Saturday courses. I finished in three years.

What was it that you liked about working there? I loved the work, loved advocating for policies rather than fighting over money. I started full time at Corp Counsel in August of 1981 after the July bar exam. I was admitted to the bar in the spring of 1982

What set it apart from other legal opportunities at the time? It was a great place to work with a lot of young lawyers and it was very collegial. It was one of the first places women were advancing in law and there were as many women there as men. And I had opportunities that someone just out of law school would not have and got to do great things. The types of things I was working on ordinarily you'd be 10 to 15 years out of law school to be able to do. We weren't just pumping stuff out – we were making a difference.

What was the profession like for women back in the 80's? When I came to Suffolk County in 1985 from the city, it was a culture shock. It was not uncommon for me to be the only woman in the courtroom. I remember when a judge asked that a senior partner be thanked for sending his secretary – that would be me he was referring to. At a negotiating table I remember it being asked why a party didn't send a lawyer. I raised my hand and said I was the lawyer. Things have changed a great deal for women.

What was one of your more memorable cases there? I'd have to say it was when I worked on getting an injunction on the Yankees. Roy Cohn was the lawyer for the Yankees.

What led you to work at Twomey, Latham, Shea & Kelley? They were doing public interest work and I wanted to do something interesting. This seemed like the perfect fit. I was hired as a partner to do outside council in environmental litigation for Smithtown and Babylon.

Why did you decide to join Jaspan Schlesinger? I wanted to go to a bigger firm with more opportunities to expand my practice.

What do you enjoy about being an attorney? I love research and writing, digging into an issue and finding the answer. I love the challenges of the job. I'm not satisfied until I have the answer.

When did you join the SCBA and why? It was in the mid 80's. I couldn't imagine not joining. If you are a lawyer you join the bar association.

What you do enjoy about being a member? The collegiality and I think that membership gives you a real appreciation of what good people lawyers are and how hard they work. At the heart of every lawyer there is a sense of wanting to see justice done.

Is there anyone you'd single out as a good role model at the bar? My most significant role model is Bob Quinlan, the former president of the SCBA and long-time head of the 18B panel. Bob truly is a lawyers' lawyer with a deep commitment to the ideals of our profession. Harvey Besunder is also a really good role model always assisting attorneys and setting a good example.

Maureen Liccione

Do you have any professional plans on the horizon? I'm going to be on the bar's Grievance Committee next year. Additionally, I was asked by the Second Dept. to be on the Independent Judicial Election Qualification Commission for the Office of the Court of Admissions.

Why would you recommend attorneys join the SCBA? For young attorneys new to the profession, I think for the role models and to get to know people in our profession. You will see these people in court as adversaries and judges. When you get to know people it is very helpful for the administration of justice.

COURT NOTES

By Ilene Sherwyn Cooper

Appellate Division-Second Department

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

Scott B. Feldman
Virginia R. Iaquinta-Snigur

Attorney Resignations Granted/Disciplinary Proceeding Pending:

Daniel J. Fox: By affidavit, respondent tendered her resignation, indicating that he was aware of the potential for reciprocal discipline based on an order of the Supreme Court of New Jersey continuing his temporary suspension from the practice of law in New Jersey and censuring him for failing to cooperate with disciplinary authorities and engaging conduct that was prejudicial to the administration of justice. Respondent acknowledged that he would be unable to successfully defend himself on the merits against any charges predicated upon this misconduct under investigation. He stated that his resignation was freely and voluntary rendered, and acknowledged that it was subject to an order directing that she make restitution and reimburse the Lawyers' Fund for Client Protection. In view of the foregoing, the respondent's resignation was accepted and he was disbarred from the practice of law in the State of New York.


Ilene S. Cooper

Decisions of Interest
Second, Ninth and Eleventh Judicial Districts

Attorneys Censured

Melvin Blakely: Motion by the Grievance Committee to impose reciprocal discipline upon the respondent based upon disciplinary action taken against him by the Supreme Court of the State of New Jersey attributable to gross neglect, failure to provide a written retainer and negligent misappropriation, recordkeeping violations, and practicing law while ineligible. Based on the findings of the Supreme Court, reciprocal discipline was imposed, and the respondent was publicly censured.

Attorneys Disbarred:

Deborah K. Rice: Application by the Grievance Committee to impose discipline based upon disciplinary action taken against her by the Supreme Court of the State of Florida and the Supreme Court of the State of Georgia. The Supreme Court of the State of Florida disbarred the respondent based upon her plea of guilty in the United States District Court for the Eastern District of Pennsylvania to two counts of mail fraud, and one count of wire fraud. The Supreme Court of the State of Georgia accepted the respondent's voluntary resignation based upon her plea. The respondent was served with a notice of the application by the Grievance Committee but failed to respond. Accordingly, based on the discipline imposed by courts in Florida and Georgia, the application was granted, and the respondent was disbarred from the practice of law in the State of New York.

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

BENCH BRIEFS

By Elaine Colavito

SUFFOLK COUNTY SUPREME COURT

Honorable Paul J. Baisley, Jr.

Motion to quash granted; subpoenas which sought depositions of non-party witnesses facially defective and unenforceable.

In *Michael DeFazio V. Joseph P. Kelly and Bright Side Electrical Services, Inc.,* Index No.: 11992/10, decided on June 20, 2012, the branch of plaintiff's motion which sought to quash two non-party subpoenas was granted.

The court found that the subpoenas were facially defective and unenforceable because they neither contained nor were they accompanied by a notice setting forth "the circumstances or reasons such disclosure was sought or required." The court further stated that the plaintiff had not made the requisite showing of "unusual and unanticipated circumstances" subsequent to the filing of the note of issue as would require additional pretrial proceedings to avoid substantial prejudice.

Honorable Hector D. LaSalle

Motion for default judgment denied; failure to comply with CPLR §3215(g)(3)(i) and (g)(4)(i).

In *Continental Marble, Inc. v. USA Associates, LLC and Benjamin Russo, AS Escrow Agent,* Index No.: 28545/12, decided on February 1, 2103, the court denied plaintiff's motion for a default judgment.

The court noted the pertinent facts as follows: Defendant Benjamin Russo was served pursuant to CPLR §308(2) on September 18, 2012 with an additional copy mailed on September 1, 2012. Defendant USA Associates, LLC was served pursuant to BCL §306 on September 26, 2012. Plaintiff alleged that defendants failed to interpose an answer. In rendering its decision, the court noted that the plaintiff failed to establish compliance with CPLR §3215(g)(3)(i) and (g)(4)(i), which was required where, as here, the plaintiff's motion was one for a default judgment sought against a defendant in an action based upon nonpayment of a contractual obligation. Pursuant to CPLR §3215(g)(3)(i), such motion required that an affidavit shall be submitted that additional notice had been given by or on behalf of the plaintiff at least 20 days before the entry of such judgment, by mailing a copy of the summons by first class mail to the defendant at his place of residence in an envelope bearing the legend 'personal and confidential' and not indicating on the outside of the envelope that the communication was from an attorney or concerned an alleged debt. In the event such mail was returned as undeliverable, or if the place of residence of the defendant was unknown, a copy of the summons shall then be mailed in the same manner to the defendant at his/her place of employment if known. If neither the place of residence, nor the place of employment is known, then the mailing shall be to the defendant at his last known residence. Pursuant to CPLR §3215(g)(4)(I), such motion requires that an affidavit shall be submitted that an additional service of the summons by first class mail has been made upon the defendant corporation at its last known address at least 20 days before the entry of judgment. As plaintiff did not comply with these sections, the motion was denied.


Elaine M. Colavito

Motion to compel granted to extent provided in decision; meaningful responses were required to discovery demands and "not applicable" without further explanation shall not be considered a meaningful response by the court.

In *Michael Firestone v. Roy Ulrich and John Ulrich, Roy Ulrich v. Matthew McGurk and Ethan Grant,* Index No.: 1909/10, decided on February 25, 2013, the court granted defendants'/third-party plaintiff's application for the court to issue an order pursuant to CPLR §3124 compelling the third-party defendants to comply with the defendants'/third-party plaintiff's discovery demands. The court directed the third-party defendants to fully respond to defendants' third-party plaintiff's demands, to the extent that they were able to do so. The court further stated that any demand for which the third-party defendant could not comply should be fully explained by the third-party defendants. The court continued and ordered that meaningful responses were required and that "not applicable" without further explanation would not be considered a meaningful response by the court. Finally, the court reminded third-party defendants that the Court of Appeals has held that, "compliance with a disclosure order requires both a timely response and one that evinces a good faith effort to address the requests meaningfully."

Motion to dismiss for failure to prosecute denied; procedurally defective.

In *Shaun Hursell v. Krista L. Tursi and Jade Maya,* Index No.: 167/09, decided on April 16, 2013, the court denied defendants' motions which sought an order of dismissal of plaintiff's complaint for failure to prosecute. In or about August of 2011, plaintiff's counsel notified defendants' counsel of the death of the plaintiff. By notice of motion dated February 26, 2013, and notice of cross-motion dated March 8, 2013, defendants now moved for an order dismissing plaintiff's complaint for failure to prosecute because there had been no substitution made for the deceased plaintiff in the action Counsel for the plaintiff opposed the motions and submitted that same were procedurally and jurisdictionally defective. In denying the applications, the court noted that the death of a party divests the court of jurisdiction and stays the proceedings until a proper substitution has been made pursuant to CPLR §1015(a) and CPLR §1021. The death of a party also terminated the authority of the attorney to act on behalf of the deceased client. Moreover, any determination rendered by the court without proper substitution generally is deemed a nullity. Further, such application must be made by order to show cause, and as such, the instant application was procedurally defective.

Honorable Arthur G. Pitts

Motion for protective order granted; defendants have not established that authorizations sought are material and necessary in the defense of the case.

In *John R. Nielsen, as executor of the estate of Richard Warren Nielsen, deceased v. Nina Alexandrova, Zafar Ulhasan Fatimi, Manoj Kumar Trehan, Manoj Trehan Medical, P.C., Daniel Han, Daniel Han, M.D., P.C. and Brookhaven Memorial Hospital Medical Center,* Index No.: 40251/10, decided on January 8, 2013, the court denied defendants' cross-motions to compel plaintiff to comply with the defendants' prior discovery demands, and the court granted plaintiff's motion for a protective order.

Here, plaintiff failed to comply with demands averring that said records were not relevant because its bill of particulars was limited to allegations regarding pulmonary, cardiac, renal and hepatic injured. The plaintiff further argued that the medical records sought by the defendants as to the condition of the decedent's skin, feet, eyes and musculoskeletal system were not material and necessary to its complaint and as such a motion for a protective order was warranted. In granting plaintiff's motion for a protective order, and denying defendants' cross-motions to compel, the court pointed out that it is well settled that although an action or wrongful death implicates numerous issues which may tangentially relate to the general health of a decedent insofar as health may have a bearing on pecuniary loss, it is plain that our courts have not been willing to erode strong public policy of this state favoring nondisclosure of privileged medical information. Thus, the mere circumstances of commencing a wrongful death action based on medical malpractice does not open the gate to disclosure of all medical information unless and until the issue is affirmatively placed in controversy.

The court concluded that the defendants sought authorizations from various medical providers which the defendants had not established were necessary and material, in the defense of within the action. The court further stated that the plaintiff had pled that its decedent sustained pulmonary, cardiac, renal, and hepatic injured which resulted in death. Medical records regarding the case the decedent received for his feet, eyes, skin and musculoskeletal system clearly were not relevant to the malpractice alleged.

On its own motion, court vacated note of issue; plaintiff died on or about December 8, 2012, and further that plaintiff's counsel, without knowing of the death, filed a Note of Issue with the clerk thereafter

In *Richard R. Ward v. Island Cardiovascular Associates, P.C. n/k/a Island Cardiovascular Associates of NY, P.C. and Shamim A. Khan, M.D.,* Index No.: 11177/10, decided on April 4, 2013, the court having been advised that the plaintiff died on or about December 8, 2012, and further that plaintiff's counsel, without knowing of the death, filed a Note of Issue with the clerk thereafter, and further than there was a pending motion fully submitted in February 21, 2013 to vacate the note of issue, on its own motion, vacated the note of issue. The court further stayed the case pending the appointment of a personal representative for the plaintiff's estate.

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.

Richard Horowitz the new Supervising Judge of the District Court

By Laura Lane

The Hon. Richard I. Horowitz was appointed as Supervising Judge of the District Court at the end of January after the retirement of Hon. Madeleine A. Fitzgibbon. Horowitz characterized his new position as ideal.

"I'm enjoying the job very much," he said, adding that he is having very good experiences with colleagues, supervisors, and is enjoying working with the staff at the District Court. "I also enjoy the interaction with the outside agencies. There are a lot of systems at work and I enjoy seeing what each entity is doing."

Also an Acting County Court Judge, Horowitz, 50, is still working in the mental health and drug treatment courts. He also remains a Special Professor of Law at Hofstra Law School, his alma mater.

In fact, Horowitz, a resident of Suffolk County for the past 15 years, is involved in many pursuits. He's the President of the Suffolk County District Court Judges Association, a member of the Advisory Board of the Cohalan Court Complex Children's Center, Judge of the New York State Bar Association Mock Trial Competition, and a mentor for students at Hofstra, Touro, and CUNY in Queens.

Horowitz plans to continue pursuing his busy schedule. "The last few months have been pretty hectic but I enjoy what I do," he said. "There are plenty of lawyers busier than I am."

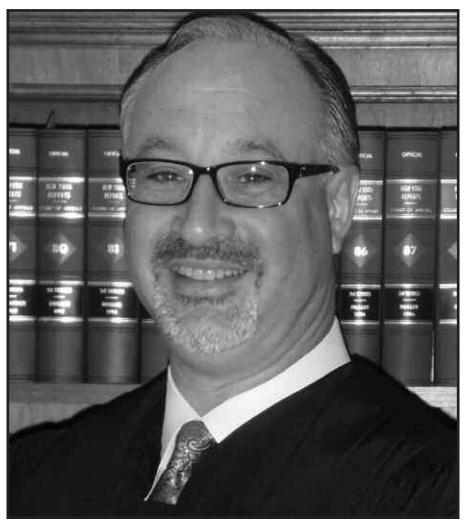
Modest and unassuming, Horowitz comes from a background somewhat different than his predecessor. He has had only two jobs his entire life, as a public defender and as a judge.

As a senior trial attorney, Horowitz worked at the Legal Aid Society of New York for *The MICA Project*-Criminal Defense Division for two years while also continuing his work at the Criminal Defense Division in Queens County, where he worked for 17 years.

At *The MICA Project*, he represented criminal defendants with mental illness and chemical addiction working as a part of a team of lawyers and social workers with a mission to divert these types of individuals out of the criminal justice system and into community based mental health treatment. In Queens County, he represented indigent individuals accused of felony and misdemeanor offenses. Horowitz handled more than 15,000 cases in Criminal and Supreme Court.

"My background gives me a unique prospective," he said. "I've always tried to do things that are public interest oriented. Criminal and Environmental Law have always been my interests."

Horowitz decided to go into law when he was a teenager but he had never even met a lawyer until he entered law school where some of his teachers were attorneys. "I always thought of law in the abstract as a teenager. I was able to put it to use as a public defender," he said.



Hon. Richard I. Horowitz

Even though his new job adds many responsibilities, he is committed to continuing to teach and mentor law school students. "I've had seven or eight students over the past couple of years," he said. "It's important to be a mentor. When I was a student I had very little opportunity to interact with lawyers or judges. I think it's important for students to have a feeling for what's going on. It's refreshing to have them around."

Horowitz pitched a new course to Hofstra Law School a couple of years ago, *Mental Health Issues and the Criminal Justice System* and it is popular. There's always a waiting list for Horowitz's class. "When I was in law school there were no courses of that nature," he explained. "I think it's an important course to learn."

Horowitz has been active at the SCBA and enjoys going to the educational opportunities offered at the Academy of Law. He is a member of the Bench/Bar Committee and has been a guest lecturer at the Academy.

"The SCBA is wonderful," he said. "The level of camaraderie and civility is unique to this county. A lot of people don't realize this because they've never worked in other counties as I have. It is very well run and offers me a chance to be social and educated, to get to know my colleagues better."

Horowitz holds a great deal of respect for Fitzgibbon. He worked for her for six years and said she is missed. "She took me under her wing and was a mentor to me," he said. "She is such a role model. One of the most difficult parts is stepping into her role and filling her shoes. I hope I can do one half as good a job as she did."

Laura Lane is the Editor-in-Chief of The Suffolk Lawyer. Additionally, she is currently the editor of the Oyster Bay Guardian, and an award winning journalist recognized by the New York Press Association and the Press Club of Long Island. Her work has appeared in the New York Law Journal, Newsday, and several magazines.

Now I have electronic pen pals

By John L. Buonora

Just when from time to time I believe that no one reads some (maybe most) of the stuff I write in *The Suffolk Lawyer*, I unexpectedly hear from a member commenting on a column.

A few months back in August of last year I wrote *Touro, A Leader Turning Law Students into Lawyers*, an article about what Touro (among other law schools), is doing to provide its students with real life experiences in the practice of law. Last month I received an e mail from SCBA member Haig Chekenian (my electronic pen pal of this piece) who has been retired several years. Haig's email as well as a follow-up email is set forth at the bottom of this piece.

But first, as I am often wont to do, I'd like to take you on a somewhat circuitous path leading to the reason for the publication of the instant article.

In the May 2003 issue of *The Suffolk Lawyer* I wrote *Real Lawyers Use Yellow Legal Pads*, a nostalgic lamenting of the increasing diminution, or even disappearance, of the yellow legal pad to be replaced by the allegedly more ecologically friendly 8" by 11" white writing pads, and eventually the lap top, I Pad and smart phone. This column was read by Emmett F. McNamara who was 96 years of age at the time and spending his winters in Florida. Emmett, who we lost this past year at the grand age of 103, wrote to me the really old fashioned way - by hand, recounting his long and colorful career as both an FBI agent and practicing attorney. This became the subject of *I'd Like You To Meet My New Pen Pal* in the March 2005 *Suffolk Lawyer*.

John L. Buonora

The September 2009 issue of *The Suffolk Lawyer* contained Lindsay Ruthven Henry, *What are a few years compared to an eternity* detailing the career both in the military in World War II and in the practice of law of former Suffolk District Attorney Lindsay R. Henry. If you didn't already know, Lindsay R. Henry was the father of former Suffolk District Attorney and Retired Supreme Court Justice Patrick Henry, and grandfather of SCBA members Lindsay Henry and Suffolk District Court Judge Jennifer Henry. This article evoked another handwritten response in October, this time from Libby Adelman of Longboat Key, Florida. Libby was the widow of attorney S. Martin Adelman, who was a friend of Lindsay. She recounted how Lindsay was a man completely free of prejudice, which in the 30's was pretty unusual, as Libby wrote speaking of Lindsay's embracing of his friend who was not allowed membership in a certain local country club because of his Jewish faith.

Over the years I've written many articles about our members and their lives and careers. Additionally, over an approximate three year period from 2003-2006 approximately 80 videotaped interviews of past presidents of the SCBA, members of the judiciary and other leaders in the profession were conducted. These interviews are preserved on DVDs. Copies are also buried in our time capsule for future generations to get a glimpse of what the practice of law was like in the 20th and early 21st Century. The collective experiences of those interviewed are informative, instructive and help to teach the lawyers who follow them about the history of the practice of law and how it evolved. As a side bar I'd like to mention that having spent about 22 years of my career as a prosecutor I particularly enjoy contributor Bill McSweeney's entertaining recollections of his time as an assistant district attorney in the Bronx.

This brings us back to my email exchange with Haig. We both believe that a recurring column written by contributing members telling of their recollections of interesting experiences, especially of those in the distant past might be well received. Our e mail exchange containing some of Haig's recollections follows (Remember, in an e mail exchange read from the bottom up):

Of course you can use my e-mail and I think it's a great idea to stir up memories from the so called "old timers."

I know that years prior to my starting in 1962 title companies were not generally used in real estate transactions but instead an abstract of title certified by a lawyer was used (as is still frequently the case in upstate New York).

And on one day a week, I think it was Wednesdays, all the lawyers representing buyers in a real estate matter in Suffolk County would go out to Riverhead to do the abstract by tediously turning the pages of the Grantor - Grantee records for each town in huge bound books.

Sometimes fortified by a liquid lunch at the Perkins Hotel I am told they would make their way back to the record room in the County Clerk's office and if in a hurry would sometimes rip a page surreptitiously out of the record book and head back to the office. It later became an incentive to use a title Company especially since the limit of a lawyer's liability in certifying the abstract of title was $1,000.

Sincerely yours,
Haig
——- Original Message ——-
From: John Buonora
To: 'haig chekenian'
Sent: Friday, April 26, 2013 1:53 PM
Subject: RE: "We Are Turning Law Students into Lawyers"

Thanks Haig:

As the old saying goes: "better late than never." I love your comments and really appreciate your thoughts. As a matter of fact, you gave me an idea. Would you mind if we published your email to me as part of a recurring column, maybe with a title like "A trip down memory lane" or something a little more clever or creative? In the column I could ask our veteran members (a more impressive title than say "old timers") for their recollections of interesting experiences in the somewhat

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Experienced attorneys needed

The Suffolk Lawyer is pleased to announce a new column that will launch next September. ***A Look Back at the Good Old Days*** will be written by guest columnists, our SCBA veteran attorneys and judges, who will treat us with a walk down memory lane sharing what it was like to practice when they were either just starting out, or during the heyday of their careers.

Life has changed a great deal in the last 30 to 40 years. We hope to offer a window to the past revealing the way the law was once practiced, what clients were like back in the day and how the courts operated.

We need volunteers. Please contact editor Laura Lane by emailing scbanews@optonline.net or contact Past President John Buonora at jlgoodhour@optonline.net. We'd love to hear from you and will help you craft your column. Everyone is waiting so don't delay.

LAND TITLE

Who are you again?

By Lance R. Pomerantz

Experienced practitioners know that some of the most contentious title disputes arise out of joint ownership among family members. Some people find out that they have co-owners in the "family estate" that they don't want and didn't even know about. To make matters worse, getting rid of them can be difficult, time consuming and expensive.

Down on the Farm

Midgley v. Phillips, et al., 2013 NY Slip Op 30788(U) (Sup.Ct., Suffolk County, April 12, 2013) involved a 10-acre farm in Peconic. The last deed of record was into William Buckingham. The opinion includes evidence that Buckingham originally permitted his cousin, Howell, possession of the farm. When Buckingham died in 1924, his will did not devise the farm. Howell died in 1928 leaving all of his property to his daughter, the mother of Midgley, the instant plaintiff. Howell's source of title, if any, is not disclosed.[1]

Following the deaths of Midgley's parents, Howell's interest in the farm was specifically devised to Midgley and his brother-in-law, Sayre, as tenants-in-common, in 1970. Soon thereafter, Sayre refused to participate or contribute to Midgley's efforts to obtain title to the property or in the renting or operation of the farm. Since then, Midgley has by turns operated the farm, leased it to others, paid property taxes and made infrastructure improvements.

The instant action was brought to establish Midgley's title against Sayre's heirs, as well as anyone else who might claim an interest as a successor to Buckingham.[2]

Lance R. Pomerantz

Cutting off the cotenants

New York recognizes the common-law presumption that one cotenant's possession is possession by and for the benefit of all other cotenants. Therefore, non-possessory cotenants are protected from the inherent danger that one cotenant's exclusive possession could form the basis of an adverse possession. Nevertheless, the protection is not absolute.

A possessing cotenant can establish title by of adverse possession if, in addition to proving the required elements of adverse possession, they can show an *ouster* of the non-possessing cotenants. An ouster can be either express or implied. Proof of an express ouster is usually straightforward (physical exclusion from the property coupled with an expressed intent to exclude). Implied ouster, however, can be quite complex, especially when the possessor may not even be aware of the existence of the non-possessing cotenants.

RPAPL §541 sets out the parameters for running the statute of limitations for adverse possession against non-possessing cotenants. Essentially, §541 limits the common-law presumption to a continuous 10-year period of exclusive occupancy. Once those 10 years has run, the 10-year period begins to run in connection with the adverse possession claim. Thus, a 20-year period of exclusive occupancy must be shown in order to cut off the interest of a non-possessing cotenant, *Myers v. Bartholomew,* 91 N.Y.2d 630 (1998.)

