THE SUFFOLK LAWYER

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JUNE 2016 - FOCUS ON APPELLATE PRACTICE

SCBA Enters its 108th Year

By Laura Lane

The Suffolk County Bar Association's 108th Annual Installation on June 3 was a night to celebrate lawyers, who, President John Calcagni said "have earned the right to be proud of the pivotal and indispensable role they have played in the administration of justice in our country's civil and criminal systems, as well as in the betterment of society as a whole."

Photo by Jimmy Rae Photography

Appellate Associate Justice Hector D. LaSalle installs SCBA Officers, from left: Patricia Meisenheimer, president elect; Justin M. Block, first vice president; Lynn Poster-Zimmerman, second vice president; Hon. Derrick J. Robinson, treasurer; and Daniel J. Tambasco, secretary.

The Hon. Derrick J. Robinson, echoed Mr. Calcagni's theme for the upcoming year, "Pride in the Profession," when he gave the invocation. "Do unto others as we would have them do unto us," Hon. Robinson instructed. "Our purpose is to promote standards of judicial excellence. Inspire us to follow your will in our action to promote pride in the profession."

The Appellate Associate Justice Hector D. LaSalle installed a group of dedicated members as officers. They included: Patricia Meisenheimer, president elect; Justin M. Block, first vice president; Lynn Poster-Zimmerman, second vice president; Hon. Derrick J. Robinson, treasurer; and Daniel J. Tambasco, secretary.

Richard A. Weinblatt, a partner with Mr. Calcagni at Haley, Weinblatt & Calcagni, LLP, served as the master of ceremonies for the evening.

"Tonight is a night for celebration," Mr. Weinblatt said. "I've known John a long time. He's honest, fair and a strong advocate for his clients. He has been a

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Photo by Barry Smolowitz

Volunteers help vets

Several SCBA volunteers provided free legal consultations for veterans of Suffolk County and their dependent family members at Volunteers for Veterans. See story on page 3.

PRESIDENT'S MESSAGE

Pride in the Profession

By John Calcagni

Note: This is the speech given by Mr. Calcagni at the SCBA Annual Installation Dinner.

John Calcagni

There's a famous Shakespearean line about lawyers that we have all heard. "The first thing we do, let's kill all the lawyers." The line was spoken in one of Shakespeare's historical plays, Henry VI, Part II, by a character named Dick the Butcher. Dick was a follower of Jack Cade, who led a rebellion against Henry in Sixteenth Century England. Jack and Dick thought that if they could destroy law and order by ridding England of all the lawyers, Jack could dethrone Henry and become King. Contrary to popular belief then, Shakespeare did not intend the line to be an insult but a compliment to attorneys, who he recognized promoted lawfulness and order in society.

But for a few minutes, let's imagine what might have happened if the rebel followers of Jack Cade had taken Dick the Butcher's suggestion. From a historical perspective, there may never have been a Declaration of Independence, a United States Constitution or a United States of America for that matter. Twenty-Five of the 56 signers of the Declaration, including its principal draftsman, Thomas Jefferson, were lawyers. Of the 55 framers of the Constitution, 32 were lawyers. The man who issued the Emancipation Proclamation in 1863 and who ended the Civil War in 1865, there-

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BAR EVENTS

Annual Outing Fishing and Golfing
Monday, Aug. 8

Join us for a round of Golf at Willow Creek. Shotgun starts at