The Hard Part

Compliance with the §541 requirements is not that difficult, especially when the existence or identity of the non-possessing cotenants is unknown. In many instances, even the non-possessors are unaware of their status. The difficulty for the possessor is in proving the acts tantamount to an implied ouster.

The *Midgley* opinion is helpful because it summarizes some of the actions that are *inadequate* to accrue a claim of adverse possession. Paying mortgages, taxes or maintenance expenses, and providing for upkeep of the property are inadequate, because, in the absence of other factors, they are consistent with preservation of the property for the benefit of all cotenants. In addition, the mere recording of a deed (typically styled a "correction" of "confirmation" deed) without any change in possession or notice to putatively "ousted" cotenants, does not constitute an ouster for claim accrual purposes.

In *Midgley,* the court found that the "Plaintiff established adverse possession of the subject property by … farming, renting, maintaining, using and improving the subject property from 1971 onward with no monetary or other contributions from any of the defendants." In addition, "Defendants' mere contentment with their complete lack of involvement or monetary or other contribution … does not inure to their benefit …"

More where that came from

Why did this case arise after all this time? Most likely, a proposed sale, mortgage or regulatory submission triggered a title search that revealed the problem. Market pressure to monetize long-held "family owned" properties continues to increase. At the same time, latter-day generations of those families have become geographically dispersed and disconnected over the last several decades. It is safe to assume that these cases will continue to pop up for the foreseeable future. The common-law presumptions, statutory impediments and the vagaries of human nature place a premium on affirmative proof of exclusion and control.

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

1 The reported opinion presumes, but does not explicitly find, that the farm passed to Buckingham's heirs (including Howell) under the intestacy laws.
2 There are 37 named defendants.

Securing home care services for the Managed Long Term Care client

By Dennis McCoy

As New York State has abandoned its traditional fee for service Medicaid in favor of Managed Long Term Care (MLTC) plans to approve and provide Medicaid home care services, staunch advocacy for the home care client may now be more important than ever. As funding for the MLTC plans is partially capitated, the home care advocate must be keenly aware of a client's case in order to discern whether the services approved by the MLTC plan are validated by the client's needs, or driven by cost saving measures due to the plan's partially capitated funding.

Under Federal statute 42 U.S.C. § 1396b, Managed Long Term Care plans are mandated to offer Medicaid services to the same extent as they are available to recipients of fee for service Medicaid. Equally, under New York State's Model Contract for MLTC plans, "Managed care plans may not define covered services more restrictively than the Medicaid Program." Thus, MLTC plans are unable to create their own limitations to home care services in order to protect their funding. In fact, the Medicaid regulations which require a cost effectiveness assessment when authorizing home care services were drafted specifically to manage the New York State Medicaid program, protect profits for the Managed Long Term Care plans, which contractually receive a capitated stipend for each home care client regardless of the hours of care provided.

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When assessing home care services, possessing a medical background, although helpful, is not required for effective advocacy. What is required however, is a proper understanding of the regulations governing Medicaid home care services found in section 505.14 of Title 18 of the New York Codes Rules and Regulations. For example, in order to be eligible, the client's requested home care services must be medically necessary and the client's condition must be stable. The client must be either self directing, or have another self directing individual available to direct the client's care.

By Dennis McCoy

Personal care services are task based and are divided into two levels of care. Level I home care services, which include general housekeeping tasks such as vacuuming, laundering, shopping and meal preparation, are limited to less than eight hours per week. Level II home care services contain all those tasks in Level I, and include personal assistance tasks such as dressing, bathing, toileting and ambulation. Both levels of care provide a client assistance with their activities of daily living (ADL's). However, it is the authorization for Level II services that allows for extensive hours of home care assistance including live-in and continuous 24 care services. This is so because if the client cannot ambulate, transfer or toilet without assistance, he / she cannot be safely left alone.

The first stage of assessing a client for home care begins at the client's consult. It is here that the attorney becomes aware of the client's relevant health issues and how his / her needs will equate to hours of home care assistance. This initial interview is where knowledge of Medicaid regulations is requisite in determining not only what home care services are warranted, but to also manage a family's expectations. Failure to gain important facts about the client, such as living with informal caregivers, or uncovering health issues such as seizures, and aspiration precautions, permits the unfamiliar attorney inadvertently to create unreasonable expectations for the client when in fact these circumstances can lead to limited hours of care or an outright denial of services down the road.

Once an application for Community Medicaid with Long Term Care is approved, the client, with the attorney's guidance, must arrange for an in home nurse assessment through one of the MLTC plans. Since some months will have passed from the date of application to the time of Medicaid approval, it is crucial that the attorney contact the client or his / her representative to discuss the current health care needs of the client. If the client has developed conditions which cannot be serviced by a personal care aide such as wound care, glucose monitoring, or the administration of oxygen or injectable medications, and the client cannot direct these tasks, the client's representative must be counseled to make arrangements to meet these higher level needs in order to prevent a denial of services. Even though MLTC plans do offer Home Health Aide and Nursing Services which can handle some higher level care needs, approval of such continuous services create a large expense to the plan, and thus may prove hard to procure.

Additionally, clients and their representatives must also be cautioned to avoid common pitfalls such as advising the nurse assessor "we need someone to watch mom," or "we would like dad to have someone to talk with as he is alone all day." Although such heartfelt comments seem pertinent to the family, they only detract from the home care assessment, as these concerns do not equate to tasks covered by the Medicaid program. Further, such comments obfuscate attention away from valid home care needs, which could potentially guide the nurse assessor toward of a denial of services.

Obtaining home care services for the non-self directing client can also prove arduous. It is here when advocacy becomes paramount because Medicaid regulations do not include safety monitoring as a home care task. However under New York Department of Health GIS 03 MA/003, "districts are reminded that a clear and legitimate distinction exists between 'safety monitoring' as a non-required independent stand alone function while no Level II personal care services task is being provided, and the appropriate monitoring of the patient while providing assistance with the performance of a Level II personal care services task, such as transferring, toileting, or walking, to assure the task is being safely completed." Therefore, when securing home care services for the otherwise mobile client with decreased mental capacity, the attorney

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SIDNEY SIBEN'S AMONG US

On the move…

Lance R. Pomerantz has opened his new East End office at 224 Griffing Avenue, Riverhead. Mailing address (140 Old Broadway, Sayville NY 11782) and telephone (631) 727-0133) remain unchanged.

The Long Island based law firm of **Bruno, Gerbino & Soriano, LLP** has opened its first New Jersey office. The office will be managed by partner Matthew J. Smith who recently joined the firm after serving as Location Share for New York and New Jersey offices of Allen, Kopet & Associates PLLC. Its main office is located in Melville, NY. The new office is at 70 Hilltop Road in Ramsey; 26 miles northwest of midtown Manhattan.

Smith, Finkelstein, Lundberg, Isler and Yakaboski, LLP, is pleased to announce that **Jean Delisle** and **Christopher B. Abbott** have joined the firm as associates.

Mitchell R. Mass has joined Bracken Margolin Besunder LLP as of counsel. Mr. Mass maintains his office in Manhattan, and is a member of the New York and Florida Bars (Business Law Divisions), as well as a member of the Association of the Bar of the City of New York.

SCBA member **Suzanne Q. Burke** has opened her law office at 140 Main Street, Sayville, (631) 319-3525. Ms. Burke, formerly with Farrell Fritz, will represent clients in a broad range of legal matters pertaining to estate planning, estate administration, tax law and real estate matters.

Congratulations…


Jacqueline Siben

Judge Paul M. Hensley was selected as the Suffolk County Criminal Bar Associations 2013 "Judge of the Year." A dinner was held at the the Irish Coffee Pub in Central Islip on May 16, 2013 in his honor.

Congratulations and best wishes to SCBA member **Jennifer Ann Mendelsohn** on the occasion of her marriage to John Gregory Green, Jr. The couple were married on May 5, 2013 at Flowerfield in St. James. The ceremony was performed by Supreme Court Justice (and SCBA member) Marion T. McNulty.

Past President **Scott M. Karson** and his wife Joleen are thrilled to announce the arrival of a beautiful granddaughter, Charlotte Grace Karson, the daughter of son Jared and his wife Carol. Charlotte was born April 25, weighed six pounds, five ounces, and she is 18 inches tall.

Announcements, Achievements & Accolades…

Robert H. Cohen, of Lamb & Barnosky, LLP, will co-present *Greenhouse Gas: Review of Construction Contracts*" at the 13th Annual School Attorney Law Conference sponsored by the NYS Association of School Attorneys at The Sagamore Hotel in Bolton Landing, New York.

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

The SCBA has a 2013 directory update: **Richard J. Cohen**, (631) 475-7572, fax (631) 447-2265, Usha Srivastava, P.O. Box 72, Port Jefferson Station, NY 11766

An interview with **Paul Hyl**, Partner at Genser Dubow Genser & Cona, elder law and estate planning firm in Melville, aired on 90.3 FM radio WHPC during the program "Law You Should Know" hosted by Ken Landau, Esq., several times in early June. It can also be heard over the internet at www.ncc.edu/whpc

Barry J. Peek, a member of Meyer, Suozzi, English & Klein P.C. in the firm's Labor Law and Employment Law practices, has been elected President of the National Cancer Center for a three-year term beginning April 23, 2013.

Karen J. Tenenbaum recently presented at the American Bar Association's 2013 Trust and Estate Spring Symposium in Washington, D.C., on "Snowbirds Fleeing State Taxing Authorities: Becoming a Resident of Another State for Estate Tax Benefits." She was also a guest speaker at the May 2013 Northeastern Regional Education Conference of the American Association of Attorney-Certified Public Accountants, held at Hershey Lodge in Hershey, PA. Her presentation covered NYS residency issues.

Condolences…

To the family of SCBA member **Lawrence A. Kushnick**, who died suddenly on June 3. He was the son of longtime member **Martin Kushnick** and his wife Janet, and had recently been sworn in as Chairman of the Board of Directors of Huntington Township Chamber of Commerce. Memorial donations may be made to Leadership Huntington, 164 Main St., Huntingotn NY 11743.

To Director **Michael J. Miller** and his family on the passing of his mother Catherine Miller.

To **Robin Abramowitz** and her family on the passing of her father, Milton Abramowitz at the age of 86.

To the family of **Richard Floyd Plotka**, an SCBA member since 1960, who passed away on March 13, 2013. Memorial donations may be given in his name to The Michael J. Fox Foundation for Parkinson's Research, Grand Central Station, P.O. Box 4777, New York, NY 10163-4777.

To **George Roach** and his wife Linda on the passing of Linda's father, James Schaefer.

The SCBA also was saddened to note the passing of Hon. **Sandra L. Sgroi's** father, Merle Berman. Condolences may be sent to Justice Sandra Sgroi at: 216 Fifth Street, St. James, New York 11780.

To former Supreme Court Justice and Suffolk's District Administrative Judge, Hon. **Arthur M. Cromarty** and his family on the recent passing of his wife Ellin Cromarty.

To SCBA member **Marilyn Lord-James** on the passing of her husband Larry G. James.

(Continued on page 25)

Proposed Uniform Act clarifies interstate guardianship issues

By Kim M. Smith

Often referred to as the "Granny Snatching Act" the New York State Uniform Adult Guardianship and Protective Proceedings Act (hereinafter referred to as "The Uniform Act") has passed both the Assembly and the Senate and is awaiting Governor Cuomo's signature.

The purpose of the Uniform Act is to address the needs of our incapacitated or functionally limited elderly residents who have not done advanced planning and require the appointment of a guardian for their personal and/or property needs. It is an act to amend the Mental Hygiene Law and the Surrogate's Court Procedure Act, but it will not change New York State's substantive guardianship rules. The Uniform Act should clarify interstate issues pertaining to guardianships.

The objectives of the Act are to identify one state court to adjudicate first time guardianship proceedings; establish a system to transfer existing guardianship appointments from one state to another; and to create a system to recognize and enforce guardianship orders from state to state.

The current New York State guardianship statute, MHL Article 81, like many states, allows a petitioner to bring a guardianship proceeding for an alleged incapacitated person if they reside in the state or are merely present in the state. The key concept of the Uniform Act is that the "home state" will have jurisdiction over the alleged incapacitated person regardless of where they are physically located. This is important, because our society has become a very mobile one, whereby our elderly residents often have connections in several states whether they are snowbirds or they have children domiciled elsewhere. As a result of our mobile society multi-state guardianship issues have become more and more common. Families can often get entwined in jurisdictional issues resulting in a delay in proper care, creating an opportunity for abuse, and/or the aggravation of interfamily disputes.

Kim M. Smith

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The Uniform Act seeks to establish a systematic procedure for transferring existing guardianships from one state to another, alleviating the need for a second guardianship proceeding to be brought in the state to which the guardian may look to move the incapacitated person. While the U.S. Constitution's Full Faith and Credit Clause normally allow court orders in one state to be recognized in other states, it does not generally apply in protective proceedings and guardianships. The cooperation of financial institutions or medical facilities in the foreign jurisdiction can often be an issue which can only be rectified by a new application for guardianship in the foreign, incurring additional costs and burdens. The Uniform Act seeks to establish a system which will enforce guardianship orders from one state to the other by permitting Guardianship Orders to be registered in each applicable state (much like that of judgments) making them enforceable without further court proceedings.

The Uniform Act intends to create a clear process for determining which state has proper jurisdiction to entertain a specific guardianship proceeding when there is a conflict. The elimination of the "mere physical presence" rule is designed to help reduce elder abuse as it prevents "granny snatching" as a way of establishing jurisdiction. Courts now can decline to exercise jurisdiction where jurisdiction previously existed even where there was unjustifiable conduct such as granny snatching. It also now requires the court to consider elder abuse and use its ability to monitor the conduct of the guardian when determining the appropriate forum. More significantly it allows the court to establish procedures that could remove individuals from abusive circumstances.

If enacted, New York State will become the 37th state to adopt the Uniform Act across the nation.

Note: Kim M. Smith, Esq., is a solo practitioner in Islandia, New York. She practices in the areas of Elder Law, Trust and Estate Planning, Trust and Estate Administration, Guardianship, Medicaid and Special Needs Planning. Ms. Smith earned her undergraduate degree from Stony Brook University where she was a member of the Golden Key National Honor Society. She received her Juris Doctorate from Touro Law School, where she graduated cum laude. Prior to her career as an attorney, Ms. Smith worked in the health care profession for over fifteen years.

Ms. Smith is a member of the New York State Bar Association, the Suffolk County Bar Association (past Co-Chair of the Elder Law Committee), the Suffolk County Women's Bar Association (immediate Past President), and the Estate Planning Council of Suffolk County. Ms. Smith also serves on the Board of Directors for Suffolk County United Cerebral Palsy and Touro Law Center's Alumni Council.

Medicaid planning for same sex spouses

Ralph M. Randazzo

New York State's gay and lesbian community won a victory in 2011 with the passage of the Marriage Equality Act, DRL 10-a and 10-b, which allows same sex couples the legal right to marry in the state. Though New York's Medicaid program had recognized foreign same sex marriages since August 2008, GIS 08 MA 023, the number of persons who married a same sex partner and lived in New York was not significant. Since 2011, the Marriage Equality Act affords same sex couples the legal right to marry within New York and enjoy both the benefits and obligations of marriage that the state offers to heterosexual married couples. As a result, many more same sex couples have married.

Through the debate leading to the Marriage Equality Act, many couples had an acute awareness of the rights and benefits they would receive, but married without any awareness of the obligations of marriage that they were undertaking.

The rights and benefits of marriage were the primary content of the debate about marriage equality, but there was little to no discussion as to the resultant obligations of marriage. Many same sex couples who married had been coupled for decades and were eager to enter into a marital relationship. As an elder law attorney and frequent lecturer on same sex marriage, I have been involved in the process of educating couples and attorneys about the obligations of marriage, most particularly the spousal obligation of support as a legally responsible relative. Most clients are entirely unaware of this obligation of support created by their change in marital status, and same sex couples who marry later in life are particularly in need of the services of the Elder Law Bar.

Ralph M. Randazzo

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Generally speaking, when a couple marries at any time in their lives they become legally obligated to support one another. This includes the mutual obligations to provide food, shelter and health care, or the costs associated therewith, planning for which typically falls within the practice of elder law when couples are advanced in years. Many same sex marriages subsequent to the Marriage Equality Act are between couples who are in their sixties, seventies and even eighties, and while an elder law attorney may have had the opportunity to counsel similarly situated heterosexual couples about the legal obligations of marriage, many same sex couples have not and do not seek premarital legal counsel. Ultimately, when such clients do reach my office, many state that they have waited their entire lives for the right to marry the person they love. Some have said that if they had been granted the right earlier they would have married then, so their current marriage is conceptually a retroactive act, despite the new personal financial "risks" the marriage creates.

On closer look, some of the couples I have counseled have always commingled assets, but many have not.[1] One particular couple serves as a meaningful example. Susan and Margaret are in their late seventies. They had been a couple for over 40 years when marriage equality became law and they promptly seized the opportunity to marry despite Margaret's failing health. They each had separate assets, but had estate plans that provided for one another, Health Care Proxies, and Durable Powers of Attorney that granted full gifting powers to the other. They were each other's primary beneficiary, but they each had different contingent beneficiaries in their wills.

Soon after their first anniversary it became apparent that Margaret would soon need care in a nursing home. Each woman had approximately $200,000 in savings. On consultation with Susan we discussed the cost of nursing home care, approximately $15,000 a month, and her status as a legally responsible relative. As such, if Margaret's assets are exhausted Susan would be obligated to pay for the costs of Margaret's nursing home care with her own assets. We discussed the statutory right of spousal refusal that New York affords married couples. That right, coupled with the

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SCBA Annual Meeting

By Laura Lane

The Suffolk County Bar Association Annual Meeting is in part, an event to celebrate those who help make the bar the professional organization that it continues to be - this year was no different. The meeting, held on May 6, with 50 people in attendance, was also, in keeping with tradition, an occasion to elect the new officer, directors and members of the nominating committee.

The bar also recognizes the winner of the SCBA High School Essay Scholarship at the Annual Meeting. In its 11th year, this year's contest had 100 submissions. The SCBA Scholarship Committee includes Lynne Adair Kramer, Rosemarie Tully and Ilene Cooper.

"It's an arduous task to read all of the essays," said Past President Sheryl Randazzo. "We saw an amazing group of essays this year and wish we could give out more than one scholarship award. Our winner, Megan M. Finn is 14th in her class."

There were many awards given at the meeting including, Golden Anniversary Awards, awards for directors leaving the board, SCBA Academy Awards of Recognition, and awards for those going off the Academy board. There were many volunteers that chaired the SCBA's committees this year. Before giving out their awards President Arthur Shulman thanked them saying, "Each of you has served our association well and it has been an honor to work with you, to whatever extent that time and circumstances permitted, over the past year."

Secretary Pat Meisenheimer 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 position for which they were nominated. They include: President Elect William T. Ferris, III, First Vice President Donna England, Second Vice President John R. Calcagni, Treasurer Patricia M. Meisenheimer, Secretary Justin M. Block, Directors Leonard Badia, Cornell V. Bouse, Jeanette Grabie, Peter C. Walsh, and the Nominating Committee Ilene S. Cooper, Michael J. Miller and Arthur E. Shulman.

Photos by Barry Smolowitz

The SCBA thanked the following members who are leaving the Academy's board for their service: Robin S. Abramowitz, Brian Duggan, Gerard J. McCreight, and Daniel J. Tambasco.

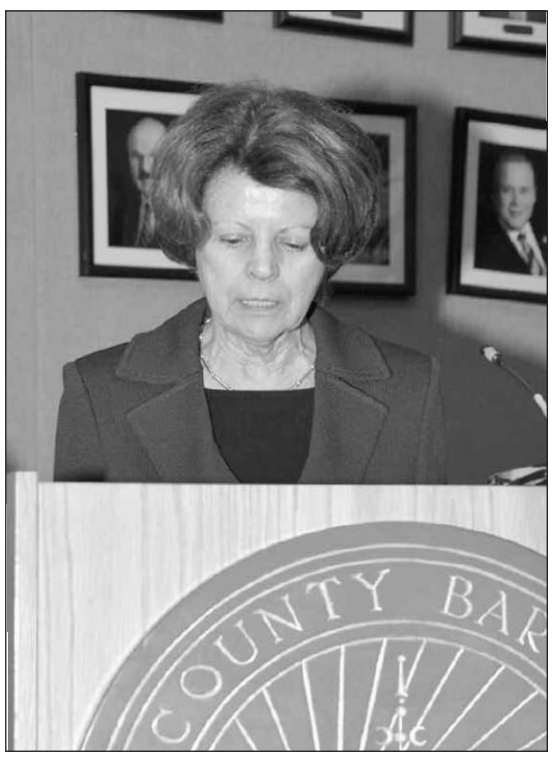
Awards of Recognition were given to James P. Deana, Harris J. Zakarin, Mona Conway, Cornell V. Bouse, Hon. William G. Ford, Richard J. Guercio, Gary Lee Steffanetta, Janna P. Visconti, Joseph W. Ryan, Jr., William McDonald, Sima Asad Ali, Laura Golightly, Andrew Lieb, Ivan E. Young, and Peter C. Walsh.

Academy Dean Kelly joined President Shulman to give SCBA Academy Awards of Recognition to the following members: Eileen Coen Cacioppo, Peter C. Walsh, Brette Haefeli, Robert M. Harper, Hon. Stephen Ukeiley, Richard L. Stern, Sheryl L. Randazzo, Glenn Warmuth, Hon. Thomas Whelan, and Gerard McCreight.

Celebrating with a Golden Anniversary Award given to members that have practiced law for 50 years were: Hon. Armand Araujo, Vincent G. Berger, Jr., John P. Bracken, Frank J. Cafaro, Hon. Lawrence Donohue, Stephen E. Feldman, Neil M. Frank, James J. Frayne, Arthur J. Giorgini, Stephen F. Gordon, Hon. Patrick Henry, Hon. Michael F. Mullen, William J. Porter, Charles E. Raffe, Stephen G. Remuzzi, Jon N. Santemma, and Martin Semel.

John Calcagni and Dennis Chase

Rick Stern



Pat Meisenheimer

I leave my ITunes account, and all 523,331 songs to my brother, Jimmy ...

By Justin Meyer

Justin Meyer

When the parents of deceased Lance Corporal Justin Ellsworth wanted access to his personal e-mail account, they ran into a problem - Yahoo! refused. It took a court order for the parents to get his e-mails and even then, Yahoo! never provided access to the account itself; instead, the e-mail provider sent printouts of every message to and from LCP Ellsworth.

Yahoo! still attempts to limit access by the survivors of a decedent; the Terms of Service state that the account is not transferable, and that any right to access the account ends at death. Yahoo! specifically states that "[u]pon receipt of a copy of a death certificate, your account may be terminated and all contents therein permanently deleted." This means that potentially important information - to the family of the decedent and to the executor of the decedent's estate, could be lost. What's more, as more and more purchases are made in the cloud, using services such as ITunes, and e-readers, the value of these accounts is increasing. However, the ability to transfer the accounts, or the files within, is still murky.

Luckily, Yahoo's policy is in the minority. Microsoft, which runs Hotmail and other services, will grant access to a deceased user's family once information proving death and kinship is provided. Google, which had a policy similar to Microsoft's, has now gone even further. On April 11, 2013, Google announced a new service that, if users activate it, will first attempt to contact the user after a user-set period of inactivity. If contact (either via cell phone or a secondary e-mail address) fails, then the service can take several actions, including deleting all e-mails or sending all data in your account to up to 10 individuals that you select (and not necessarily family members). The Google Inactive Account Manager also includes other user data - a user's Google Voice, Youtube and Picasa data (as well as that from other Google products) can be shared or deleted.

While access to e-mail is important, there are some online accounts that could have real-world value. Online games, such as World of Warcraft, include in-game items that can be bought and sold, and that have real value. However, the Terms of Use for World of Warcraft (owned by Blizzard), states that Blizzard owns the accounts of the players, and these accounts, which can have some value, cannot be transferred. The items possessed by the characters in the accounts may also have real-world values; there is a market for the sale of virtual items, and because some items cannot be transferred, there is also a market for the sale of accounts.

With all of this in mind, how can executors handle these assets when attempting to take control of accounts, and the files within? Brian Dailey, of the Dailey Law Firm (who succeeded in getting the order against Yahoo!) succeeded by arguing that the accounts should be treated like a safe deposit box; it does not matter who owns the account, it only matters who owns the things inside. If it can be argued successfully, this line of thinking would apply to ITunes accounts and other similar accounts - such as Barnes and Noble and Amazon accounts for the e-reader. While this argument has not yet been tested outside of the courtroom in Oakland, Michigan (and then it was victorious but without any opinion issued), there is merit to it.

The theory goes like this - simply because a service provider (be it Yahoo!, Apple, or anyone else) owns the account, it does not mean that it owns the contents within. It can be compared to a bank, which owns the safe deposit box, but not the items placed there by the renter. Someone who has purchased an MP3 file on ITunes therefore owns that file (and it would be an asset that could pass through intestacy or the will) regardless of who owns the account that holds it, and whether that account can or should be transferred. Similarly, e-mail accounts, which contain pictures and text - both of which could be argued to be intellectual property belonging to either the sender or receiver, do not belong to the e-mail provider; none of these services argue that they have any ownership right over the e-mail or attachments within the accounts. It stands to reason, therefore, that the ownership of these items transfers to the estate upon the account-holder's death.

The safe deposit box analog may prove to be the strongest argument for personal representatives and their attorneys going forward. However, this area of law is still unclear. While some states have attempted to handle these issues with new laws, New York still lags behind; as more money is spent on virtual accounts and goods, and more assets are held in these accounts, it will become more important to determine how they will be handled. While we wait for the legislature to make a decision, these matters will be decided by the courts.

FOCUS ON ELDER LAW SPECIAL EDITION

Note: Justin Meyer is an attorney with Meyer and Associates, Counselors at Law, PLLC in Hauppauge, where he practices estate planning, estate administration and business law. He is a member of the Suffolk County Bar Association as well as the NYSBA, New Jersey State Bar Association and the Florida Bar.

The Suffolk Lawyer wishes to thank Elder Law Special Section Editor Janna Visconti for contributing her time, effort and expertise to our June issue.

Janna Visconti

PRO BONO

Pro Bono attorney of the month – Anneris M. Peña

By Maria Dosso

Nassau Suffolk Law Services and the Suffolk Pro Bono Project are proud to honor Anneris M. Peña as Pro Bono Attorney for the Month of June 2013. Peña has been a valuable asset to the project, volunteering many hours in bankruptcy and matrimonial cases where the greatest demand for pro bono services exists.

Peña grew up in the South Bronx and since her high school days, worked in law firms gathering valuable information and learning about the practice and procedural aspects of the law. This learning experience continued throughout her college days at L.I.U. CW Post majoring in finance, while she worked nights and weekends at several law firms in New York City.

So, even before she started her formal legal education at St. Johns Law School, Peña was well on her way to developing her legal skills. After receiving her law degree in 1997, she joined a firm in Syosset where she practiced foreclosure and bankruptcy law and made good use of her background in finance. It was a perfect fit and she was soon promoted to manager of the bankruptcy division.

After marrying and starting a family, she found that balancing family life and work was a challenge. So eventually Peña preferred to be self-employed and worked on her caseload at her own pace making her own hours. She worked on cases involving litigation, real estate, wills and estates but her strong point was always her bankruptcy practice.

During this time, Peña went through her own challenges, especially after a divorce that took a financial and emotional toll. But ironically, this experience is also what piqued her interest in family law. She started sitting in on family court hearings and learning about the practice by observing the proceedings.

After several months, Peña decided to branch out further into this area of the law. She joined the Suffolk Bar Association, learned about the Pro Bono Project and decided to take a couple of matrimonial cases with the assistance of a mentor. She attended CLEs at the Bar Association and thoroughly did her homework in preparation for the representation. "I don't take my legal education or my representation of clients lightly, especially since your family is the most important part of your life, along with your finances" she said.

Peña's motivation to do pro bono work has always been about giving back. After doing an internship in the Bronx Criminal Court and working in various law firms in the city, she witnessed crime, poverty and many broken homes. "After all I've seen, there was a time I thought the last thing I would ever want would be to work on cases involving family related turmoil," said Peña. Now that's exactly what I want!"

Anneris M. Peña

When asked what motivates her to do pro bono work she said, "I went through my own divorce which was financially and emotionally costly. I don't understand how people of little or no means can manage it. I am now very happily remarried, have been very blessed in my life and I just want to make a difference."

She believes that as "attorneys, we are very privileged in this profession. Many people are not. Doing pro bono can make such a difference in someone else's life. In the whole scheme of life, how hard is it to take some hours out of your week and give a little back?"

In her personal life, Peña takes her parenting role very seriously. She commented on how mothers who are attorneys have to find that balance between their work and parenthood. As an involved mother, she is a Girls Scout volunteer and finds this gives her more time with her daughter and has helped her to find that balance.

Peña's contribution to the Pro Bono Project has been very valuable, especially as she is able to help out with the Spanish speaking clients.

"She is a true model of a conscientious and dedicated attorney, giving her best to all her clients, without regard to whether they are pro bono or paying clients," said Maria Dosso, Director of Communications and Volunteer Services.

Anneris M. Peña, is an inspiration and an example of what it means to give generously in the true spirit of *pro bono.* We are proud to count her on the panel and to bestow her with the honor of Pro Bono Attorney of the Month.

Note: Maria Dosso, Esq. is the Director of Communications and Volunteer Services at Nassau Suffolk Law Services. She has worked at Law Services for over 25 years, first practicing in the areas of disability, consumer debt, public benefits and housing law. Currently she manages the Legal Support Center for Advocates, a community education and advocates' consultation service, and coordinates the agency's public relations initiatives and pro bono/volunteer projects.

CONSUMER BANKRUPTCY

Avoiding judgment liens when only one spouse files

Recent decision shows attorneys aren't familiar with law

By Craig D. Robins

When a homeowner seeks bankruptcy relief, one of the great benefits of bankruptcy is the ability to avoid and eliminate judicial liens, provided that certain conditions are met. This is a concept I've written about previously.

Consumers essentially have the ability to avoid judgment liens (such as those obtained by credit card companies), that impair the debtor's homestead exemption. However, what happens when the home is owned by a husband and wife as tenants by the entirety, but only one spouse files? How do you calculate the amount of equity the debtor owns, to determine whether the judgment lien is impairing the homestead exemption on that equity?

In June 2011, Judge Alan S. Trust, sitting in the Central Islip Bankruptcy Court here in the Eastern District of New York, issued a decision which addressed the proper analysis and methodology for determining whether a judicial lien can be avoided on a home that is jointly owned by a debtor and a non-filing spouse. *In re Heaney*, 453 B.R. 42, 48-49 (Bankr. E.D.N.Y. 2011).

However, most interestingly, just a year after Trust issued the *Heaney* decision, several well-respected attorneys in our district (all of whom happen to be Chapter 7 or Chapter 13 trustees) continued to file applications to avoid judicial liens, but did so improperly, without utilizing the *Heaney* methodology.

This led Trust to issue another decision involving three separate cases, filed by three separate well-respected attorneys. In that decision, he spelled out, with even greater clarity, an exact five-step process for calculating equity for purposes of judicial lien avoidance when only one spouse has filed bankruptcy. *In re Moltisanti*, No. 10-72180-ast, (Bankr. E.D.N.Y., Oct. 24, 2012). That's what I'll discuss in this month's column.

Craig D. Robins

Section 522(f)(1)(A) of the Bankruptcy Code permits a debtor to avoid the fixing of a judicial lien "on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled."

A debtor may exempt a certain amount of equity in his or her principal residence above the amount of the mortgage liens. If using the state law exemption (C.P.L.R. § 5206), that amount is currently $150,000 for debtors living on Long Island. Under the federal exemptions (§ 522(d)(1)), the amount is $22,975.

Trust explained that under New York law, each spouse in a tenancy by the entirety is "seized of the whole property." Thus, when only one spouse files for bankruptcy, the full fair market value of the home must be considered in calculating whether the debtor may avoid one or more judicial liens. In other words, it is improper to use half the value even though only one spouse is filing. A sole-filing spouse must use the full, entire value.

Accordingly, in these cases where only one tenant by the entirety has filed bankruptcy, the proper method for calculating equity for purposes of judicial lien avoidance under § 522(f)(1)(A) is as follows:

- Use the full fair market value of the debtor's principal residence.
- Subtract all mortgage liens and all other liens of record on the principal residence.
- Apply the full amount of the debtor's homestead exemption as if there were no liens on the principal residence.
- If there is any equity remaining in the principal residence after satisfying all other liens and the debtor's homestead exemption, the judicial lien may attach to that remaining equity.
- Any judicial lien that can be avoided as set forth above is avoided according to state law priority, meaning that for debtors residing in New York, the judicial lien most recently recorded is avoided first and so on, until either all the judicial liens are avoided or until there is some equity to either partially or fully secure a judicial lien.

Here are two takeaways from this decision. First, with the increase in the New York state homestead exemption to $150,000 per debtor two years ago, bringing motions to avoid judicial liens has become a large part of consumer bankruptcy practice. It is therefore important to know exactly how such applications should be brought and the methodology for computing the amount of equity in the home when only one spouse files.

Second, attorneys should regularly read the local written decisions. Had the three attorneys in *Moltisanti* done so, they could have saved themselves a lot of grief. Our judges have been doing an outstanding job issuing written opinions. Reading them does not incur ECF fees, and they are readily available on the court's website. I find them to be exceedingly informative and extremely invaluable.

These written decisions clarify how judges will rule on various issues in our courts; they let us know how a judge thinks and reasons, and what issues are important to the judge, which can be helpful in trying to ascertain how a judge would rule on a different issue in the future; they can be entertaining; and, as was the case with the decisions discussed above, they sometimes provide specific instructions for seeking a certain type of relief. I check the local written decisions almost daily and so should all practicing bankruptcy attorneys.

Editor's Note: Craig D. Robins, Esq., a regular columnist, is a Long Island bankruptcy lawyer who has represented thousands of consumer and business clients during the past 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.

INTELLECTUAL PROPERTY

When two paths for Trademark Infringement cases collide

By Gene Bolmarcich

Perhaps the most unusual aspect of trademark law is the "dual" legal system that exists to adjudicate disputes. Lawyers who practice in this area generally accept it as just another one of those quirky aspects of trademark law that make it so different from many other areas of law. When I explain this to fellow attorneys who do not practice in this area of law, the reaction is often one of great surprise, sometimes along the lines of "this has to be fixed." In order to explain this, one must start from the basics.

In the U.S., trademark rights arise from use, unlike in some countries where mere registration can establish rights and, in some cases, even trump a prior user of the same trademark. Although in the U.S. "use" establishes trademark rights, registration of a trademark with the USPTO provides many valuable benefits and most serious trademark owners pursue registration of their important trademarks. The dual system arises from such a regime whereby trademark rights are ultimately dependent upon actual use of the trademark in commerce, but also wherein the USPTO exists in part to determine whether a trademark may be registered and also (through its administrative court, the Trademark Trial and Appeal Board, or TTAB) to adjudicate disputes initiated by a party who objects to such registration despite initial approval by the USPTO (referred to as "oppositions"). In other words, there are separate legal regimes for determining rights to registration (the TTAB) and for ruling on disputes over rights to use trademarks (federal courts).

Gene Bolmarcich

This dual system potentially creates several practical problems that can be difficult to explain to a client in a trademark matter. A complete dissection of the law governing trademark registration and the rights it confers is beyond the scope of this article but the important thing to note is that a trademark registration does not necessarily grant its owner exclusive rights to the trademark, and thus may not be a determining factor in a legal battle between two parties involving the rights to a trademark. The first, and perhaps simplest, problem to understand involves situations where someone may be able to register a trademark even though actual use of the same trademark is out of the question. This arises when there is a prior user of a confusingly similar trademark who has not registered its trademark. Because the USPTO, in its examination of trademark applications, only takes into account prior trademarks that are either registered or pending registration, the rights of so called "common law" users are ignored.

The converse can also occur, that is when a party is unable to register a trademark due to a prior registered trademark that the USPTO deems to be confusingly similar, but which a court of law would find not likely to cause confusion (and thus, both marks can co-exist in the marketplace, as there is no infringement). This difference of opinions, which can often occur as a result of the ways that the respective tribunals treat and/or determine the facts of the case, lies at the heart of perhaps the biggest problem often encountered in trademark infringement litigation that plays out at both the TTAB and in federal court, either simultaneously or sequentially. It involves the issue of collateral estoppel (or "issue preclusion") - specifically, the deference that should be given to a prior TTAB holding involving the same parties and trademarks, on the issue of "likelihood of confusion" (the ultimate test for determining whether one trademark may be registered in light of another). There currently exists a circuit split on this issue, making it ripe for Supreme Court adjudication.

This problem of issue preclusion can be a disastrous one for a company that wins its case at the TTAB and then goes on to litigate the same issue in federal court, only to have the court refuse to give any consideration whatsoever to the prior TTAB holding. This type of outcome is disappointing to say the least, especially because many companies use the TTAB as a cheaper alternative to the courts to resolve trademark disputes. Although it is true that a losing party at the TTAB will often not choose to either initiate or continue with litigation in court, this is not always the case. A recent divided panel from the Eight Circuit Court of Appeals illustrates the tension caused by this issue of collateral estoppel as it relates to the deference given to TTAB decisions on the issue of likelihood of confusion by federal courts.

In *B&B Hardware, Inc. v. Hargis Industries, Inc*., Appeal No. 11-1247 (8th Cir. May 1, 2013), the majority of the court chose to take the position that no deference is due a TTAB decision even where collateral estoppel would otherwise apply because the TTAB is not an Article III court. This case is the latest ruling (including two prior ones from the Eight Circuit itself) in a 15 year legal battle between B&B, the prior user of the trademark "Sealtight" (for fasteners used in the aerospace industry) and Hargis Industries, who applied in 1996 to register the trademark "Sealtite" (for a line of self-drilling screws used in the building construction industry). The TTAB ultimately ruled in 2003 that Hargis could not regis-

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TRUSTS AND ESTATES UPDATE

By Ilene Sherwyn Cooper

Contested Accounting

In a contested accounting proceeding, the fiduciary moved for summary judgment dismissing the objections of his brothers.

The decedent died survived by three sons. The principal asset of his estate was a rent stabilized apartment building in Manhattan. The decedent lived in one apartment in the building with his wife and three sons, until two of the sons married and moved elsewhere. When his third son (the estate fiduciary) married, he and his wife continued to live with his father in the family apartment, until the death of his father. During the time he resided in the building, the fiduciary/son also acted as a caretaker of the building with no compensation. The terms of the decedent's will directed that his estate be sold. At the time of its sale, the apartment building was valued at more than $2.1 million.

The objections to the executor's accounting involved claims related to the sale of the apartment building, and the legitimacy of accounting fees, legal fees and commissions. Specifically, with regard to the sale of the building, the objectants maintained that the executor failed to sell the asset in a timely fashion, and that he failed to maximize the price by continuing to reside in the rent stabilized apartment that he had long occupied.

Ilene S. Cooper

The court found the undisputed proof revealed that the executor had listed the building for sale shortly after being appointed, that the executor's attorney had prepared eight different contracts of sale for the apartment, but through no fault of the fiduciary the sale failed to be consummated, and that a sale ultimately occurred at four times the date of death value of the asset, and $200,000 more than its "closing date value." The court concluded that the objectants had failed to submit any proof that the executor had breached his fiduciary duty in connection with the sale.

The court further found that objectants had failed to demonstrate that the fees of the executor's counsel were excessive, or were paid for his personal benefit. The court noted that objectants' claims to the contrary were based on nothing more than conclusory allegations without any evidentiary support. Similar conclusions were reached with respect to the objectants' claims pertaining to accounting fees.

Accordingly, summary judgment was granted to the executor.

***In re Vartanian,* N.Y.L.J., Jan. 18, 2013, p. 30 (Sur. Ct. New York County)(Sur. Anderson).**

Surcharge

The petitioner, decedent's nephew, and 20 percent of the decedent's residuary estate, requested a partial distribution from the estate for himself individually and as sole distributee of the estate of his post-deceased mother, who was a 40 percent residuary beneficiary. The other residuary beneficiary of the estate was the fiduciary's father.

The fiduciary's account revealed that while the initial distributions from the estate were in the proportions required by the decedent's will, subsequent distributions favored the fiduciary's father to the exclusion of the petitioner and his mother. During the pendency of the proceeding, the fiduciary made payments of the pro rata share amounts.

The court opined that a fiduciary has a general duty to deal impartially with the beneficiaries of an estate or trust, and owes a duty of undivided loyalty to each of the estate beneficiaries. As such, when a distribution was made to one residuary beneficiary, an equal distribution should have been made to petitioner and his mother's estate. Accordingly, the court held that petitioner and his mother's estate were entitled to interest on the excess sum distributed to the fiduciary's father, which sum was to be paid by the fiduciary personally, as a surcharge.

Pursuant to CPLR 5001(a), the court may award pre-judgment interest for surcharges based upon a breach of fiduciary duty to fully compensate a beneficiary for any losses which he may have suffered or gains, which he may not have fully realized due to the fiduciary's negligence. Accordingly, in the exercise of its discretion, the court imposed interest at the rate of six percent per annum from the date of each payment to the fiduciary's father through the date of adjusted payments to the petitioner and his mother's estate.

***In re Ryan,* N.Y.L.J., Dec. 31, 2012, at p. 29 (Sur. Ct. Suffolk County).**

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

COMMERCIAL LITIGATION

Avoid the dismissal of duplicative & factually insufficient causes of action

By: Leo K. Barnes Jr.

This month we review the recent decision by Eastern District Magistrate Judge Arlene R. Lindsay that addresses unfair competition and tortious interference with prospective business relations claims incident to a dispute involving design patents and marketing materials.

In *Carson Optical, Inc. v. Prym Consumer USA, Inc.*, CV-11-3677 (ARL), 2013 WL 1209041 (E.D.N.Y. 2013), plaintiffs Carson Optical, Inc. ("Carson Optical"), a corporation that markets and sells optical products, and Leading Extreme Optimist Industries, Ltd. ("Leading"), an overseas company that manufactures optical products, filed suit against defendants Prym Consumer USA, Inc. ("Prym"), a manufacturer of magnification products, and Jo–Ann Stores, Inc. ("Jo–Ann Stores"), a retailer of Prym's products, alleging claims for (i) patent infringement, (ii) trade dress infringement under the Lanham Act, and (iii) state law claims for unfair competition and tortious interference with prospective business relations in connection with four of Carson Optical's design patents. All of the claims related to magnifiers that were sold by Prym to Jo–Ann Stores, and then sold at retail by Jo–Ann Stores.

Leo K. Barnes

The complaint alleges that Prym secured a manufacturer to copy and reproduce Carson Optical's products, and Jo–Ann Stores conspired with Prym to accomplish this goal. In addition, plaintiffs asserted that Prym copied portions of Carson Optical's written marketing materials for one of Carson Optical's products. Specifically, plaintiffs alleged that Prym engaged in the conduct constituting common law unfair competition and tortious interference with prospective business relations premised upon: copying and reproducing Carson Optical's products; providing knock-offs of Carson Optical's products to Jo–Ann Stores; securing Jo–Ann Stores as a customer by importing, offering for sale, and selling products that infringe plaintiffs' intellectual property rights; copying portions of Carson Optical's written marketing materials; systematically infringing Carson Optical's intellectual property rights (including one of Carson Optical's patents) and thereby unfairly competing with Carson Optical; and displacing Carson Optical as a supplier to Jo–Ann Stores by illegally copying Carson Optical's products.

After the action was commenced, defendants subsequently sought dismissal, *inter alia*, of plaintiffs' common law tort claims for unfair competition and tortious interference with prospective business relations, arguing that plaintiffs' state law claims were legally insufficient and likewise preempted by federal patent law.

Recall that as a general matter, an unfair competition claim must be premised upon the "misappropriation of a commercial advantage which belonged exclusively to" the plaintiff. *See LoPresti v. Massachusetts Mut. Life Ins. Co.*, 30 A.D.3d 474, 476, 820 N.Y.S.2d 275 (2nd Dep't 2006). The misappropriation, however, must concern a specified trade secret (or other proprietary information). Indeed, in *Atari, Inc. v. Games, Inc.*, 2005 WL 447503 (S.D.N.Y. 2005), Southern District Judge Rakoff observed:

> Under New York law, "the gravamen of a claim of unfair competition is the bad faith misappropriation of a commercial advantage belonging to another by infringement or dilution of a trademark or trade name or by exploitation of proprietary information or trade secrets." *Eagle Comtronics, Inc. v. Pico Prods., Inc.,* 256 A.D.2d 1202, 1203 (N.Y.App.Div.1998). Therefore, the party bringing the claim must own a trademark, trade name, trade secret or other proprietary information to misappropriate.

(Continued on page 26)

WHO'S YOUR EXPERT

Let's here it from the expert

By Hillary Frommer

On a Thursday afternoon in April, I sat down with Dr. Gerald Goldhaber, President and CEO of Goldhaber Research Associates, who has offices both in Buffalo and New York City. Goldhaber is an expert witness, nationally renowned, with more than 30 years experience in the fields of warning label research and political polling.[1] I asked him to describe some of the most challenging aspects of dealing with lawyers. He provided some very insightful and invaluable advice that all lawyers should follow when working with expert witnesses.

Retain an expert as early on in the litigation as possible

Goldhaber described situations when he was retained as an expert at the tail end of the discovery process, or even after discovery has closed. In his view, a lawyer places both the expert and client at a disadvantage by retaining an expert witness late in the litigation. According to Goldhaber, there are several critical reasons why the lawyer should retain the expert as early as possible. First, the expert needs specific information in order to form the opinion about which he or she will testify at trial. That information comes from the documents and deposition testimony elicited during discovery. By engaging the expert before document discovery is complete and the critical depositions are taken (including the depositions of the parties and relevant fact witnesses), the expert can advise the lawyer what documents to request and what questions to pose at a deposition, which will contain the information needed to formulate the expert opinion. If the lawyer engages the expert after discovery has been completed, it may be too late to get the expert everything he or she needs. As a result, the expert could have an incomplete picture of the facts and ultimately render an incomplete or even inaccurate opinion.

Second, the expert needs sufficient time to formulate the opinion, and in federal cases, to prepare the FRCP Rule 26(a)(2)(B) report.[2] Experts are busy people; they do not just work on your case. Just ask Goldhaber, whose office is inundated with four-foot high stacks of binders, documents, and transcripts relating to the multiple cases in which he is currently engaged. A conscientious and thorough expert, Goldhaber reads every document and deposition transcript. If placed in a time crunch however, it becomes very difficult for him, or any expert witness, to review all of the necessary materials. This can lead to an incomplete report or, what is more embarrassing for the expert, lawyer, and client, sloppy work product.

Hillary Frommer

The decision to retain an expert will ultimately be made by the client, and of course has an impact on the litigation costs. Lawyers should discuss as soon as possible with the client the value of retaining the expert at the outset of the case, because while more costly, this can only benefit the client in the end.[3]

Give the expert everything he or she needs to do the job hired to do

When Goldhaber is retained as an expert witness, he does not want to review a lawyer-prepared summary of a deposition. He wants to read the entire deposition transcript. He does not want to see only those cherry-picked documents which the lawyer thinks are relevant. He wants to see every document produced in discovery by all parties. When Goldhaber has been retained as a rebuttal witness, he wants to review all of the materials his opposing expert reviewed in forming his or her opinion. In fact, Goldhaber told me that when he is retained as a rebuttal expert in federal cases, the first thing he reads is the list of the materials relied on by the opposing expert.[4]

Experts are retained because, well, they are experts. They know better than the lawyers which documents and testimony are important for the opinions they were hired to provide. Thus, one of the first questions the lawyer should ask the expert is "what information do you want?" The answer will likely be "everything," but if it is not, consider giving it all to him or her anyway.

Do not deliberately keep "bad" information from the expert

Most disturbing to Goldhaber is when lawyers outright withhold documents from him which they think are harmful to the case. The only thing that accomplishes is upsetting the expert — who now is missing critical information, will formulate an opinion based on incomplete facts, and is poised to be blindsided during cross-examination at trial with that withheld information. Experts want to be known in the business and perceived by jurors as thorough and accurate. Withholding key information from the expert because it is not "good for the case" jeopardizes the expert's reputation inside and outside the courtroom. In fact, Dr. Goldhaber related to me an incident where an expert resigned from an engagement before trial because the lawyers withheld a critical document from him.

It is important for the lawyer to provide the expert with all of the tools he needs to give the most effective testimony at trial that will hopefully help win the case, no matter how damaging the lawyer thinks they are to the case. Let the expert decide how those "bad" facts impact his or her expert opinion, if at all.

Allow adequate time to prepare for trial

When Goldhaber takes the witness stand in a courtroom, he wants to be confident that he is able to help the lawyer present the expert opinion in the best way possible. This can be accomplished only through adequate preparation with the lawyer. The expert should be well-prepared not only to present his or her opinion in the most effective way, but also to answer the anticipated tough questions on cross-examination.

One interesting tidbit from Goldhaber: when preparing to testify, he likes to know the make-up of the jury (such the demographics and occupations of the jurors), which lawyers obtain during voir dire. In Goldhaber's experience, that information has helped him establish his credibility with the jury as an expert.

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

1 Dr. Goldhaber's clients have included Fortune 500 companies, educational institutions, and governmental organizations. He has written and edited 10 books and is a frequent lecturer on the topics of warnings and communication. More information about Dr. Goldhaber and Goldhaber Research Associates is available at www.Goldhaber.com.

2 If expert is writing a report, tell him immediately when that report must be produced to the otherwise—not the week before it is due.

3 When deciding whether to retain an expert, the lawyer should have a candid discussion with the expert about his or her fees, and ask the expert to prepare a budget that includes how much time the expert anticipates reviewing the discovery materials, and the expected costs for such review.

4 These materials must be disclosed pursuant to Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure.

Among Us (Continued from page 7)

To the family of Supreme Court Justice **John J. Leo**, on the passing of his mother-in-law, Genevieve Hull.

Board of Directors report the passing of long time member **Lawrence J. Holt**.

New Members…

The Suffolk County Bar Association extends a warm welcome to its newest members: **John A. Aviles, Vincent Cuocci, John J. Drake, Indira T. Edwards, Stephen Holbreich, Marc Andrew Kramer, Debra A. Kruper, Ian S. Mednick, J. Stewart Moore, Hayley Morgan, Michele Pilo, Henry S. Shapiro, Shana Slawitsky, Steven Tekulsky** and **David A. Vallone**.

The SCBA also welcomes its newest student member and wishes him success in his progress towards a career in the Law: **Ralph Humphrey**.

Celebrating the right of free speech (Continued from page 1)

Shulman said she will be missed and her dedication to the association always be remembered.

This year's musical performers, an authentic New Orleans jazz band, kept everyone moving, even those who never made it to the dance floor. Infectious, it was impossible to ignore the talents of Terrance Simien & the Zydeco Experience.

The choice of Simien appeared to be indicative of the promise from the SCBA's new president for reinvention.

"To ensure continued success, we need to democratize the voices of our legal community and strive for genuine member engagement," said Chase when discussing how he'd like to see the leaders and issues chosen at the SCBA. "We envision two-way conversations, and we most sincerely desire our membership to be redefined by fully embracing both diversity and technology. We don't just want the bar to do things *for you*; we want the bar to do things *with you*. Future success is building partnerships; building the capacity to do great things together and building a strong and genuine sense of community."

Chase said he is committed to concentrating on making the voices of the diverse legal community strong and he plans to incorporate technology too.

"Our future is not about any one person, our future as a prestigious organization should be to recognize that we are but a meaningful *conduit* for our members' ideas," he said. "We shall never subscribe to any assertion that the best years of this great association are behind us, we must firmly believe our best is yet to come. The *now* is *here."*

Justice Sandra L. Sgroi installed Judge James P. Flanagan as the next dean of the Suffolk Academy of Law as well as the incoming directors who included: Leonard Badia, Cornell V. Bouse, Jeanette Grabie and Peter C. Walsh.

Presiding Justice Randall T. Eng did not make it to the event to install the officers due to the inclement weather. Justice Cheryl E. Chambers filled in for him, installing the SCBA officers for 2013-2014. They are: William T. Ferris, III, President Elect; Donna England, First Vice President; John R. Calcagni, Second Vice President; Patricia M. Meisenheimer, Treasurer and Justin M. Block, Secretary.

2013 New York Statewide High School Mock Trial Tournament

By: Joy Ferrari

The New York Statewide Mock Trial Program is a joint venture of the New York Bar Foundation, the New York State Bar Association's Committee on Law Youth & Citizenship (LYC) Program and the statewide local bar associations. While the Mock Trial Tournament is set up as a competition, emphasis is placed on the educational aspect of the experience, which focuses on the preparation and presentation of a hypothetical courtroom trial that involves critical issues that are important and interesting to young people.

The goal of the Mock Trial Program is to promote an understanding of the law, improve proficiency in an array of life skills, develop positive civic attitudes and broaden interest in law related and academic careers.

High school teams from public and private schools participate in the tournament beginning at the county level. In tournament competitions, the teams argue both sides of the case and assume the roles of attorneys and witnesses. Local judges and attorneys score teams based on their preparation, performance and professionalism. The highest scoring team from the county tournaments proceeds to the regional competition. The top team from this competition is then invited to participate in the state finals in Albany.

This year 25 Suffolk County schools and approximately 348 students participated in the Mock Trial program. The participating high schools this year were: Bay Shore, Central Islip, Commack, Comsewogue, East Islip, Elwood John Glenn, Half Hollow Hills East, Half Hollow Hills West, Hampton Bays, Harborfields, Islip, Kings Park, Mattituck, Miller Place, Newfield, Northport, Patchogue-Medford, Rocky Point, St. Anthony's, St. John the Baptist, Smithtown West, West Babylon, William Floyd, and Wyandanch.

After eight weeks of competitions and 66 trials at the school and court levels, William Floyd High School prevailed over Northport High School at the Suffolk County Final held on April 17 at the United States District Court in Central Islip presided by Hon. John M. Czygier, Jr., Suffolk County Surrogate Court, Acting Supreme Court Justice.

Suffolk County Supreme Court Justice Emily Pines presided at the Long Island Regional Final held April 24, also held at U.S. District Court, between William Floyd HS and the Nassau County finalist, Our Lady of Mercy Academy. The victor of that competition, William Floyd, will continue on to the State Finals in Albany in May.

For the past 25 years, Alan Todd Costell has served as Suffolk County Attorney Coordinator for the Mock Trial Program. This program, also, enlisted the support of approximately 84 volunteer attorneys and judges who participated in an advisory capacity to the schools or as judge at the competitions.

This program could not exist without the continuing support of the Supervising Judge of the District Court, Hon. Richard I. Horowitz. The SCBA extends appreciation to Judge Horowitz, his staff and the court's security personnel for their assistance in the use of the District Court facilities. Also, appreciation is extended to the Federal Court personnel for their assistance in accommodating this competition.

If you are interested in becoming a judge or attorney coach for the 2014 tournament or know of a school who would like to become involved, please contact Joy Ferrari, SCBA Administrator for the Suffolk County tournament, at 234-5511 ext. 224 or email joy@scba.org.

William Floyd H S Suffolk County, the Long Island Regional Mock Trial Champions.

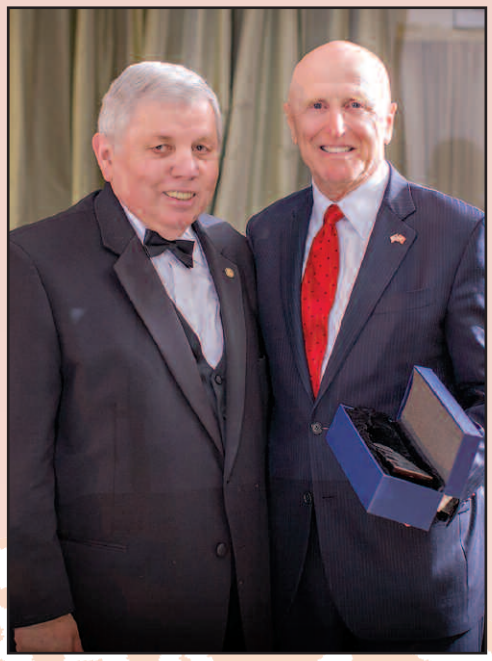
Appreciation for insuring the success of this tournament is extended to the following SCBA members:

Hon. Salvatore A. Alamia (ret)
Hon. Armand Araujo (ret)
Peter J. Ausili
Marla Grossman Band
Hon. Toni A. Bean
Cornell V. Bouse
Eric J. Bressler
Peter E. Brill
William A. Cadel
Rudolph H. Cartier, Jr.
Hon. John M. Czygier, Jr.
Robert W. Dapelo
William A. DeVore
Gerard Donnelly
Wayne J. Donovan
Robert W. Doyle, Jr.
Hon. Richard T. Dunne
John P. Finnerty
Hon. James P. Flanagan
Patricia T. Grant Flynn
Howard E. Gilbert
William C. Goggins
Hon. Philip Goglas
Melissa B. Greenberger
Leonard M. Grenci
Elizabeth Harrington
Hon. Richard Hoffmann
David M. Kaufman
Thomas J. Keegan, Jr.
Hon. Chris Ann Kelley
Michael C. Kennedy
Hon. Karen Kerr
Howard E. Knispel
Mark C. Kujawski
Hon. Caren Lynn Loguercio
Matthew Mady
Michael M. McClellan
Hon. James A. McDonaugh
Vincent J. Messina, Jr.
Scott M. Mishkin
Brian C. Mitchell
Lurette Mulry
Hon. Emily Pines
John T. Powers
Cornelius S. Rogers
Jamie Rosner
Robert J. Savage
Steven L. Sarisohn
Tara A. Scully
Kenneth M. Seidell
Thomas Sica
Joel Sikowitz
Joseph K. Strang
Francesco P. Tini
Hon. Stephen Ukeiley
Joseph P. Walsh
Richard D. Winkler
Andrew Ross Wolk

A Night To Remember

President, Officers and Directors
Sworn In at Installation Dinner
June 7, 2013

Photos by Brian and Sara Jean Botticelli Portraits



FREEZE FRAME

Photo Courtesy of the Administrative Judge's Office

Recognizing the role of courts in the United States, Suffolk County Court Community Law Day was held on May 2. Suffolk County District Administrative Judge Hon. C. Randall Hinrichs, J. Richardson, Hon. Fern Fisher, the Deputy Chief Administrative Judge of NYC, Director New York State Access to Justice Program Director; Shawn Renee Guzman and Marian Rose Tinari were at the event.

FREEZE FRAME

Photo by Barry Smolowitz

A full contingent of Academy officers and volunteers were in attendance when Hon. John Kelly (at the head of table), completed his tenure as Academy of Law Dean. All expressed appreciation for his dedicated service.

Those days, those nights, as a Bronx assistant

The Complaint Room

By William E. McSweeney

The ground floor entrance to 215 East 161st Street, the Criminal Court Building, Bronx County, gave onto a great lobby where escalators and elevators ascended to the higher floors, and ascended as well to Law in the Abstract: all-purpose parts and jury parts, where papers were flung about with abandon – complaints, supporting depositions, informations, indictments, motions, answers, rulings and where - through hearings and trials - the scrubbed and shaved re-enactment of crimes were made altogether presentable to finders of fact and deciders of law.

Symbolically, the Complaint Room was on the ground floor, located just to the right of the main entrance. This room, windowless, confined by cinder-block walls, themselves painted an institutional grey, was a few hundred square feet in area, exact dimensions unknown, but large enough to house seven steel desks, and a score of wooden chairs, at which and on which sat ADAs, police officers, and civilian complainants. The room was paper-strewn, dusty, dank, suffused with the acrid stench of stale tobacco smoke. Chain-smoking my Camels, I of course contributed, if contributed is a fit word, to the blue haze, a toxic cumulative cloud, that hugged the ceiling.

As its name might suggest, the Complaint Room was the first court stop for both the aggrieved civilian and the arresting officer who had answered that person's call for help. Incongruously, the room also served as a nursery, a rude one to be sure, in that youngsters of varied complexion, and in varying degrees of anxiety, commensurate with the severity of the unlawful acts they had lately witnessed in their own homes, would wander the floor while their infant siblings were dandled on the knees of their mothers, themselves often bloody and bandaged, who narrated the events that had resulted in their being bloody and bandaged.

There was another incongruity - namely, the choice of weapons employed in some of these cases. Temper aflame by alcohol, or drugs, or merely acting in a manner consistent with his violent nature, the assailant would opportunistically reach for the nearest available instrument, book, lamp, chair - things otherwise associated with rumination would, perversely, be associated with altercation. One unusual weapon that was vouchered was a can of Enfamil: its intended use was for the nurturing of a child, its actual use the battering of the child's mother, she who now bore a crescent of stitches marking her forehead.

William E. McSweeney

Another unlikely weapon: a cricket bat (!) This had been the instrumentality of an assault upon a cricketer by an opponent, during the melee that followed a match between Barbadian teams; while the players had imported the sport from their homeland, they had not, to judge by this day, imported the sportsmanship; that is, the game had taken root in the new country, but not the civility otherwise associated with it.

As I wrote this complaint, I now and again looked at the victim's head, itself swathed in a floppy, blood-flecked, turban of bandage. Finally, I couldn't resist the obvious:

"Not very 'cricket' of him, was it?"

To my weak joke, the man simply and softly answered, "No."

Domestic disputes, as they were euphemistically styled, formed a large part of complaint-room work. Some hundreds of times, while the arresting officer sat alongside the complainant, his silent, sympathetic presence supporting her person, I lent support to her legal position. I wrote a solid, factual complaint to be lodged against the defendant; obtained a corroborating affidavit from the complainant, thus curing the complaint of hearsay; and, finally, on the case jacket, endorsed cumulative remedies — "Seek $10,000 bail;" "Obtain Temporary Order of Protection" - for the arraignment ADA to urge upon the court.

Notwithstanding that most of these domestic matters were merely "processed" by the Criminal Justice System, that is to say, resolved short of trial, typically by a plea, each matter was "processed" only because of the strength of the DA's case; the plea was a function of, an outcome directly proportional to, the hard evidence that existed. A plea to a lesser charge, a non-criminal plea, on the part of the defendant, in return for his enrolling in an anger management course, was a fairly representative goal of the assistant.

To him, and especially with respect to domestic cases, "plea" was not a dirty word. It spoke of a just resolution, one that could accommodate all parties: the defendant would reform, not burdened by a criminal conviction; the complainant would thereafter live with him, safely; the District Attorney would draw satisfaction from his service as peacemaker, which Lincoln believed to be the lawyer's highest incarnation. In short, justice would be served.

Arguably, these were the optimal outcomes. There were other outcomes. 90 percent of these domestic cases ended in dismissal, the result of the complainant's refusal after her complaint had been filed, to proceed with the case. Homicide was still another outcome, an extreme outcome, a rare outcome - the result of the defendant's having been released in his own recognizance, or released on low bail, at the arraignment; thereafter having torn up the complainant's order of protection on his way to her apartment; and, once arrived, having killed her.

This outcome was what the Complaint Room ADA tried to preclude. The ADA didn't concern himself with odds; the odds were long against a murder occurring, but with stakes: a person, one person, could die if the complaint wasn't taken seriously. With the twin goals, then, of protecting the complainant by keeping the defendant "in," and strengthening his case for future trial, should it ultimately reach that stage, the good ADA, sobered by the stakes, worked with especial care on these "domestic" cases.

Accordingly, the case jacket that he composed in the Complaint Room contained, if applicable, photos of the victim's wounds, the name of the hospital involved, vouchers of weapons recovered, names, addresses, phone numbers of the victim and other eyewitnesses to the offense; arresting officers' names, shield numbers, and commands. In its fullness, its completeness - if composed correctly - the complaint-room jacket represented, in its essentials, an organism perfectly evolved from the onset of its birth.

Notwithstanding the case jacket's essential completeness, it would itself be subsequently placed in a trial folder, along with a transcript of Grand Jury minutes, a copy of the indictment, and copies of defense motions and prosecutorial answers to these motions. But all of these additional documents were after-the-fact ones; that is to say, they were produced after the fact of the defendant's initial arraignment, his arraignment on the complaint; thus the importance of good Complaint-Room work on the part of the ADA.

If the complaint was cured of hearsay by the time of the defendant's arraignment; if the names of witnesses and their statements supportive of the complaint were immediately in the hands of the District Attorney; if a thorough investigation of facts was completed at the threshold of the case, then the likelihood that the defendant would be held for trial was enhanced. The good and early prosecutorial intervention that had occurred in the Complaint Room would

(Continued on page 27)

EDUCATION

New regulations regarding the Dignity For All Students Act

By Candace J. Gomez

At the Board of Regents' meeting held on April 23, 2013, the board adopted several regulations implementing the Dignity for All Students Act ("DASA"). The following regulations will take effect on July 1, 2013.

Section 100.2(c) of the Commissioner's Regulations has been amended to extend the required instruction for students regarding bullying and cyberbullying. Public school and charter school students must receive instruction that supports the development of a school environment free of discrimination, harassment, bullying and cyberbullying. Students must also receive instruction in the safe, responsible use of the Internet and electronic communications. In public schools other than charter schools, such instruction must be provided as part of a component on civility, citizenship and character education in accordance with Section 801-a of the Education Law.

Section 100.2(l) and Section 119.6 of the Commissioner's Regulations have been amended to set forth additional requirements for public school Codes of Conduct and charter school disciplinary rules and procedures or Codes of Conduct. Pursuant to these amendments, such Codes of Conduct or disciplinary rules and procedures must include provisions that require:

• Appropriate conduct, dress and language, not only on school property, but also at school functions that may be held off school grounds.

• The prohibition of discrimination, harassment, bullying and cyberbullying against any student, by employees or students on school property or at a school function, that creates a hostile school environment by conduct, threats, intimidation or abuse that either: (1) has or would have the effect of unreasonably and substantially interfering with a student's educational performance, opportunities or benefits, or mental, emotional and/or physical well-being that reasonably causes or would reasonably be expected to cause emotional harm; or (2) reasonably causes or would reasonably be expected to cause physical injury to a student or to cause a student to fear for his or her physical safety. These prohibitions extend to discrimination, harassment, bullying and cyberbullying off school property when such acts create or would foreseeably create a risk of substantial disruption within the school environment and where it is foreseeable that the conduct, threats, intimidation or abuse might reach school property.

Candace J. Gomez

• Disciplinary measures responding to acts of discrimination, harassment, bullying and cyberbullying, with respect to such acts against students by students, that incorporates a progressive model of student discipline including measured, balanced and age-appropriate remedies and procedures that make appropriate use of prevention, education, intervention and discipline, and considers among other things, the nature and severity of the offending student's behavior(s), the developmental age of the student, the previous disciplinary record of the student and other extenuating circumstances, and the impact the student's behaviors had on the individual(s) who was physically injured and/or emotionally harmed. Responses must be reasonably calculated to end the harassment, bullying, and/or discrimination, prevent recurrence, and eliminate the hostile environment.

• The prohibition of retaliation against any individual who, in good faith, reports or assists in the investigation of harassment, bullying, and/or discrimination.

• Each board of education and board of cooperative educational services to ensure community awareness of its Code of Conduct by mailing a plain language summary of the Code of Conduct to all persons in parental relation to students before the beginning of each school year and making such summary available thereafter upon request. This mailing requirement has not been explicitly set forth in the amendments with regard to charter schools.

Section 100.2(kk) of the Commissioner's Regulations has been amended to set forth provisions regarding the reporting of incidents of discrimination, harassment, bullying and cyberbullying. The new regulation requires that:

• School employees who witness harassment, bullying, and/or discrimination or receive a verbal or written report of harassment, bullying, and/or discrimination must promptly verbally notify the principal, superintendent, or their designee not later than one school day after such employee witnesses or receives a report of such an act.

• School employees who witness, or receive a verbal or written report of, harassment, bullying, and/or discrimination must file a written report, in a manner prescribed by the school district, BOCES or charter school, with the principal, superintendent, or their designee no later than two school days after making a verbal report.

• The principal, superintendent or the principal's or superintendent's designee shall lead or supervise the thorough investigation of all reports of harassment, bullying and/or

(Continued on page 25)

HEALTH AND HOSPITAL

Medicare HMO right of reimbursement and equitable remedies continued

By James G. Fouassier

In my recent article, *The Medicare Lien Trumps GOL 5-335*, a peripheral issue was whether a Medicare Advantage organization (i.e. the "MA plan" or the "Medicare HMO") possessed a private right of action independent of any reimbursement claim derived as a function of an equitable lien. As I noted, courts weighing in on the issue were split. A resolution of the question was not dispositive in the court's finding in *Potts v. The Rawlings Company, LLC*, 2012 US Dist LEXIS 137802 (SDNY; 9-25-12), the subject of the article. The claims at bar did not actually involve whether the MA plans had such a private right of action. Instead, they simply involved the issue of whether a state law that directly conflicts with federal laws and regulations is preempted. The court held these to be distinct questions. After analyzing other relevant precedent, the court found that whether an MA plan has a private right of action, to the extent that GOL 5-335 would deny the MA plan's right to seek reimbursement the state statute is preempted by the Medicare Secondary Payer Act.

The Eastern District of Pennsylvania, *in In re Avandia Marketing, Sales Practices and Products Liability Litigation*, dismissed the reimbursement claims of the MA plan on the ground that it did not possess a private right of action. The Third Circuit reversed, finding that the text of the MSP Act and the intent of Congress conveyed to MA plans the same rights under the MSP Act as were possessed by regular Medicare.

James G. Fouassier

On April 15 the US Supreme Court declined to review the case, leaving stand the holding. Consequently, at least in the Third Circuit, the issue now is settled: since Congress intended that an MA plan be on the same footing as "traditional" Medicare, an MA plan indeed has a private right of action for reimbursement of medical expenses, even to the extent of seeking the "double damages" that regular Medicare could seek under the Medicare Secondary Payer Act. GlaxoSmithKline v. Humana Med. Plans, No. 12-690 (U.S. cert. denied Apr. 15, 2013).

On a related note of some importance, the high court recently ruled that notwithstanding that subrogation claims authorized by ERISA section 502(a)(3) are equitable in nature (i.e., the ERISA grant of authority to a health plan or beneficiary to seek "equitable relief"), equitable principles of relief cannot be broadly applied in the face of express contractual agreements to the contrary. *US Airways, Inc v. McCutchen, et al;* ___ US ___, No. 11-1285, April 16, 2013) At first blush this seems to conflate and confuse legal and equitable remedies. The seminal case of *Sereboff v. Mid Atlantic Medical Services*, 547 US 356 (2006) recognized the nature of action for the recovery at bar as "equitable relief" and applies equitable principles to create a "lien" upon collateral proceeds against which the health plan's recovery may be had. So, if the proceeding is equitable in nature, should not all the recognized rules and maxims of equity apply ? This was the reasoning of the defendant beneficiary in *McCutchen.*

The health plan administered by US Airways paid out $66,000 for McCutcheon's medical bills. Later McCutchen settled his personal injury action for $110,000, less an attorney fee of 40 percent. US Airways then sought recovery of its payments under a provision of the ERISA health plan that expressly held that the beneficiary is required to reimburse the plan out of any such recovery for any sums paid for medical claims. When it later sued him under ERISA 502(a)(3) McCutchen argued that, since the plan was seeking "equitable relief", it was bound by certain equitable principles. One is that an equitable lien may be asserted only against an over-recovery (the so-called *make whole* doctrine). Since he only recovered a small portion of his total damages, the argument went, there is no basis for a recovery. Another is that a party asserting a lien is required to contribute to the expenses incurred in the securing of the recovery fund against which the equitable lien vests (the *common fund* rule). This argument alleges that since McCutchen incurred all the costs and fees in securing a fund against which US Airways might assert its claim, US Airways had to contribute at least a proportional share of the costs to the settlement by a reduction in its lien.

The district court rejected both arguments, holding that the ERISA plan benefit terms "clearly and unambiguously" provided for full (not proportional) reimbursement of the medical expenses that were paid out. On appeal, however, the Third Circuit reversed. Applying principles of unjust enrichment it agreed with McCutchen that an "equitable" proceeding must apply equitable principles that traditionally limit the relief requested. 663 F. 3d 671 at 676 (2011). Full reimbursement not only would leave McCutchen with less than full payment but it also would be a windfall for US Airways, which contributed nothing to the recovery.

Yes and no, the Supreme Court held (in a "5 to 4" decision [1]). While it is true that an action under ERISA 502(a)(3) is "equitable" in nature, what the ERISA plan really is doing here is seeking enforcement of what the court labels an "equitable lien *by agreement*". That kind of lien arises from and is intended to carry out the provisions of an express contract. "So enforcing the lien means holding the parties to their mutual promises. . . Conversely, it means declining to apply rules – even if they would be "equitable" in a contract's absence – at odds with the parties'

(Continued on page 23)

JALCBA – Suffolk County Women

By Alison Besunder

I had the privilege of attending a dinner I had never attended at a place I had not yet been to by an organization I had not previously heard of until I became a member of the Suffolk County Women's Bar Association on May 13. In honor of breast cancer awareness month, I thought I would use this month's column to share with you what I learned in the hopes that more colleagues among us can become involved.

The event was the 2013 JALBCA (Judges and Lawyers Breast Cancer Alert) Annual Dinner at Cipriani Wall Street. The impetus for my attending was the invitation of Tara Scully and the incentive to see her and others of my Suffolk County cohorts in the backyard of my home in Brooklyn Heights. I was privileged to hear the presentation by JALBCA's honorary president Hon. Judith S. Kaye and the presentation of this year's award to the UBS U.S. Litigation Team by Hon. A. Gail Prudenti, the recipient of the 2012 award. I was also moved and inspired by learning more about the JALBCA organization.

Alison Besunder

JALBCA is an organization dedicated to mobilizing the legal community of the New York City metropolitan area in the fight against breast cancer. Since 1992, JALBCA has reached out to the legal community and visitors to New York's courthouses to educate them about breast cancer. JALBCA's Lawyer's Division, working with Womens' Bar Associations statewide, sponsors the October Courthouse Alert and disseminates literature and information about breast cancer to courthouses throughout the state. JALBCA's Project Renewal provides mammography screening vans and dispatches them to underserved communities.

This year JALBCA expanded to Suffolk County as well as Westchester. For the eighth year, in 2012, 225 women were screened, 57 women were referred for follow up, and 12 mammography vans provided free mammograms in all five boroughs of Manhattan, Suffolk, and Westchester Counties. Of these women, 114 were uninsured. At the end of the JALBCA annual dinner, representatives from dozens of firms stood and pledged their individual donation of a van to JALBCA's efforts.

During the dinner I was seated next to a fellow practitioner who had successfully emerged from a four-year struggle with breast cancer. Although she had survived the battle, her law practice continued to struggle. As a solo practitioner, she made the obvious choice of attending to her health, but was struggling to find her way back to what was once a thriving practice. The discussion reminded me that while the legal profession has resources in place for lawyers struggling in other areas such as stress, alcohol, and depression, there are few to help lawyers suffering from health problems to keep their practice afloat.

JALBCA partners with an organization called Share to provide a hotline for support and comfort to colleagues battling breast cancer. Through the confidential hotline, lawyers and judges can request to speak directly with one of our members for support and guidance.

In short, the evening was an enlightening one that inspired me to become more active with this worthwhile cause. For more information on JALBCA, or to volunteer with JALBCA or the Suffolk County Women's Bar Association, please visit their respective websites at www.jalbca.org and www.suffolkwomensbar.org.

TRUSTS AND ESTATES

Obtaining pre-judgment interest on fiduciary surcharges

By Robert M. Harper

A number of remedies are available to estate and trust beneficiaries who suffer financial harm at the hands of the fiduciaries appointed to administer estates and trusts. Among the remedies that may be available to aggrieved estate and trust beneficiaries is the imposition of a surcharge against a fiduciary that performs poorly. In addition to a surcharge, estate and trust beneficiaries may seek an award of pre-judgment interest on a surcharge imposed against a fiduciary, personally, which can prove quite costly for an executor or trustee found to have violated a fiduciary duty. This article addresses the Surrogate's Court's discretion to award pre-judgment interest on surcharges against fiduciaries, and discusses a recent case in which Suffolk County Surrogate John M. Czygier, Jr. exercised such discretion.

CPLR 5001(a) provides that "[i]nterest shall be recovered upon a sum awarded . . . because of an act or omission depriving or otherwise interfering with title to, or possession or enjoyment of, property, except that in an action of an equitable nature, interest and the rate and date from which it shall be computed shall be in the court's discretion."[1] The discretion to award pre-judgment interest, and at what rate, for surcharges based upon a breach of fiduciary duty is a matter within the discretion of the court.[2]

"Pursuant to this power, the Surrogate's Court may properly impose interest on surcharges made against a petitioning [executor or] trustee when the interest is warranted to fully compensate the [estate or] trust beneficiaries for any losses which they may have suffered or gains which they may not have fully realized due to" the fiduciary's misconduct.[3] Ample support exists for awarding pre-judgment interest against fiduciaries who are surcharged for violating the duty of loyalty.[4] Given the foregoing, it is worthy of note that Surrogate Czygier has recently awarded pre-judgment interest on surcharges imposed upon executors and trustees who breached their fiduciary duties.[5]


Robert M. Harper

In *Matter of Taylor*, the petitioner, the decedent's son-in-law, procured Letters Testamentary to serve as executor of the decedent's estate, which was to pass, in equal shares, to the decedent's three children under her will. After the will was admitted to probate, the petitioner made disproportionately high distributions to his wife, one of the decedent's three children, and failed to make equal distributions to the decedent's other three children. The petitioner also failed to comply with an order directing him to account as executor, which resulted in a finding of contempt against him, the issuance of a warrant of commitment for him, and the petitioner being taken into custody by the Suffolk County Sheriff's Office.

Ultimately, the petitioner rendered his accounting as executor and petitioned to have it settled by the Surrogate's Court, Suffolk County. The accounting and pre-objection discovery resulted in the filing of objections by the respondent, one of the decedent's sons, which gave rise to a summary judgment motion requesting the imposition of a surcharge and pre-judgment interest on the surcharge against the petitioner, personally.

In granting summary judgment to the respondent, Surrogate Czygier explained that the petitioner had a fiduciary duty to make equal distributions to each of the estate's three beneficiaries. The surrogate also found that the petitioner breached that duty by making disproportionately high distributions to his wife and directed the petitioner to make an immediate distribution to the respondent in an amount equal to the distributions the petitioner made to his wife.

But Surrogate Czygier did not end his analysis there. Instead, the surrogate correctly held that the circumstances warranted the imposition of pre-judgment interest on the surcharge against the petitioner. Surrogate Czygier required the petitioner to pay the interest award (which was imposed at a rate of six (6%) percent per annum, for a period of approximately five years), personally, reasoning that interest was warranted to compensate the respondent for any losses which he suffered or gains he may not have fully realized due to the petitioner's conduct.

When representing objectants in accounting proceedings, practitioners should not stop at seeking surcharges against errant fiduciaries. Instead, objectants' counsel should be sure to seek the imposition of pre-judgment interest on a surcharge, which can be quite substantial over time. In doing so, attorneys will take steps to ensure that their clients receive the highest monetary recoveries possible under the circumstances.

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

1 Matter of Cogliano, N.Y.L.J., Sept. 29, 2008, at 46, col. 5 (Sur. Ct., Suffolk County).
2 Matter of Janes, 90 N.Y.2d 41, 55-56 (1997).
3 Matter of Rubenstein, N.Y.L.J., June 16, 2004, at 20, col. 3 (Sur. Ct., Kings County); Matter of Ryan, N.Y.L.J., Dec. 31, 2012, at 29, col. 2 (Sur. Ct., Suffolk County).
4 Matter of Tollner, N.Y.L.J., June 7, 1995, at 43, col. 3 (Sur. Ct., Nassau County) (awarding pre-judgment interest at the "legal rate" of nine (9%) per annum).
5 Matter of Taylor, N.Y.L.J., Mar. 26, 2013, at 25, col. 2 (Sur. Ct., Suffolk County).

TAX LAW

Charitable conservation easements

By Louis Vlahos

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A cursory review of IRS enforcement efforts over the last few years reveals that the government has dedicated substantial resources to auditing charitable conservation easements. The IRS vigilance in this area has been warranted since there have been many abuses over the years, ranging from aggressive valuations by appraisers, to misrepresentations by taxpayers of the public benefit generated by the easement. Concern over these issues led the Obama administration, as part of the 2014 budget, to propose limitations on deductions for certain conservation easements.

This should not come as a surprise to taxpayers or their advisers. The IRS announced in 2004 that it would be taking stricter enforcement action as to improper charitable deductions based upon conservation easements. In light of the increased scrutiny of conversation easements, it behooves any taxpayer contemplating the grant of an easement to understand its basic requirements and reporting obligations.

Requirements

An income tax deduction may be allowed for the fair market value of a "qualified conservation contribution," provided certain requirements are satisfied. A qualified conservation contribution is the contribution of a "qualified real property interest" to a "qualified organization," which is made exclusively for conservation purposes. The contribution cannot be part of a quid pro quo exchange; for example, where the easement is granted to a county in exchange for a zoning change or exemption.

A qualified real property interest includes a "restriction (granted in perpetuity) on the use which may be made of real property." Any interest in the property retained by the donor must be subject to legally enforceable restrictions that will prevent uses that are inconsistent with the conservation purpose of the donation.

A qualified organization is a public charity that is dedicated to promoting conservation purposes and that has the resources to enforce the easement. Toward this end, the donation must give the charity the right to inspect the property and to enforce the easement by appropriate legal proceedings.


Louis Vlahos

Acceptable conservation purposes

There are several "conservation purposes" for which the contribution may be made; for example, preservation of land areas for recreation by, or for the education of, the general public; the protection of a relatively natural habitat of fish, wildlife or plants, or similar ecosystem; the preservation of open space (including farmland and forest land) for the scenic enjoyment of the general public, or pursuant to a clearly delineated federal, state or local governmental conservation policy, which will yield a significant public benefit; or the preservation of an historically important land area or a "certified historic structure."

A taxpayer's stated conservation purpose will be closely examined by the IRS to ensure the presence of a real public benefit.

Value of a conservation easement

The amount of the donation, and of the related tax deduction (subject to various limits), is the fair market value of the easement as of the date it is donated. A deduction is permitted only if the easement diminishes the value of the property it encumbers.

As a general rule, the fair market value of a conservation easement is equal to the difference between (a) the fair market value of the to-be-encumbered property before the easement is granted and (b) the fair market value of the property after the easement is granted. If the granting of the easement increases the value of any other property owned by the taxpayer or a related person, the amount of the deduction for the easement must be reduced by the amount of the increase in value of the other property, whether or not it is contiguous to the encumbered property. If the taxpayer or a related person can reasonably expect to receive, as a result of the donation, an economic benefit greater than that which will inure to the general public, no deduction is allowable.

In order to determine a property's fair market value, one must first determine its "highest and best use." This is not necessarily its current use. Rather, it is the highest and most profitable use for which the property is adaptable and needed. Generally speaking, this use must be physically possible upon the property, legally permissible and financially feasible. Of the possible uses, the most profitable is the highest and best. This analysis is very fact-intensive. It is also important to the IRS since it provides the starting point for valuing the conservation easement and may be a point of contention in an audit.

Once the highest and best use is determined, a number of valuation methods may be applied in arriving at the property's fair market value.

A taxpayer must substantiate the value of the conservation easement by submitting with its federal tax return a "qualified appraisal" of the value for the easement prepared by a "qualified appraiser."

Qualified appraisals

A qualified appraiser is someone who: "(I) has earned an appraisal designation from a recognized professional appraiser organization or has otherwise met minimum education and experience requirements . . ., (II) regularly performs appraisals for which the individual receives compensation, and (III) meets such other requirements as may be prescribed [by the IRS]**...**."

A qualified appraisal is an appraisal of property which is conducted by a qualified appraiser in accordance with "generally accepted appraisal standards"..., and must include (i) a description of the property that is sufficiently detailed for an unfamiliar reader to ascertain that the property that was appraised is the property that was contributed, (ii) a description of the physical condition of the property, (iii) the terms of any restriction on the use of the property, once donated, (iv) the appraised fair market value of the property on the date of the contribution, (v) the method of valuation used to determine the fair market value, and (vi) the specific basis for the valuation.

Reporting

In addition to the usual reporting requirements for charitable contributions, the taxpayer must also prepare and file IRS Form 8283, Noncash Charitable Contributions. The appraiser and the charitable organization are required to complete portions of this form. The charitable organization must also report on its annual tax return that it received and holds conservation easements and it must set forth, among other things, specific information as to the purposes of such easements and its enforcement thereof.

Conclusion

The granting of a conservation easement for the purpose of generating a charitable contribution deduction should not be undertaken lightly. As the foregoing discussion demonstrates, the applicable rules are complicated and the necessary substantiation is detailed. As a result of the various reporting requirements, coupled with the IRS's increased enforcement activity with respect to such easements, a taxpayer can find himself in a situation where he owns permanently encumbered property for which no income tax deduction was allowed.

Note: Lou Vlahos, a partner at Farrell Fritz, heads the law firm's Tax Practice Group. Lou can be reached at (516) 227-0639 or at lvlahos@farrellfritz.com.

REAL ESTATE

Landmines in real estate brokerage

By Andrew Lieb

Many of your practices deal with corporate work or commercial litigation and you say to yourself, sure I can represent a real estate brokerage, but can you? Yes, legally you can represent whoever you like. Yet, applying your skills from other areas of practice to this licensed category is very dangerous and can lead to your client losing their license and to you being sued for malpractice. In fact, this type of representation is really a niche practice and should be reserved for those who will take the time to truly understand that real estate is a licensed profession in this State.

I was inspired to write this article because my firm recently finalized a buy-out between members of a Limited Liability Company, in which one broker is buying out her salesperson co-member and it is apparent that the attorney, who drafted the membership agreement and advised concerning the franchise agreement, just pulled out a form and played plug and play. Wow, if only the corporate lawyer who had put this entity together was familiar with license law, they never would have done it in the first place.

You see, real estate agents have to comply with Article 12-A of the Real Property Law and 19 NYCRR 175, which include the regulations issued by the Department of State, New York, for this highly regulated profession. However, that is far from the end of the story as there is also precedent from Administrative Hearing Decisions and Administrative Appeals Decisions as well as Consent Orders that provide guidance for the practice. Then, there are the all-important Opinion Letters offered by the Office of the General Counsel of the Department of State, New York, to further guide the interpretation of the applicable Statutes, Regulations, and Administrative and Case Law.

Andrew Lieb

So where should have the corporate lawyer started when they put together the subject membership agreement before drafting? Well, with a very simply question: can a real estate salesperson even be a member of a Limited Liability Company in the first place?

To analyze this inquiry one would initially look to the applicable Statute, the Real Property Law, at §441-b(2). Therein, the statute states, in pertinent part, "[n]o license as a real estate salesperson shall be issued to any officer of a corporation nor to any manager or member of a limited liability company nor to a member of a co-partnership licensed as a real estate broker." If you got this far, you may say absolutely not, but maybe that is not entirely correct. So, you may want to go further and perform a thorough search of the topic and next you would turn to 19 NYCRR 175.22 and find the subject regulation applicable to ownership restrictions, which is entitled "Ownership of voting stock by salespersons prohibited." This regulation states that "[n]o licensed real estate salesperson may own, either singly or jointly, directly or indirectly, any voting shares of stock in any licensed real estate brokerage corporation with which he is associated." So, while the statute appears to be a blanket restriction, the regulation contains a carve-out by way of differentiating between voting and non-voting stock. Moreover, the regulation addresses a corporate structure, but does not apply the carve-out to the Limited Liability Company structure. Therefore, you would next turn to a search of case law and administrative precedent on the topic to see if you can find any guidance. Yet, you would not likely find anything directly on point. So, you would finally look to preexisting Opinion Letters and you would find the much talked about Opinion Letter, dated April 26, 2013, which determined that "brokerages may not provide corporate titles to agents for marketing or other purposes." Therein, you would find an analysis of RPL §441-b(2) and 19 NYCRR 175.22 and a conclusion that "[t]aken together, these provisions prohibit a real estate salesperson from holding voting stock or being appointed as an officer in a corporate brokerage, a manager or membership of a limited liability company or a member of a partnership." So, there is no guidance providing that a salesperson can be a member of a Limited Liability Company regardless if somehow their voting rights are curtailed.

Therefore, would it be shocking to learn that the buy-out that we just finished addressed a Limited Liability Company that had granted the salesperson a voting membership?

So, where are we now? We are thankful to the Department of State for offering Opinion Letters that help guide this practice and we, as members of the Bar, should ask many questions to the General Counsel so that our clients can fully comply and raise the standard of practice in the industry. So, thank you for the Opinion Letters Department of State. They are quite helpful for practitioners to gain an insight on how the Department of State will decide future Administrative Hearings for license complaints. In that spirit, my firm has asked the Department of State if the salesperson can now purchase a membership interest in another brokerage with non-voting rights, but we have also asked if the salesperson can vote on non-brokerage related decisions, like borrowing money. Stay tuned for an article with the answer to these questions when *The Suffolk Lawyer* publishes again after the summer hiatus - happy summer.

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

APPELLATE PRACTICE

Emergency applications to the Appellate Division, Second Department

By Glenn P. Warmuth

When your lower court application for a temporary restraining order ("TRO") is denied and you need emergency relief from the Appellate Division, Second Department ("the Second Department") it is vital to know the court's policies and procedures. Here are some tips from a recent Suffolk Academy of Law CLE program given by the Appellate Practice Committee which should help you get in the door.

The first step is to determine if your application in the lower court was ex parte. This is essential because it determines what procedure you will follow.

In most instances your application before the lower court will not have been ex parte because 22 NYCRR § 202.7(f) requires that notice must be given of an application for a TRO unless doing so would cause significant prejudice. This rule requires "a good faith effort" to give notice. Most courts, including the Second Department, interpret this to require reasonable (24 hour) notice. Your motion was not ex parte if you gave notice of your lower court application and your adversary did not come to court to oppose your application. Your motion was not ex parte if you gave notice of your lower court application and your adversary disputes the effectiveness of the notice. The only time the lower court motion will be considered ex parte by the Second Department is where no notice was given regarding the lower court application.


Glenn P. Warmuth

CPLR §5704

If your motion in the lower court was ex parte then you can seek relief in the Second Department pursuant to CPLR §5704. An application pursuant to CPLR §5704 is not a motion and is not an appeal. It is a proceeding in and of itself. There is no $45 motion fee and no fee to file an appeal.

Next, you should determine how many Justices will be needed to decide your application. The answer will be either one or four. You want to think about this because if you need a panel of four Justices you want to arrive in Brooklyn early in the day and you want to avoid Wednesdays when the Second Department holds meetings which would significant delay the determination of your application. If you seek to vacate a TRO then one Justice will decide your application. If you seek a TRO then four Justices will decide your application. If the lower court refused to sign your order to show cause and it does not seek a TRO then one Justice will decide your application.

Whether or not your application in the lower court was ex parte you are still required to follow the notice requirements of 22 NYCRR § 202.7(f) when making your application in the Second Department. It is important to understand that this is a new notice which explains to your adversary that you are going to the Second Department to seek relief. This will give your adversary the ability to appear at the Second Department and contest your application for a TRO. You must submit an affirmation to the Second Department explaining that you have either given the notice required by 22 NYCRR § 202.7(f) or explaining why you did not give notice.

If your application can be decided by only one justice you may go to a justice's local chambers to make the application. This is not recommended. You are better off traveling to the courthouse in Brooklyn to make your application because it avoids logistical challenges and claims of judge shopping.

When you arrive in Brooklyn you should have the original or a full copy of

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ANIMAL LAW

Buying that doggie in the window - consumer rights when purchasing a new best friend

By, Amy L. Chaitoff, Esq.

We just take a "look" into a pet store selling puppies or kittens. But, if you make the colossal mistake of taking the little ones into the store with you, you might just give in to the temptation and high pressure sales - that is of both the salesman and your kids - and that soft, cuddly bundle of fur, with big brown eyes staring up at you. At this point you are not thinking as a lawyer, you are running on pure emotion and the kids are already thinking of a name. But once you get home with your new best friend and the fog of impulse and euphoria have cleared, your lawyer brain kicks in, and you now think - what did I sign, and what are my rights?

Well, as many of us learned in law school "the contract is king." So your starting off point is to read the express terms and warranties provided in the sales contract and what rights the contract gives the purchaser. Parties may contract to any number of various terms, however, the sales contract cannot provide the buyer with less rights then the consumer might otherwise have under New York State Law.

Consumer rights under the "Pet Lemon Law"

General Business Law Article 35-D, commonly referred to as the "pet lemon law," regulates the sale of dogs and cats.

Article 35-D, Section § 753 provides consumers with certain remedies should the dog or cat that they purchased become ill shortly after purchase. The statute provides that: if within 14 days following the sale of a dog or cat, or, within 14 days following written notice by the pet dealer to the buyer of their rights under article 35D, the consumer has a New York State licensed veterinarian of the consumer's choosing certify that such animal is unfit for purchase due to illness; a congenital malformation which adversely affects the health of the animal; or the presence of symptoms of a contagious or infectious disease, the consumer has the right to choose one of the following three remedies as provided by section § 753(1):

> (a) The right to return the animal and receive a refund of the purchase price including sales tax and reasonable veterinary costs directly related to the veterinarian's certification that the animal is unfit for purchase pursuant to this section;
>
> (b) The right to return the animal and to receive an exchange animal of the consumer's choice of equivalent value and reasonable veterinary costs directly related to the veterinarian's certification that the animal is unfit for purchase pursuant to this section; or
>
> (c) The right to retain the animal and to receive reimbursement from a pet dealer for veterinary services from a licensed veterinarian of the consumer's choosing, for the purpose of curing or attempting to cure the animal. The reasonable value of reimbursable services rendered to cure or attempting to cure the animal shall not exceed the purchase price of the animal.


Amy L. Chaitoff

Who is considered a pet dealer?

General Business Law, Article 35-D, Section, § 752 defines at "pet dealer" as any person who, in the ordinary course of business, engages in the sale or offering for sale of more than nine animals per year to the public or directly to the consumer, or, any breeder who sells or offer to sell directly to the consumer, more than 25 animals per year that are born and raised on the breeders residential premises. Specifically excluded from the definition of a "pet dealer" are both: breeders who sell or offer to sell directly to the consumer fewer than 25 animals per year that are born and raised on the breeders residential premises; and duly incorporated humane societies who adopt out their animals whether or not an adoption fee is charged.

It should be noted that the above definition of a "pet dealer" excludes those breeders that breed large amounts of animals but that *do not* sell directly to the public. Therefore, the definition of a "pet dealer" excludes from its definition and thus licensing and mandatory inspections by the New York State Department of Agriculture the most horrendous animal breeding facilities commonly referred to as "puppy mills." This is a huge loop hole in the current law. Currently, there are several bills in both the house and senate that aim at closing this loop hole. To view those bills go to www.assembly.state.ny.us.

Are pet dealers required to be licensed?

The New York State Department of Agriculture and Markets oversees the licensing and inspection of "pet dealers" in New York. Licenses must be renewed yearly and must be renewed 30 days prior to their expiration date. In addition to state licensing, many local counties and cities, etc., may require additional local licensing, depending on where the "pet dealer" is located.

The New York State Department of Agriculture and Markets reviews all complaints regarding the operation, facility, care of the animals, and record keeping of all licensed "pet dealers."

What documents/information is the consumer entitled to at time of sale?

General Business Law, Article 35-D, Section § 753-b provides that at the time of sale, pet dealers must provide the purchaser with certain information about the animal, including but not limited to: a description of the animal, including breed of the animal, sex, color and identifying marks at the time of sale; the date of purchase; the amount of the purchase; the breeder's name and address, if known, or if not known, the source of the dog; the dog's date of birth and the date the pet dealer received the dog; a record of inoculations and worming treatments administered; a record of any veterinary treatment or medication received by the dog; and written notice as provided by the department of health summarizing rabies immunization requirements. If the dog is being sold as a pure breed being capable of registration, the pet dealer is to supply the names and registration numbers of the sire and dam (mother and father), and the litter number, if known. If the dog is from a United States department of agriculture licensed source, the individual identifying tag, tattoo, or collar number for that animal is to be provided. The pet dealer's records must indicate if the breed is unknown or a mixed breed. See, General Business Law, Article 35-D§ 753-b.

The pet dealer must also provide to the consumer at the time of sale, that dogs residing in New York state must be licensed, and that a license may be obtained from the municipality in which the dog resides, and information on the value of spaying and neutering dogs and cats. See, Section § 753-b(3). See, Section § 753-b. Further, every pet dealer must post conspicuously a notice stating that, "[i]nformation on the source of these dogs and cats and the veterinary treatments received by these dogs and cats is available for review by prospective purchasers." See, Section § 753-b(4)

In addition, to the above requirements, the pet dealer must also certify the following in a signed statement: that the dog has no known disease or illness; the dog has no known congenital or hereditary condition that adversely affects the health of the dog at the time of the sale; or a record of any known congenital or hereditary condition, disease or illness that adversely affects the health of the dog at the time of sale, along with a statement signed by a licensed veterinarian that authorizes the sale of the dog, and includes but is not limited to, the necessary treatment, if any, and verifies that the condition, disease, or illness does not require hospitalization or nonelective surgical procedures, etc. The veterinary statement is valid for 14 business days following examination of the dog by the veterinarian. See, Section § 753-b(2)(e)(i).

Section § 753-c contains provisions regarding animal pedigree registration. It requires that any pet dealer who represents that an animal is registered or capable of registration with an animal pedigree registry organization, must provide the purchaser with the appropriate documents necessary for registering the animal within 120 days following the sale of the animal. If the pet dealer does not provide this paperwork at the time of sale and the purchaser notifies the pet dealer in writing before the 120 days has run, that they have not received the appropriate registration documents, the pet dealer has an additional 60 more days, in addition to the one hundred twenty days, in which to provide the appropriate documents.

However, if a pet dealer fails to provide documents as required under Section § 753-c, the purchaser, upon written notice to the pet dealer, may keep the animal and receive a partial refund of 75 percent of the purchase price of the animal, and in which event, the pet dealer does not have to provide the registration documents. Acceptance by the purchaser of the above referenced registration documents, whether or not within the time periods set forth above is deemed a waiver of the right to a partial refund by the purchaser.

Remedies under the Uniform Commercial Code ("UCC")

In addition to the "pet lemon law," consumers can seek additional remedies through the Uniform Commercial Code ("UCC"). As animals are chattel, dogs and cats are classified as "goods" under the "UCC". See, "UCC" section 2-105. Under "UCC," section 2-104(1), merchant is defined as, "a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent

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VEHICLE AND TRAFFIC

Initial interview of a DWI or vehicle and traffic client in 2013

By David A. Mansfield

The recent changes in New York State Department of Motor Vehicles administrative regulations concerning the relicensing of multiple drinking/drugged driving offenders make the initial client interview of someone accused of this type of crime or offense or any Vehicle and Traffic Law violation even more important.

Defense counsel must inquire into their client's entire history of alcohol or drug related convictions under §1192, administrative findings of chemical test refusals §1194 and even zero tolerance findings under §1192-a.

The sweeping overhaul of 15 NYCRR Part §136.5 will have very serious collateral consequences for any client previously convicted of two or more alcohol or drugged driving offenses or incidents ,such as a finding pursuant to §1194 for a chemical test refusal finding independent of an underlying conviction on the criminal charge. In rarer cases, zero tolerance findings in combination with other convictions or incidents may result in an inability to be relicensed for at least five years, and perhaps, permanently.

There is an ongoing legal debate about the effective date of the regulations, which the Department of Motor Vehicles position in September 25, 2012. There is a question of the legality to deny driver license applications filed previously to that date based upon incidents and convictions which occurred prior to the effective date. Defendants and their defense counsel could not reasonably foresee that a plea or conviction would result in far more serious consequences than the prevailing scheme of regulations and statutes. The Department of Motor Vehicles website lists Part §136 as revised and final as of May 1, 2013. The courts will be the appropriate forum to resolve these issues. This is subject for another article and seminar as events unfolds.

Defense counsel must make every effort to learn the previous lifetime alcohol or drugged related driving convictions or incidents are on their client's driving record. Defense counsel must be thoroughly familiar with the requirements of the Driver's Privacy Protection Act or DPPA 18 U.S.C. §2721 et seq. You should obtain a signed, a notarized MV-15GC, or general consent to release information at the time of the interview. Please be sure to request, compare and retain a copy of the presented photo identification item. The form is available on the website. You will not be able to obtain the lifetime record, but at least it is a start. If you are enrolled with the Department of Motor Vehicles to obtain driving records online, it is instantly available.

You will be best served by a copy of your client's lifetime driving record currently available only by Form MV-15. The only problem is that as a FOIL or Freedom of Information Law request, it may take weeks to get the driving record.

David A. Mansfield

The lifetime driving record must be reviewed not only for alcohol or drug related driving offense convictions or incidents, but other Vehicle and Traffic Law convictions now defined as a "serious driving offenses" within 25 years of the date of the revocable offense. Serious driving offenses are defined in Part§136.5(a) (2) as a fatal accident, regardless of any finding of violations of the Vehicle and Traffic Law at an administrative hearing convened pursuant §510, (ii) a Penal Law related driving conviction, (iii) conviction for two or more violations which more than five points are imposed under Part§131.3 or (iv) 20 or more points from any violations.

The transition from the Traffic Violations Bureau to a court of law, The Suffolk County Traffic and Parking Violations Agency for traffic infractions other than driving while ability impaired by alcohol §1192(1), makes it very important to have the driving record in your file to discuss and determine the risk of incarceration in extreme cases, Department of Motor Vehicles administrative hearings for license suspensions pursuant to §510 and Part §131, and exposure to the Driver Responsibility Assessment fee.

A non DWI/driving while impaired charge against your client who is defined under Part §132.1(b) as a "dangerous repeat alcohol or drug offender" could face serious collateral license consequences for any VTL conviction that results in a driver license revocation if their prior background including three or four or more alcohol/drugged driving related convictions or incidents. This regulation is posted on the website as revised and final, effective February 13, 2013.

This will result in an additional two year revocation in addition to the statutory revocation. Your client must reapply after the expiration of the waiting period. The license application will be approved with a problem driver restriction for two years of restricted-use privileges without the installation of an ignition interlock device. This will arise in your practice if your client is convicted of a third speeding violation with this type of background which mandates a minimum six-month revocation.

Whether eligibility for a regular restricted-use license §530, Part §135.7 as a safe harbor can avoid the additional minimum two year period of revocation and restricted-use license is an open question as of the date of the publication of this article. The overall intent of the regulations is clear to be as strict as possible with this classification of offenders. This would lead one to believe that lifetime review will override the restricted-use license, and the most severe collateral consequences will be imposed.

Your client deemed a "dangerous repeat alcohol or drug offender" faces lifetime review §132.2 for any high –point driving conviction under §132.1(b) (2c) which is defined as five or more points will trigger a proposed notice of license revocation. Your client can request a hearing before an administrative law judge under §132.3 with the sole issue to be determined if there is the existence of unusual, extenuating and compelling circumstances. Experience has proven that the Department of Motor Vehicles only in the rarest of cases will find such circumstances.

Repeat DWI/drugged offenders face a permanent license denial with five or more lifetime convictions or incidents. A 25-year review of the driving record with three or four alcohol/drugged related convictions and one serious driving offense will also result in permanent denial as a persistently dangerous driver. There is a very limited exception for persistently dangerous drivers for unusual, extenuating or compelling circumstances Part §136.4 (4) (d).

If your client is revoked for an alcohol drugged related driving offense or incident but does not have any "serious driving offenses" in the 25 years from the revocable offense they may be eligible for restoration of their license five years after the expiration of the statutory revocation. Relicensing will be with a five year problem driver restricted-use license and mandatory installation of ignition interlock device.

There are many additional issues that should be discussed in an initial interview. It is now of paramount importance to learn to the best of your ability your client's lifetime driving record especially if they are a repeat alcohol/drugged driving offender in order to provide effective and professional representation to advise of the potential serious collateral consequences and be guided accordingly.

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

Right of reimbursement *(Continued from page 19)*

expressed commitments. *McCutchen, supra*; page 8. The agreement itself becomes the measure of the parties' equity, the court held. So the application of the principle of unjust enrichment must fail in the face of an express contractual grant to the contrary effect.

However, because the relief essentially is equitable in nature, to the extent that the contract is ambiguous or silent, a court may apply principles and maxims of equity. In the case at bar the plan was silent on the issue of attorneys' fees. Consequently, it is proper to look to equity to resolve the issue, and the court did so by applying the equitable remedy that allocates the costs of a third party recovery between the insurers and the beneficiaries. Had the parties intended an application different from the "default" remedy provided by equity they would have expressed their intention in the contract.

All of this causes one to wonder. Since many equitable claims arise out of some agreement between the parties, be it express or implied in fact or at law (i.e. "quasi-contract") just where does one draw the line? Is not the very essence of "unjust enrichment" that the law will not allow unfair forfeitures, damages, penalties or windfalls, regardless of the agreement of the parties ? Will the conduct and behavior of the parties ever be a consideration, or must courts rigidly refuse to consider principles of equity simply because the agreement clearly sets out a right or remedy of the complaining party ? Is not the ability of courts to temper legal remedies with equitable considerations one of the essential pillars of modern justice?

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

1. The dissenters agreed that equity cannot override the plain terms of the ERISA plan agreement. They would decline to entertain the issue of attorneys' fees, however, because in its brief the petitioner conceded that a beneficiary is required to reimburse without any contribution. This, the dissenters hold, precludes any consideration of the equities of such a right in this specific case.

AMERICAN PERSPECTIVES

Warriors All

By Justin Giordano

New year, new direction

On January 23, 2013 outgoing Defense Secretary Leon Panetta and Joint Chiefs of Staff Chairman Gen. Martin Dempsey overturned the ban on women in combat, which had been in place since 1994. The 1994 policy essentially did not permit women to serve in military units that engaged in direct combat with the enemy. Defense Secretary Panetta's directive calls for the creation of a fully gender integrated American military by 2016. The new Pentagon policy also mandates that each service must come up with its own plan to implement the change and submit it to the Secretary of Defense by May 15, 2013.

The net effect of this new policy is to open access to all military positions including any and all combat positions. All services comprising the US military are required to file an exemption for units or positions they want closed to women, which would require a substantial rationalization. This is a reversal of the current system.

The move towards full integration has been gradual but rather steady over the past couple of decades. For example in the previous year the Pentagon opened some 14,500 new positions to women by removing a rule that prevented women from serving in positions with frontline battlefield units. In actuality a good number of the occupations in question were already open to women; however the unit assignments were not.

As a consequence of Panetta's mandate, approximately 240,000 more positions across the four services, the overwhelming majority of them emanating from the ranks of the infantry and special operations roles, will be made available to women. Naturally they will have to meet the standards that are imposed by each respective service and unit therein but the bottom line is that women will be able to apply and serve in any position within across all military branches.

As of September 30, 2011 statistics, nearly 273,000 women served in all four branches of the military. This accounts for some 14.5 percent of the total number of people engaged in active service. The percentage of women serving in the reserves and National Guard is even a bit higher at approximately 73,000 or 15.5 percent of the total force.

The benefits to the individual young woman who intends on pursuing a career in the military are obvious in the sense that this policy opens all the doors to promotions and advancement through the ranks. And since the most prized positions within the defense department structure are related to combat positions, the sky will indeed be the limit for women seeking to attain the highest possible ranks. For example, achieving the rank of general, from one to five stars, for a combat unit is obviously the highest attainable position (exceeded only by become a member of the Pentagon's Joint Chiefs of Staff or the highest of all military position, the Chairperson of the Chiefs of Staff), and the attainment of this position has now been made much more realistic for women interested in said pursuit.

Justin Giordano

Justification: philosophical, historical and otherwise

Women have been involved and engaged in combat throughout the ages, be it as military leaders or foot soldiers and a myriad of roles in between. Historical examples abound, too many to list, but just to name a couple that jump out one is the Britannic warrior and Iconic queen Boudicca, who fought and led a rebel an insurgent army of some 200,000 against the Romans in the first century A.D. Joan of Arc (a.k.a. the maid of Orleans) is another intrepid, frontline woman warrior who led French forces against the occupying British in the 15th century. Other notable historical female figures responsible for orchestrating, ordering and directing military operations include Queen Cleopatra of ancient Egypt, Queen Elizabeth the First, and more recently, Prime Minister Margaret Thatcher of the U.K., and Prime Minister Golda Meier of Israel.

There is also little doubt that females that were trained to engage in direct combat history demonstrated the same courage and grit as their male counterparts, again as history attests. For example, female gladiators in ancient Rome, Spartan women in ancient Greece, Russian, and other countries, female combat units in War World II, etc. In modern societies including ours, women serve as police officers, on SWAT teams and other positions that have a high probability of placing them in a position where they have to engage in combat of one form or another.

Even when it comes to the realm of combat sports, women cannot be legally prevented from most brutal and violent forms. In fact, women are now engaging in traditionally seen as male dominated fields such as boxing or mixed martial arts as a result of the enactment of Title IX in 1972, which enacted gender equity in education and athletics. This has further enabled American women to become full participants in sports resulting in their increasingly joining the ranks of male oriented sports such as wrestling. Women's wrestling and other martial arts have been Olympic events for some time now and the 2012 Olympics held in London, U.K., featured the latest female combat event, boxing.

It is nevertheless a biological reality that females face some physical challenges vis-à-vis their male counterpart and the many studies that have compared the physical attributes of men and women generally show that men are, based on said physical attributes, more easily adept to combat related activities. It also remains true that most women do not wish to volunteer for combat positions. Surveys that have been conducted show that this is the case even for women serving in the military. This per se should not be surprising since generally speaking, most individuals, be they men or women, do not prefer to risk their lives. It is indeed a special breed that volunteers to be a fighting soldier. However the aforementioned should be used as a "disqualifier" for any woman who is so willing to serve and is able to meet the standards set by any of the branches of the service. After all there already are women serving as fighter pilots and other combat positions in the U.S. Air Force and all evidence shows that they have performed admirably.

Lastly and for comparative purposes, the United States would certainly not be the first nation to have a policy that allows women in combat. We would be joining a slew of other nations, many allies, among them Canada, Ireland, Germany, Finland, New Zealand, and Norway.

The question of equal rights, equal responsibilities

One of the most oft-repeated arguments by those opposing this policy, especially with regard to women in direct combat against the enemy, revolves around the possible capture and treatment in captivity of female soldiers. More specifically they voice their strong concern about the potential of rape and other inhumane and barbaric forms of torture. Those who support the policy counter that it must be noted that we as a society have long been willing to send young men into battle with the real possibility that they can be mutilated and killed. They, just like their female sisters-in-arms, can also be taken prisoner and be subjected to horrific tortures, as for instance was the case of Senator John McCain (incidentally the senator came out in support of the new policy). Consequently, if the concern that female soldiers might be sexually assaulted is grounds for keeping them out of combat roles, then it would seem that the concern that men might be wounded, killed or tortured might also be sufficient grounds to keep men out of combat as well. Essentially if the argument is based on the principle of "equal rights, equal responsibilities," then the logical extension is, at least in theory, that if we are really worried about horrendous things happening to our soldiers, regardless of gender, then war as an option should be eliminated altogether.

Finally from a less philosophical yet more pragmatic perspective, being a full citizen implies by definition that everyone is subject to the same duties and responsibilities. That is the objective and intent behind "all men are created equal" and the impetus for the "suffrage movement" and "civil rights legislation" and other such major legislative actions.

Currently when a male reaches adulthood he is required to register for the Selective Service as mandated by the 1979 act. Failing to register carries serious consequences including not receiving any form of financial aid for higher education. This in turn could have a devastating impact on a young individual that cannot afford the increasingly high costs of a college education without government backed educational loans. However, young women are currently not required to do the same. It doesn't take a great deal of insight to conclude that the "equal rights, equal responsibilities" is certainly not being adhered to here.

People of good will differ and take opposing positions on this issue. Perhaps there are no perfect answers. The venerated American doctrine, as reflected in the U.S. Constitution, that "everyone is created equal" should serve as a guide. The doctrine does not imply a guarantee of equal results but merely an equal opportunity for every individual to pursue their desired goals. Opening the opportunity for women to serve in combat positions falls within the parameters of that foundational principle.

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

President's Message *(Continued from page1)*

intentions, but not as yet fully realized.

The goals of my Administration are fourfold: a) advancing a genuine effort in creating diversity within bar leadership; b) evaluating current hardware/software currently employed by the Association and making recommendations with respect to improving/updating all technology based systems; c) creating better liaisons between local law schools and the Association to foster better communication through outreach; d) taking the difficult steps necessary to reduce the Association's carbon footprint. The last goal may be *pie in the sky*; however, Vatican City became the first sovereign nation to become carbon neutral in February of this year. The seemingly herculean endeavor, however, was first undertaken in 2007; carbon neutrality does not occur overnight. The goal, however, shall not be sought by ignoring the more pressing concerns of the Association and our members. We shall merely attack existing problems in a *greener* fashion.

The first step to achieving greater diversity within the ranks of our leadership is to create a standing (but closed) committee which encompasses the leaders from other bar associations in the county (or for that matter, within the state). The committee will meet regularly with the President, President-Elect, the Executive Director from the SCBA, along with the Executive Director and Dean from the Suffolk Academy of Law. By working together, the leaders of other bar associations will be provided with a direct conduit to existing leadership to maintain an open and free exchange of ideas. The goal for the committee will be to work together to address the concerns of all practitioners and to encourage not only membership in the SCBA, but leadership as well.

The evaluation of existing technology based systems will not come with any associated costs. Working together with our existing Director of Technology, Barry Smolowitz, we can employ a team of consultants to develop a strategy for identifying and deploying a new database allowing for greater efficiency in completing *the far too numerous* tasks assigned to our incredibly capable staff at the Association. Upgrading the system will not come without costs; however, the project needs to be addressed now.

Outreach may be the key to fostering better relationships between law students and our Association. To encourage membership in the SCBA, we need to reach out to law students early and often to clearly demonstrate how effectively practitioners can work together, using SCBA membership as one of the most important tools in our arsenal. With the increasing number of small firm and solo practitioners in Suffolk County, membership in our Association is vital to success. Outreach need not be limited to any one particular law school, as students from throughout the county attend more than one law school. I shall strive to dedicate a substantial part of my Administration to at least lay the groundwork to ensure future leaders can continue the process.

Most importantly, I ask that you think for yourself and question authority; if you believe there is a better way, my door is forever open to hear your ideas. I genuinely look forward to working with you in the coming year.

Dignity for all Students Act (Continued from page 18)

discrimination, and ensure that such investigation is completed promptly after receipt of any written reports.

• When an investigation verifies a material incident of harassment, bullying, and/or discrimination, the superintendent, principal, or designee shall take prompt action, consistent with the code of conduct, reasonably calculated to end the harassment, bullying, and/or discrimination, eliminate any hostile environment, create a more positive school culture and climate, prevent recurrence of the behavior, and ensure the safety of the student or students against whom such behavior was directed.

• The principal, superintendent, or their designee must promptly notify the appropriate local law enforcement agency when it is believed that any harassment, bullying or discrimination constitutes criminal conduct.

• The principal shall provide a regular report on data and trends related to harassment, bullying, and/or discrimination to the superintendent. The term "regular report" means at least once during each school year, and in a manner prescribed by the school district, BOCES or charter school.

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

Securing home care services (Continued from page 6)

must advocate the need for directive care consisting of continuous prompting and assistance in order to complete all activities of daily living safely.

In essence, an attorney presence at the home care assessment may prove more important than submitting the actual Medicaid application. If the client's main focus for retaining an Elder Care lawyer is to obtain home care assistance, it is insufficient merely to secure Medicaid coverage. The client's main focus is on the end result; obtaining home care services for themselves or their loved ones. Therefore, an attorney's skill and experience in obtaining a timely Medicaid approval serves only as the prerequisite for the advocacy necessary to secure effective home care assistance. Without an attorney's support, the home care client or representative may be unable to prevent Managed Long Term Care plans from depriving the applicant from receiving warranted home care assistance.

Note: Dennis McCoy is an attorney with Grabie & Grabie, LLP, practicing extensively in the areas of Medicaid qualification and advocacy, Asset Protection Trusts, Wills and Estate Planning.

Electronic pen pals (Continued from page 5)

distant past for inclusion in the Suffolk Lawyer. Let me know what you think.

John

P.S. Your mention of Liberty Mutual and "No Pay" reminded me of when I was still in law school in the sixties in NYC there were three companies referred to as the "Subway Mutuals." One was Cosmopolitan Mutual and I can't think of the other two right now, (one wasn't Liberty) but they were notorious for a "No Pay" policy. I wondered whether one of the reasons was that the companies were not terribly solvent.

From: haig chekenian [mailto:hchekenian@verizon.net]
Sent: Friday, April 12, 2013 3:51 PM
To: jlgoodhour@optonline.net
Subject: "We Are Turning Law Students into Lawyers"

I enjoyed your article in the October *Suffolk Lawyer* because it was good to learn law students are getting some pre-graduation education in the practice side of the profession and also because it took me back to when I started in January 1962 working for Weismann, Meyer & Wexler in Smithtown.

I was fresh out of evening session at Brooklyn Law School and had to decide between continuing to work in newspapers or becoming a lawyer working for $70.00 a week. I chose the latter and was soon driving all over Suffolk County to the justice courts (there was no District Court then) and sometimes to Special Term in Riverhead to answer the calendar for Leonard Wexler who did the negligence litigation.

That's when I learned the meaning of "ready."

As you said in your article "ready" has many meanings not in the dictionary. The per diem mavens who worked for the insurance companies knew them all. The Liberty Mutual lawyers wore tie pins that said "No Pay."

"Ready." Hardly ever spoken.

"Really ready" if you wanted to scare your opponent.

"Could be Ready" with the right judge on the bench.

"Ready Conference" — always a safe move.

"Ready subject to" if you were, as usual, backed up with cases for the same carrier.

and finally punting out of danger: "Application."

When I got out on my own I realized a new client with a negligence case could do better with someone really skilled in this game and I referred them to Beasley & Andes.

I retired several years ago.

This email was delayed because your article disappeared under a pile of papers on my kitchen table and just reappeared a few days ago. Thanks for the memories.

Haig Chekenian
Smithtown, N.Y.

Let's see if our members agree.

Note: John L. Buonora is a past president of the Suffolk County Bar Association and the Suffolk County Criminal Bar Association. He retired as Suffolk County Chief Assistant District Attorney and is an Adjunct Professor of Law at Tuoro Law Center.

LETTERS

Thank you for support of Law Day

May 23, 2013

Arthur E. Shulman, President
Jane LaCova, Executive Director
Eric Sackstein, Van Coordinator
Barry Smolowitz, Director of Technology
Suffolk County Bar Association
560 Wheeler Road
Hauppauge, NY 11788-4357

Dear Colleagues,

Thank you very much for your support for the 2013 Suffolk County Courts Community Law Day event. Without your extraordinary efforts, the occasion could not have been the success it was. As Chief Judge Jonathan Lippman observed, "equality and equal justice are the bedrock of our Constitutional guarantees." Those sentiments were eloquently echoed by Chief Administrative Judge A. Gail Prudenti in her recent New York Law Journal article titled: *The Pursuit of Justice: A Constant Striving* in which she noted "[w]e are committed, above all, to ensuring that all people who enter our courts are treated fairly and receive equal justice regardless of race, gender, ethnicity, or financial circumstances." The Suffolk County Bar Association is living testament to those ideals. Your partnership in all aspects of the event enabled us, as a court system, to transform an idea into action.

Among the outreach efforts on Law Day was a mobile help van staffed by attorneys to assist struggling members of our community with issues related to consumer debt and foreclosure. The van was fully booked for virtually all time slots. It is evident that the citizens of our County are hungry for the information offered from both the Suffolk Bar and other participating organizations. The continued support by the Bar Association in ongoing efforts by the courts to enhance representation in Suffolk ensures that access to our courts is an attainable objective for everyone.

Again, thank you.
Sincerely,

C. Randall Hinrichs
District Administrative Judge

To the Editor:

We read with great concern the article by Nicole Marmanillo last month, who seems ready to put workers at risk in the name of "reform." New York's Scaffold Law protects construction workers by requiring basic safety measures at construction sites. Yet, misinformation about the law mischaracterizes the measure. In fact, the Scaffold Law incentivizes protections at worksites that keep workers safe and cut down costs.

The Scaffold Law is a common sense law that requires safety equipment and training for construction workers. Under the law, property owners and general contractors, who are in the best position to oversee safety, are responsible for providing protections for their workers.

Marmanillo declares that worker safety is a problem of the past. She argues that construction workers already have protections in place and don't need the Scaffold Law. She should talk to Brian Pickering and Jigar Jamindar. Pickering, an ironworker, went headfirst off the side of a building in Port Washington. A foreman ordered him to work on an improperly constructed steel beam with no safety equipment. He went into a coma, had dozens of surgeries, and is unable to use his right hand today. Jamindar, a former U.S. marine, fell 25 feet at a Uniondale construction site that didn't have the proper or safe equipment to work at 25 feet off of the ground. He is in constant pain and no longer able to work. He no longer has bladder or bowel function and has great difficulty walking. Without the Scaffold Law, they would have had no recourse to pay their exorbitant medical bills or provide for their families.

Construction is one of the most dangerous occupations in the country. In 2011, the Bureau of Labor Statistics recorded 721 construction deaths in the U.S. and thousands more serious injuries. To argue that we don't need better protections is to ignore these tragic, preventable deaths.

OSHA is supposed to inspect construction sites but they are not keeping workers safe. OSHA itself acknowledges that it can inspect only about one construction site per day in the entire New York metro area. The New York Committee for Occupational Safety & Health has reported that OSHA's fines are insufficient deterrents for employers. Studies have shown that at approximately one in three OSHA construction sites in New York, inspectors found serious violations of safety standards. Employers violated these standards in 80% of the accidents where a worker fell and was killed. What OSHA is doing alone is not effective – we need the Scaffold Law.

Those seeking to eliminate the Scaffold Law often misleadingly use the term "absolute liability." But an owner or contractor is not held liable for accidents unless their failure to provide proper safety equipment caused a worker's injury. Sometimes accidents happen and the worker is at fault. In these cases, the Scaffold Law is not applicable. Liability can be avoided simply by having the proper safety equipment in place.

Owners and general contractors have other defenses to the statute, namely the recalcitrant worker and sole proximate cause defenses. In fact, there have been countless cases where workers' claims are dismissed because of these defenses. But opponents of the law choose to gloss over those defenses, if not outright ignore them, rather than acknowledge the tremendous value of a century-old law that works to protect workers, owners and general contractors alike. This is of deep concern to those of us who focus on picking up the pieces for those who have been injured on construction projects.

The Scaffold Law is designed to protect workers and incentivize safer construction sites. As long as contractors and owners follow simple safety rules, they don't need to worry about higher insurance costs. In fact, safer workplaces mean decreased insurance premiums and more job growth.

The Scaffold Law is one of the best protections we have to keep construction workers safe. We can't let misinformation dictate how we treat the thousands of workers who are seriously hurt on the job every year.

Michael Jaffe, New York State Trial Lawyers Association President
Pazer, Epstein & Jaffe PC

Michael Levine, New York State Trial Lawyers Association Secretary
Rappaport Glass Levine & Zullo LLP

Robert Danzi, New York State Trial Lawyers Association President-Elect
Law Office of Robert F. Danzi

Medicaid planning for same sex spouses (Continued from page 8)

exemption of all transfers to a spouse, entitles the healthy community spouse to retain all of the assets for their own care and support in the community while the ill spouse receives Medicaid coverage for nursing home care. However, Spousal Refusal gives the state the right to seek reimbursement from or sue the community spouse for the actual cost of care paid by the Medicaid program for the ill spouse. New York files such suits and makes such claims against community spouses. Fortunately, and unlike many same sex (and opposite sex) couples who marry, Susan and Margaret had previously granted Powers of Attorney to one another that afforded unlimited gifting powers between them.[2] As a result, Susan was able to transfer Margaret's assets into her own name and will be able to file a Medicaid application for Margaret with a Spousal Refusal. Susan prepared a new estate plan for herself that included provisions dividing her assets between both women's residuary beneficiaries upon Susan's death. This was done in recognition that they had each named different contingent beneficiaries in their previous wills. Susan understands and accepts that Medicaid may seek reimbursement or sue her for reimbursement for Margaret's care. She is comfortable with that fact because she was able to receive all of Margaret's assets and maintain them with and as her own. She is less comfortable with the possibility that after Margaret's assets are exhausted her own personal assets are still vulnerable to a spousal recovery suit by Medicaid.

With the relief that accompanies a long fought battle for marriage equality, same sex married couples are almost always unaware of the spousal support obligation that comes with their marriage. Because many of these couples are elderly, this becomes a particularly important obligation. When same sex couples contemplate marriage later in life and we as elder law practitioners are approached in advance for counsel and advice, the circumstances that are presented are often similar to second marriage situations. Often the couples do not share children and have different contingent beneficiaries. Often they have separate assets and are substantially financially independent of one another, even if they share a residence. These couples need the counsel of the Elder Law Bar.

When Susan and I discussed the vulnerability of her assets to a Medicaid collection action for the cost of Margaret's care, however likely or unlikely that collection action may be, Susan's response was that they would have married years ago if it was legal to do so. She said their marriage now completed part of their commitment to one another and that she did not regret the obligations that came with the marriage. I wonder how common her philosophy and outlook will be as her peers learn the same realities of marriage in New York.

Note: Ralph M. Randazzo is a Partner in Randazzo & Randazzo, L.L.P., a firm with offices in Huntington and New York City. He has experience in elder law, estate planning, guardianship, Medicare and Medicaid, taxation, and has been the court appointed guardian to several incapacitated individuals. His firm concentrates in the areas of life and estate planning, elder law, planning for disabilities, probate, and guardianship.

1 As is also frequently true in heterosexual married couples.

2 Without proper advice, many married couples believe that their marriage gives them the right to control their spouse's assets and do not have appropriate Durable Powers of Attorney. This belief is incorrect.

When two paths for Trademark Infringement cases collide (Continued from page 12)

ter its trademark due to a likelihood of confusion with B&B's Sealtight trademark. In giving no deference to this ruling and upholding a jury verdict against B&B on its claim of trademark infringement (the court would not even allow the TTAB decision into evidence due to its possible prejudicial effect on the jury), the Eight Circuit established its position on this issue, which other Circuits including the Third, have taken the opposite approach to by giving TTAB decisions preclusive effect on the issue of likelihood of confusion involving the same parties and the same trademarks as those involved in the subsequent litigation.

This tension and resultant circuit split arises because in many if not most cases it is often unclear whether the TTAB has actually decided the issue of likelihood of confusion under the same legal test as that used by courts. The TTAB is limited in its review of the likelihood of confusion issue because it is generally unable to accept into evidence any "real world" factors that a court is able to when the court analyzes the issue. Although the TTAB is guided by a factor-based test for determining likelihood of confusion, just as the various federal circuits have their own individual factor-based tests, as a practical matter the TTAB can only consider the marks as presented, and the goods or services listed, in the applications or registrations at issue. Any other factors come into play only if they naturally flow from the nature of the goods or services themselves or if stated as a limitation in the descriptions thereof. For example, the TTAB can conclude that the purchasers of the parties' goods are "sophisticated" and therefore less likely to be confused if the goods are extremely expensive and involve a long and involved selling process (e.g., a private jet). Thus, the determinations of Trademark Examining Attorneys and the TTAB can be often criticized as "not based on reality." This is the nature of the dual system. The TTAB only decides rights to register. Many trademarks are refused registration because of a prior trademark registration, but due to real world factors that are not apparent when looking only at the trademark registration and the refused application, a court might easily come to a different conclusion.

This is one basis on which to refuse to apply collateral estoppel. The Eight Circuit took it further by categorically dismissing the precedential value of all TTAB decisions regardless of whether they looked at the same factors as the court would. The Second Circuit approach, which makes much more sense to this author, is such that before preclusive effect is given to a TTAB decision, the decision must be carefully examined to determine exactly what was decided and on what evidentiary basis. This recognizes the fact that there are times when in fact a TTAB decision will consider all of the factors that a court would, either because it went slightly beyond the "four corners" of the involved registrations and/or applications, or perhaps because a court would find that it need not consider factors beyond the marks and the goods/services, or that these other factors are neutral in the case at hand.

In the B&B case, its back to the district court for a recalculation of the attorneys fees that the jury awarded to Hargis. Based on this sage, one must wonder it it's worth spending money on a TTAB battle. And yet, this still is generally recognized as a quicker and cheaper way to decide an infringement case.

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

Avoid the dismissal of duplicative & factually insufficient causes of action (Continued from page 13)

The *Carson* Court analyzed the unfair competition claim, and concluded that the tortious conduct proffered in support of the unfair competition claim was premised upon: (i) patent infringement; (ii) that defendants copying of an unpatented product; and (iii) trade dress infringement. The court addressed each in turn.

With respect to plaintiffs' allegation that defendants engaged in unfair competition by copying and reproducing Carson Optical's patented products, the court held that plaintiffs' allegations were insufficient to establish the bad faith element for a cognizable claim for unfair competition under New York law. Notably, the court held that plaintiffs' factual allegations that Jo–Ann stores unfairly competed by "refusing to continue its longtime supplier relationship with Carson [Optical]" and "pretending to fairly evaluate Carson [Optical] as a supplier with no intention of continuing its business relationship," failed because retailer Jo–Ann Stores did not unfairly compete by declining to do business with wholesaler Carson Optical because Jo-Ann Stores had no contractual obligation to do so.

In addition, relying upon the Supreme Court's *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, at 570 (2007) (a Complaint must set forth sufficient factual detail which demonstrates that the allegation is plausible on its face), the *Carson* Court found that the bare assertions that Prym intended to interfere with Carson Optical's prospective business relationship with Jo–Ann by dishonest, unfair, and improper means and that Prym engaged in a plan to displace Carson as a supplier to Jo–Ann by unfair means, were conclusory and failed to identify specifically the alleged wrongful conduct undertaken by defendants, thereby warranting dismissal pursuant to *Twombly*.

Concerning Plaintiffs' claim of unfair competition based on the allegation that Defendants copied an unpatented product, the court held that the copying of a product not protected by federal copyright is not actionable and cannot serve as a basis for a cognizable claim under state law. Next, in addressing plaintiffs' unfair competition claim that defendants infringed upon the trade dress of one of plaintiffs' products, the court held that "plaintiffs' conclusory allegation that defendants sold 'knock-off products,' without proffering any facts to make that conclusion plausible, is insufficient to establish the bad faith requirement for a cognizable claim."

The court next addressed plaintiffs' claim sounding in tortious interference with prospective business advantage, which requires that plaintiff allege "(1) there is a business relationship between the plaintiff and a third party; (2) the defendant, knowing of that relationship, intentionally interferes with it; (3) the defendant acts with the sole purpose of harming plaintiff, or, failing that level of malice, uses dishonest, unfair, or improper means; and (4) the relationship is injured." *Goldhirsh Grp., Inc. v. Alpert,* 107 F.3d 105, 108–09 (2d Cir. 1997). With respect to the third prong of the cause of action, while a plaintiff is required to show the defendant's interference with business relations existing between the plaintiff and a third party were performed either: (i) with the sole purpose of harming the plaintiff; or (ii) by means that are dishonest, unfair or in any other way improper (*Catskill Dev., L.L.C. v. Park Place Entm't Corp.*, 547 F.3d 115, 132 (2d Cir. 2008)), if the defendant's interference is intended, at least in part, to advance its own competing interests, the claim will fail unless the defendant utilizes dishonest, unfair, or improper means to do so. *PPX Enters. v. Audiofidelity Enters.*, 818 F.2d 266, 269 (2d Cir. 1987), abrogated on other grounds by *Hannex Corp. v. GMI, Inc.*, 140 F.3d 194, 206 (2d Cir.1998); see also, *Hammerhead Enterprises Inc. v. Brezenoff*, 551 F.Supp. 1360, 1369-1370 (S.D.N.Y. 1982).

Judge Lindsay, in addressing plaintiffs' claim for tortious interference with prospective business relations, which was based upon the same factual allegations as plaintiffs' unfair competition claim, held that the claim likewise failed because no allegations were set forth that defendants' conduct was motivated solely by malice or to inflict injury beyond the prospect of economic gain. In addition, plaintiffs did not plead conduct in violation of state law that was separate from their federal patent law claim. Thus, the court found that plaintiffs' unfair competition and tortious interference with prospective business relations claims failed due to the absence of additional tortious conduct separate and apart from the federal patent law cause of action, and granted defendants' motion for partial judgment on the pleadings.

Carson Optical is another reminder that an attorney must invest significant time and effort, side by side with the client, in order to achieve maximum factual information in order to ensure that claims are not dismissed as duplicative or because the complaint fails to contain sufficient facts that support each element in the cause of action.

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

Emergency applications (Continued from page 22)

the motion papers from the lower court (either the signed order to show cause which granted or denied a TRO or the unsigned order to show cause). If the lower court refused to sign the order to show cause that refusal must be noted on the order to show cause by the lower court justice.

Your motion papers will be submitted in the clerk's office and you will be asked to wait in the lawyer's lounge. You must wait. If you leave your application will not be considered and you may have to wait a long time. In almost all cases you will then speak with a court attorney in the lawyer's lounge. You will not address the justice(s) directly and you will not make your arguments in a courtroom. There will be no record of the discussion. When making your argument in favor of a TRO you should keep in mind that the standards for obtaining the TRO are the same as they were in the lower court. You must prove likelihood of success on the merits and irreparable harm absent a TRO. When the discussion is over the court attorney will then speak privately with the justice(s) and the application will be decided. The court attorney will then return to tell you the outcome. This ends the proceeding in the Second Department. The underlying motion will then be decided in the lower court.

The leave to appeal option

If your motion in the lower court was not ex parte (which is likely) then CPLR §5704 is not available. To deal with this the Second Department has developed what is referred to as the "leave to appeal option." The leave to appeal option is essentially a motion filed in the Second Department in which you seek leave to appeal the trial level order to show cause. Since you are making a motion you must pay the $45 motion fee. Your motion papers consist of a new order to show cause with supporting papers. The original trial level order to show cause should be annexed as an exhibit to your new order to show cause. In the new order to show cause you can seek any relief you want. You are not bound by the relief sought in the lower court.

You will bring your motion papers to the clerk's office and pay the fee. As above you will wait in the lawyer's lounge and speak with a court attorney. No matter what relief you seek only one justice will determine your initial stay application. This is different than what happens with a §5704 application. Once the court rules on the initial stay application a return date will be set. Your adversary will have time to put in opposition papers and the motion will be submitted for a decision. There is no right to a reply. The motion will then be decided by a panel of four justices. When the motion is decided the TRO may be terminated, extended or modified. This ends the leave to appeal option. The leave to appeal option is a fiction. There is no real leave to appeal. Once the decision on the motion is issued the leave to appeal option is over. There is nothing left pending in the Second Department with respect to this application.

If you are unsure of the procedures regarding seeking emergency relief in the Second Department you can always call the clerk's office. The clerk's office is friendly and helpful and they welcome questions. Good luck with your emergency applications.

Special thanks to the Hon. Sandra L. Sgroi, Associate Justice Appellate Division, Second Department, Aprilanne Agostino, Esq., Clerk of the Court, Appellate Division, Second Department, Kenneth Band, Esq., Associate Deputy Clerk, Appellate Division, Second Department and Harris J. Zakarin, Esq., Co-Chair of the Appellate Practice Committee, for their assistance with this article.

Note: Glenn Warmuth is a partner as Stim & Warmuth, P.C. where he has worked for over 25 years. He currently sits on the Board of Directors for the Suffolk County Bar Association and is an Officer of the Suffolk Academy of Law. He is the former Co-Chair of the Appellate Practice Committee. He can be contacted at gpw@stim-warmuth.com.

Buying that doggie in the window (Continued from page 22)

or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill." See, "UCC", section 2-104(1). Therefore, a consumer who purchases a dog or cat from a pet dealer or merchant, (i.e.., pet stores and breeders who sell more than 9 animals per year to the public or directly to the consumer, or, any breeder who sells or offer to sell directly to the consumer, more than 25 animals per year that are born and raised on the breeders residential premises), are afforded protection under the "UCC." The "UCC" governs the sale of goods and defines the rights and duties of both sellers and purchasers. As with all sales of goods by a merchant comes an "implied warranty of merchantability." This "implied warranty of merchantability" provides that the goods that the merchant is selling are indeed fit for their "ordinary purposes" for which the goods are to be used. When dealing with dogs and cats or "companion animals" the purpose for which most consumers purchase a dog or cat is for companionship as a beloved pet. Of course, the "ordinary purpose" for which a consumer may purchase a dog or cat can differ based on why the animal was purchased, i.e., as a companion animal; breeding animal; for its specific breed or qualities; breeding line or ancestry; hunting purposes; dog showing ; agility; etc. Therefore, a consumer may have a claim under the "UCC" for breach of the implied warranty of the animal.

How to report violations/cruelty of a "pet dealer"

Agriculture and Markets Law, Article 26-A, section §401 regulates the minimum standards of animal care of dogs and cats by pet dealers. If anyone suspects a "pet dealer" of violating section §401, they can make a complaint to the New York State Department of Agriculture. In addition, anyone may make a cruelty complaint under Agriculture and Markets Law, Article 26, section §353 misdemeanor animal cruelty and/or 353-A, aggravated cruelty to animals., i.e., felony animal cruelty, to their local county Society for the Prevention of Cruelty to Animals. The Suffolk County Society for the Prevention of Cruelty to Animals is the organization that investigates complaints of animal cruelty in Suffolk County.

Adopt a shelter animal

The moral of the story behind any animal purchase as with most purchases is *caveat emptor* "let the buyer beware." Many times the animals that you see in retail pet stores are raised in deplorable conditions in huge facilities outside of New York even internationally and are imported into the state for sale here. Many animals do not even survive the trip. Animals derived from "puppy mills" are often sick, have behavioral issues from lack of socialization or being improperly weaned from their mother, and commonly have forged documentation.

The best option is always adoption. More than a million dogs and cats are euthanized in the United States alone each year simply due to lack of an available good home. When you save an animal from a shelter, you are not only saving that animal but making a cage space available for another animal rather than the shelter making a difficult decision of who to euthanize due to lack of cage space. So in reality you are saving two animals.

Note: Amy Chaitoff is a solo practitioner with a practice in Bayport. Her practice focuses on representing individuals, organizations, and businesses with animal related legal issues. She is co-founder and immediate past Co-Chair of the Suffolk County Bar Association's Animal Law Committee and Vice Chair of the New York State Bar Association's Animal Law Committee. Ms. Chaitoff can be reached at (631) 265-0155 or amy@chaitofflaw.com.

Those days, those nights (Continued from page 18)

likely lead, depending on the seriousness of the injuries sustained by the victim, to the defendant's indictment within six days of his arrest, and likely lead to his subsequent conviction within three to six months of the indictment. The case, in short, was made in the Complaint Room.

I can think of two renowned prosecutors who understood this - this importance of early intervention - and who early put it to work. My boss, Mario Merola, was one. He assigned his troops to felony and homicide duty; that is, he'd have an assistant assigned to the "felony" car and the "homicide" car. Answering a call, the assistant, depending on which car he was driving, would go to the scene of a homicide and take part in the investigation at the street level, or he'd drive to the precinct where a felon had been arrested. There, in the company of a reporter, a video technician, both from the DA's office, and the arresting officer, the assistant would Mirandize the suspect and would then take — subject to its being volunteered, a videotaped statement from him.

If, at a subsequent suppression hearing, the court viewed the taped statement and found it truly voluntary, it would survive the hearing and be introducible at trial.

The other prosecutor who was an early to intervene was Vincent Bugliosi - he who obtained 105 felony verdicts out of 106 cases tried during his years with the Los Angeles County District Attorney's Office. He memorialized three of his cases in books, which later became telefilms: "Helter-Skelter," "And The Sea Shall Claim Them," and "Till Death Do Us Part."

In this last telefilm, Bugliosi is chided by a Bureau Chief for his hands-on, from-the-ground-up involvement with every case. "Mr. Bugliosi," the Chief says, derisively, to assembled ADAs, "thinks that the D.A. makes his case on the street." Bugliosi doesn't retort to the comment, but he nonetheless continues making his cases on the street, cases, with one exception, he'll later "make" in court.

"Bill," an officer once said to me, "the cop who makes the arrest is the cop who doesn't mind his own business, but puts his nose where it doesn't belong, goes to places he doesn't belong. That's how arrests are made." Bugliosi and Merola understood that the good ADA puts his nose where it doesn't "belong," goes to crime scenes where he doesn't "belong" — that's how convictions are obtained.

As depicted on television - "There are two agencies in the Criminal Justice System, one makes the arrest and one prosecutes those arrested," a severe bifurcation between the functions of the police and the District Attorney is implied. Whereas, a partnership — often an uneasy one, to be sure, in practice - was contemplated by Bugliosi and Merola, and the latter's assistants were told to "take charge" of the case early on.

To use an analogy from carpentry, both men saw the construction of a case, from street to court, as not so many planks that were butt-joined, but that were tongue-in-groove-joined, seamlessly joined in an interlocking manner.

This interlocking, seemingly an ideal, was often realized in the Complaint Room, a room that held safety, but one that nonetheless existed fairly close in space and time to the crime scene, a room which housed those persons who still dripped blood, visible to all, and suffered pain, physical and psychic, fathomable to few.

I reflect across a span of 26 years - eight as an assistant, 18 as a criminal - defense attorney. On both sides of the courtroom, I've had a measure of variety, contentment, success, and happiness, in front of a jury. Yet, improbable for a trial lawyer to state, it was in the Complaint Room where an urgency was felt; there was a sense of one's being a savior that imparted a satisfaction particular only to that room: the victim had called for help; the officer had arrested the aggressor and delivered the victim to the ADA; the ADA, through effective writing, the power of the pen, had kept the aggressor "in." This last aspect would be learned by a perusal of the case folder the next day: "Defendant held on $2000 bail; TOP in effect."

I'm not particularly religious, but despite the drudgery that marked the Complaint Room; the skirting the edge of human failure witnessed there; the sense of futility that, like cigarette smoke, ever-hovered; the utter ingloriousness of its coffee-stained, litter-strewn, altogether dingy environment, it was there, enveloped by this grimy aura, while doing work that was plodding, unheralded, understated, undervalued, that I first felt I was doing the work of the Lord.

Note: William E. McSweeney, a member of the SCBA, lives in Sayville. This essay is part of a larger work recounting his experience as a Bronx County Assistant District Attorney.

SUFFOLK ACADEMY OF LAW

OF THE SUFFOLK COUNTY BAR ASSOCIATION

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

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 late June, July, and August 2013. There's also an opportunity to register early for a fall Trial Practicum at a discount.

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

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

NOTES:
Program Locations: Most, but not all, programs are held at the SCBA Center; be sure to check listings for locations and times.
Tuition & Registration: Tuition prices listed in the registration form are for ***discounted pre-registration.*** **At-door registrations entail higher fees.** You may pre-register for classes by returning the registration coupon with your payment.
Refunds: Refund requests must be received 48 hours in advance.
Non SCBA Member Attorneys: Tuition prices are discounted for SCBA members. If you attend a course at non-member rates and join the Suffolk County Bar Association within 30 days, you may apply the tuition differential you paid to your SCBA membership dues.
Americans with Disabilities Act: If you plan to attend a program and need assistance related to a disability provided for under the ADA,, please let us know.
Disclaimer: Speakers and topics are subject to change without notice. The Suffolk Academy of Law is not liable for errors or omissions in this publicity information.
Tax-Deductible Support for CLE: Tuition does not fully support the Academy's educational program. As a 501©)(3) organization, the Academy can accept your tax deductible donation. Please take a moment, when registering, to add a contribution to your tuition payment.
Financial Aid: For information on needs-based scholarships, payment plans, or volunteer service in lieu of tuition, please call the Academy at 631-233-5588.
INQUIRIES: 631-234-5588.

UPDATES

ANNUAL AUTO UPDATE
Plus an Explanation of the *Byrnes* Calculation
Monday, June 17, 2013

This year's program is expanded to include both an update on auto liability and No Fault and a discussion of the *Byrnes* Calculation (settling a personal injury case when the injury happened on the job).

Presenters: **Jonathan Dachs, Esq.** (Dachs, Corker, Sauer & Dachs)
Professor Michael Hutter (Albany Law School // Special Counsel–Powers & Santola)
Robin Sambur, Esq. (Sherman, Federman, Sambur & McIntyre(
Time: 5:30–9:10 p.m. (Sign-in from 5:00) NOTE EARLY START Location: SCBA Center **Refreshments:** Light supper
MCLE: 4 credits (professional practice)

ANNUAL EVIDENCE UPDATE
Tuesday, June 25, 2013

Presented jointly with the Nassau Academy of Law, this always popular program will cover evidence trends and developments for both criminal and civil practitioners on the State and Federal levels.

Presenters: **Professor Richard Farrell** (Brooklyn Law School // Author–*Prince, Richardson on Evidence*)
Time: 6:00–8:30 p.m. (Sign-in from 5:30) Location: SCBA Center **Refreshments:** Light supper
MCLE: 2.5 credits (professional practice)

JUNE SEMINARS

Lunch 'n Learn
N.Y. SALES & USE TAX:
What Every Lawyer Needs to Know
Tuesday, June 18, 2013

This program will shed light on sales and use tax obligations and provide guidance for avoiding or handling sales tax audits. Topics include:

- what's subject to sales tax and what is not, including new developments
- determining the necessity for use tax
- fiduciary duties and statute of limitations
- transfer liability
- resources for guidance; advisory opinions; offers in compromise. . . .

Presenters: **Mark L. Stone, CPA, MST** (Sales Tax Defense, LLC); **Jennifer Koo, Esq.** (Sales Tax Defense, LLC)
Time: 12:30–2:10 p.m. (Sign-in from noon) Location: SCBA Center **Refreshments:** Lunch
MCLE: 2 credits (professional practice)

Evening Seminar from the SCBA Animal Law Committee
WHAT NON-PROFITS NEED TO KNOW:
Focus on Animal-Related Organizations
Wednesday, June 19, 2013

A highly skilled faculty discusses matters of importance to all non-profits, plus issues of special concern to animal rescue groups. The agenda will cover:

- Duties and Obligations of Directors and Officers
- First Amendment Rights of Employees and Volunteers
- Applying for Not-for-Profit Exemption
- Bylaws, Contracts, Policies & Procedures; Employee Handbooks
- Workers' Compensation Issues (Employees and Volunteers)
- The Animal enterprise Terrorism Act

Presenters: **Dennis R. Chase, Esq.** (Chase Sensale Law Group, LLC); **Thomas J. Killeen, Esq.** (Farrell Fritz, PC); **Amy Chaitoff, Esq.** (Chaitoff Law PLLC); **Diane M. Pfadenhauer, Esq.** (Employment Practices Advisors, Inc); **Ellen Trageser, CPA** (Cohen Greve & Co.)
Program Coordinator: **Amy Chaitoff, Esq.** (Academy Officer)
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
NEW DWI REGULATIONS
Thursday, June 20, 2013

An outstanding faculty – including a renowned guest presenter – addresses the new DWI regulations and their ramifications for those who handle DWI defense. As a bonus, those who attend may purchase Peter Gerstenzang's *Handling the DWI Case in New York* at a 20 percent discount.

Presenters: **Peter Gerstenzang, Esq** (Gerstenzang, O'Hern, Hickey, Sills & Gerstenzang)
Tina K. Piette, Esq (Amagansett)
Honorable Lisa Rana (East Hampton Town Justice)
Program Coordinators: **Tina Piette, Esq.** and **Peter Walsh, Esq.**
Time: 6:00–9:00 p.m. (Sign-in from 5:30) Location: Bridgehampton National Bank **Refreshments:** Light supper
MCLE: 3 credits (professional practice)

From the SCBA Animal Law Committee
DOG DAY AFTERNOON:
Agility Expo and Pet Fair
Saturday, June 15, 2013 (Rain Date: Sunday, June 16)

This fifth annual family-fun event from the SCBA Animal Law Committee includes agility and rescue group demonstrations; a chance to view and adopt pets; petting zoo, pony rides, and face painting for the kids, vendors; food; raffles, and more.... Only $10 per car. Bring well-behaved dogs for a run through the agility course. Proceeds benefit Academy animal law education – both CLE and public programs.

Academy Coordinator: **Amy Chaitoff, Esq.** (Academy Officer)
Time: 10:00 a.m.–4:00 p.m. Location: St. Joseph's College (155 West Roe Blvd.–Patchogue)

SUMMER SEMINARS & SERIES

Summer Lunch 'n Learn Series
SUMMER "STUDY GROUPS"

This lively summer series comprises twelve topics deemed of interest to both new and experienced practitioners. With content driving the exact format of each program, most (but not all) will be conducted as interactive round table discussions, preceded and followed by formal remarks from presenters highly skilled in the particular subject matter. Specifics for programs listed as general practice areas will be announced shortly. A few of the programs will be offered "off campus," at the Central Islip or Riverhead Courthouse. Any program may be taken individually, but a savings results from enrollment in any trio of seminars. Enrollment in the full series (24 credits) provides a considerable savings.

Series Coordinators: **Hon. John Leo** and **Lynn Poster-Zimmerman**
Each Program:
Time: 12:30–2:10 p.m. (Sign-in from noon) Refreshments: Lunch **MCLE: 2 credits (Specific breakdowns TBA)**

TOPICS, DATES, & LOCATIONS

DISTRICT COURT PRACTICE (CIVIL)
Tuesday, July 9 SCBA Center
Coordinator: Hon. James Flanagan

COMMON DEFICIENCIES IN LOAN MODIFICATIONS
Thursday, July 11 SCBA Center
Presenter: Peter Tamsen, Esq.

FAMILY COURT PRACTICE
Tuesday, July 16 SCBA Center
Coordinator: Hon. John Kelly

LAW OFFICE MANAGEMENT
Thursday, July 18 SCBA Center
Presenters: Sheryl Randazzo, Esq., and Allison Shields, Esq.

RESTRICTIVE COVENANTS
Tuesday, July 23 SCBA Center
Coordinator: SCBA Labor & Employment Law Committee (Sima Ali, Esq., Co-Chair)

SUFFOLK ACADEMY OF LAW

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BUYING & SELLING A SMALL BUSINESS
Thursday, July 25 SCBA Center
Presenters: Donald Smith, Esq., and
Mona Conway, Esq.

LANDLORD-TENANT DISPUTES
Tuesday, July 30 SCBA Center
Coordinator: Hon. Stephen Ukeiley

MATRIMONIAL PRACTICE
Thursday, August 1 SCBA Center
Coordinator: Donna England, Esq.

DISTRICT COURT PRACTICE (CRIMINAL)
Tuesday, August 6 Courthouse – C.I.
Coordinator: Hon. Richard Horowitz

POWERS OF ATTORNEY
Thursday, August 8 Choice of Location
Coordinator: Eileen Coen Cacioppo, Esq. SCBA Center
Coordinator: Kim Smith, Esq. Courthouse – Riverhead

CRIMINAL PRACTICE
Tuesday, August 13 Courthouse – Riverhead
Coordinator: Criminal Court Committee

AVOIDING – AND BEATING – TRUST CONTESTS
Thursday, August 15 SCBA Center
Presenters: Robert Harper, Esq., and
Suzanne Q. Burke, Esq.

Evening Ethics Program
A NIGHT AT THE MOVIES
Wednesday, July 17, 2013

This popular annual ethics roundtable from the SCBA Professional Ethics Committee once again promises to educate through entertainment. Silver screen vignettes will be the basis of audience roundtable discussions and commentary from a knowledgeable panel. Hot dogs, popcorn, candy and other "movie food" add to the evening's ambience. There is no more pleasurable way to earn your ethics credits!

Program Coordination: **SCBA Professional Ethics Committee**
Time: 6:00–9:00 p.m. (Sign-in from noon) Location: SCBA Center **Refreshments: Movie Food**
MCLE: 3 credits (ethics)

Special Summer Luncheon CLE
INSIDE THE LEGISLATIVE PROCESS:
An Overview and Insights on How a Bill Becomes a Law from Chief Administrative Judge A. Gail Prudenti and OCA First Deputy & Legislative Counsel Marc Blaustein
Friday, August 2, 2012

The Academy is delighted to present this important luncheon CLE for the attorneys of Suffolk County. Honorable C. Randall Hinrichs, Suffolk County Administrative Judge, will introduce the program. Be sure to register early!

Program Coordinator: **Hon. John Leo** (NYS Supreme Court // Academy Officer)
Time: 12:30 – 1:30 p.m. (Sign-in from noon) Location: SCBA Center **Refreshments:** Luncheon
MCLE: 1 credit

FALL SERIES

Lectures; Mentoring Workshops; Mock Trials
TRIAL PRACTICUM

Registrants have three enrollment options for this trial skills program: the full, hands-on program (lectures, workshops and mock trials); the lecture series; or specific, individual lectures. Judges and experienced trial attorneys will serve as presenters and mentors. **Register early (before August 1) and take a 10 percent tuition discount on any of the enrollment options**.

Practicum Schedule

Lecture 1 Case Theory; Jury Selection Opening Remarks Wednesday, September 18
Related Mentoring Workshop Thursday, September 19

Lecture 2 Direct Examination
Wednesday, October 2
Related Mentoring Workshop - Thursday, October 3

Lecture 3 Cross Examination & Expert Witnesses
Wednesday, October 16

Lecture 4 Evidence & Objections
Wednesday, October 23
Mentoring Workshop for Lectures 3 & 4 – Group A
Thursday, October 24
Mentoring Workshop for Lectures 3 & 4 – Group B
Wednesday, October 30

Lecture 5 Closing Remarks
Wednesday, November 6
Related Mentoring Workshop Thursday, November 7
Mock Trials For Full-Program Participants Week of November 18

Evening Sessions (Lectures & Mentoring Workshops):

Time: 6:00–9:00 p.m. (Sign-in from noon) Location: SCBA Center **Refreshments: Light Supper**
MCLE: Full Program – 30 credits
Lecture Series – 15 credits
Single Lectures – 3 credit

JUNE 2013 REGISTRATION FORM

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

COURSE	SCBA Member	SCBA Student Member	Non-Member Attorney	Season Pass	12 Sess. Pass	MCLE Pass	New Lawyer MCLE Pass	DVD	Audio CD	Course Book
ANNUAL UPDATES										
Auto Update	$110	$60	$135	Yes	Yes	3 cpn	3 cpn	$125	$115	$25
Evidence Update	$ 90	$50	$115	Yes	Yes	2 cpn	2 cpn	$100	$95	$15
SEMINARS, CONFERENCES, & SERIES										
NYS Sales & Use Tax	$50	$25	$75	Yes	Yes	2 cpn	2 cpn	$90	$85	$15
Non-Profits (Animal Related)	$50	$25	$75	Yes	Yes	2 cpn	2 cpn	$95	$85	$25
New DWI Regs (*East End*)	$75	$50	$80	Yes	Yes	3 cpn	3 cpn	N/A	N/A	N/A
SUMMER										
Summer Study Groups □ District-Civil □ Loan Mods □ Family Court □ Law Office Man. □ Restrictive Covenants □ Small Biz □ Landlord-Tenant □ Matrimonial □ District-Criminal □ POA - SCBA □ POA - Riverhead □ Criminal Practice □ Trust Contests	Series - $360 Trio – $120 Ind. Prog - $50	Series - $180 Trio – $ 60 Ind. Prog - $25	Series - $600 Trio – $190 Ind. Prog - $75	Yes	Yes - 2 for one	Series - 15 cpns Trio - 5 Ind. -2	Series - 15 cpns Trio - 5 Ind. -2	TBA	TBA	$10 each
Night at the Movies	$100	$65	$125	Yes	Yes	3 cpns	3 cpns	N/A	N/A	N/A
Inside Leg Process Luncheon	$50	$35	$75	Yes	Yes	1 cpn	1 cpn	N/A	N/A	N/A
FALL										
Trial Practicum □ Full Program □ Lecture Series □ Individual Lecture: 1. Theory; Jury; Opening 2. Direct 3. Cross & Experts 4. Evidence & Objections 5. Closings	$550 $375 $ 90	$500 $200 $ 50	$600 $450 $100	Full Yes + $100 Lectures Yes	Full 10 uses Lectures - 1 each	Full 25 cpns Lec-tures - 3 each	Full 25 cpns Lec-tures - 3 each	Lec-tures: $100 each	Lec-tures: $95 each	TBA

Name: _____

Address: _____

Phone: _____ E-Mail _____

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

METHOD OF PAYMENT ____ Check **(check payable to Suffolk Academy of Law)** _____ Cash

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

Account # _____ Exp. Date: _____ Signature: _____

ACADEMY OF LAW NEWS

More Academy News on page 31
CLE Course Listings on pages 28-29

ACADEMY Calendar of Meetings & Seminars

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

JUNE

14	Friday	Meeting of Academy Officers & Volunteers. 7:30–9:00 a.m. Breakfast buffet. All SCBA members welcome. (First meeting of the new administrative year.)
15	Saturday	**Doggy Day Agility Expo & Pet Fair.** 10 a.m. – 4 p.m.; St. Joseph's College. Rain date on Sunday, June 16. Sponsored by the SCBA Animal Law Committee; benefits the Academy Animal Law Education Fund.
17	Monday	**Annual Auto Liability Update & the *Byrnes* Calculation Explained** (Jonathan Dachs; Professor Michael Hutter; Robin Sambur)**.** 5:30–9:15 p.m. Light supper from 5:00 p.m.
18	Tuesday	**Sales & Use Tax: What Lawyers Need to Know.** 12:30–2:10 p.m. Lunch from noon.
19	Wednesday	**Animal-Related Organizations: What Non-Profits Need to Know.** 6:00–9:00 p.m. Vegan-vegetarian supper from 5:30 p.m.
20	Thursday	*East End:* **New DWI Regulations** (with Peter Gerstenzang). Bridgehampton National Bank. 6:00–9:00 p.m. Light supper from 5:30 p.m.
23	Tuesday	**Annual Evidence Update** (Professor Richard Farrell). 6:00–8:30 p.m. Light supper from 5:30.

JULY

9	Tuesday	*Summer Study Groups:* **District Court (Civil).** 12:30–2:10. Lunch from noon (SCBA)
11	Thursday	*Summer Study Groups:* **Common Deficiencies in Loan Mods** 12:30–2:10. Lunch from noon (SCBA)
16	Tuesday	*Summer Study Groups:* **Family Court.** 12:30–2:10. Lunch from noon (SCBA)
17	Wednesday	**Night at the Movies (Ethics Roundtable).** 6:00–9:00 p.m. Movie food from 5:30 p.m.
18	Thursday	*Summer Study Groups:* **Law Office Management.** 12:30–2:10. Lunch from noon (SCBA)
23	Tuesday	*Summer Study Groups:* **Restrictive Covenants.** 12:30–2:10. Lunch from noon (SCBA)
25	Thursday	*Summer Study Groups:* **Buying and Selling a Small Business.** 12:30–2:10. Lunch from noon (SCBA)
30	Tuesday	*Summer Study Groups:* **Landlord-Tenant Practice.** 12:30–2:10. Lunch from noon (SCBA)

AUGUST

1	Thursday	*Summer Study Groups:* **Matrimonial.** 12:30–2:10. Lunch from noon (SCBA)
6	Tuesday	*Summer Study Groups:* **District Court (Criminal).** 12:30–2:10. Lunch from noon (C.I. Courthouse)
8	Thursday	*Summer Study Groups:* **Powers of Attorney.** 12:30–2:10. Lunch from noon (SCBA)
		Summer Study Groups: **Powers of Attorney.** 12:30–2:10. Lunch from noon (Riverhead Courthouse)
13	Tuesday	*Summer Study Groups:* **Criminal Practice.** 12:30–2:10. Lunch from noon (Riverhead Courthouse)
15	Thursday	*Summer Study Groups:* **Trust Contests.** 12:30–2:10. Lunch from noon (SCBA)

SEPTEMBER

13	Friday	Meeting of Academy Officers & Volunteers. 7:30–9:00 a.m. Breakfast buffet. All SCBA members welcome.
18	Wednesday	**Trial Practicum** begins – lecture on Case Theory, Jury Selections, Openings. Lectures continue on October2, 16, 23, November 6. Workshops Interspersed.
24	Tuesday	**New Traffic Bureau.** Evening. Details TBA.

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

Interactive Study Groups Anchor Academy's Summer Term

By Dorothy Paine Ceparano

Each summer the Academy selects a unifying idea around which to build the bulk of the season's curriculum. This year, the theme is "study groups," a format that will allow lawyers not only to learn from skilled moderators or panels, but also to engage in interactive dialogue. The result should be programs that are lively and that foster an exchange of ideas among peers.

The series, coordinated by Honorable John Leo and Lynn Poster-Zimmerman, comprises twelve lunch 'n learn programs on topics deemed to be of interest to most practitioners. The subject matter will drive each program's specific format. Most will be round-table discussions in which – following an introductory lecture – the audience will be divided into groups to discuss and attempt to solve specific problems. Group leaders will report "findings" back to the audience as a whole and the lecturers will follow up with additional remarks. If the topic does not lend itself to this process, however, a more traditional format will be utilized.

While most of the programs will be held at the SCBA Center in Hauppauge, a few will be presented "off-campus," in the courthouses in Central Islip or Riverhead. All are scheduled for Tuesdays or Thursdays.

Scheduled topics, with details to be supplied in upcoming publicity pieces, are **Civil Practice in District Court** (July 9 at the SCBA Center); **Common Deficiencies in Loan Modifications** (July 11 at SCBA Center); **Family Court Practice** (July 16 at SCBA Center); **Issues in Law Office Management** (July 18 at SCBA Center); **Restrictive Covenants** (July 23 at SCBA Center); **Buying and Selling a Small Business** (July 25 at SCBA Center); **Landlord-Tenant Practice** (July 30 at SCBA Center); **Matrimonial Practice** (August 1 at SCBA Center); **Criminal Practice in District Court** (August 6 in Central Islip); **Powers of Attorney** (August 8 – presented at both SCBA Center and Riverhead Courthouse); **Criminal Practice** (August 13 in Riverhead); **Avoiding – and Beating — Trust**

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Academy Plans Fall Trial Practice Series

"I want to know where to stand in the courtroom, what to do and when to do it." ... "I want to know how to object...in real terms...not just the governing law." ... "I want to know how to adapt, quickly, when the playing field suddenly changes." ... And so on.... Through program evaluation forms and informal dialogue, SCBA members have let the Academy know that they would like more hands-on trial skills training. These requests have been heard, and a new **Trial Practicum** has been planned for the fall. It promises to be a boon for any lawyer seeking courtroom confidence.

But not only the new or uninitiated lawyer will want to check out this series. The program has been designed to meet the needs of a wide range of practitioners, from those who seek a full immersion program to those who want to pick up tips for selected aspects of the trial process.

The full program comprises five evenings of lectures, with hands-on mentoring workshops interspersed, and culminates in mock trial sessions. Cases and exercises – both civil and criminal – will utilize NITA materials.

Registrants have three enrollment options: the full program (lectures, workshops and mock trials); the lecture series; or specific, individual lectures. Those who take the full program (enrollment limited) will receive 30 MCLE credits, i.e., more than two years' worth of credits, with an allowance of six credits to be carried over into the next biennial reporting period. Individual lectures bestow three credits each.

With one or two week intervals between sessions, the Trial Practicum begins in mid-September and runs through mid-November. The kick-off presentation, on the evening of Wednesday, September 18, covers **identifying the theory of a case, jury selection, and openings**. The related mentoring workshop is on the following evening. The next lecture, on **direct exam-**

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Fall Trial Practice Series *(Continued from page 30)*

ination, is scheduled for Wednesday, October 2, with the mentoring session, again, on the following evening. The October 16 lecture session covers **cross examination and expert witnesses,** and the October 23 lecture covers **evidence and objections**. Following these two lectures, two workshop groups will be formed to practice the imparted skills: Group A on October 24; Group B on October 30. The final lecture covers **closings** and is scheduled for Wednesday, November 6, with the mentoring session on the following evening. Five mock trial classes are scheduled for the week of November 16, one each day (at the courthouse if court schedules permit).

Tuition for the Trial Practicum is dependent upon the degree of participation. Cost for the full, 30-credit program – lectures, mentoring workshops, and mock trials – is $550. The lecture series (15 credits) is priced at $375, and individual lectures (three credits each) are $90. Those who enroll in any of the options before August 1 may take a ten percent tuition discount.

The dedicated program committee has been actively engaged in developing the program since late February. Chaired by Cheryl Mintz, the group includes William Ferris, Stephen Kunken, Hon. James Flanagan, Hon. Stephen Ukeiley, Hon. Thomas Whelan, Patricia Meisenheimer, Dan Tambasco, Allison Shields, Marianne Rantala, Lynn Poster-Zimmerman, Guido Gabriele III, Robert Harper, Marilyn Lord-James, Robin Ambramowitz, and Amy Chaitoff. A highly skilled program faculty – lecturers and mentors – will be drawn from the bench and bar.

Lawyers are invited to call the Academy (631-234-5588) for more information or to take advantage of the early enrollment discount. – Dorothy Ceparano

Academy's Summer Term *(Continued from page 30)*

Contests (August 15 at SCBA Center).

In addition to the Summer Study Group Series, the Academy's summer curriculum includes **"A Night at the Movies,"** the annual ethics seminar from the SCBA Professional Ethics Committee. Scheduled for the evening of July 17, the highly popular program promises to once again entertain and educate through round-table discussions based on vignettes from the silver screen.

Finally, planning is in progress for a **summer luncheon presentation featuring Honorable A. Gail Prudenti, New York State Chief Administrative Judge**. Suffolk Administrative Judge C. Randall Hinrchs will introduce Judge Prudenti. Justice John Leo, an Academy Officer, is the program coordinator. Details on date, time, and topic will be announced shortly.

Finally, the Academy is delighted to announce that **Honorable A. Gail Prudenti, New York State Chief Administrative Judge,** accepted an invitation to present a CLE program this summer. Judge Prudenti, joined by OCA First Deputy and Legislative Counsel **Marc Blaustein,** will visit the SCBA Center on Friday, August 2, for a luncheon presentation entitled **"Inside the Legislative Process: An Overview and Insights on How a Bill Becomes a Law."** Suffolk Administrative Judge C. Randall Hinrchs will introduce the program. Justice John Leo, an Academy Officer, is the program coordinator. The one-credit presentation (12:30 p.m.) will be preceded by lunch and followed by a dessert reception.

Readers are invited to call the Academy (631-234-5588) for information on any upcoming programs.

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

2013 Florida Bar Recordings Available Through the Academy

Lawyers who need to fulfill Florida continuing legal education requirements may borrow a set of audio recordings supplied to the Academy by the Florida Bar. The 2013 set supplies 14.5 hours of General CLER credits, including 4.0 ethics hours. A maximum of 4.5 certification credits may also be earned through the recordings.

Recording topics include estate tax; e-filing; overturning local land use decisions; dealing with *pro se* litigants and qualified representatives; opening and closing strategies; examination of witnesses; privacy, confidentiality and medical records; elder law, capacity, and disability issues; practice pointers from the bench; and ethics.

To borrow the recordings, call the Academy at 631-234-5588. A $100 refundable deposit may be required.

– DPC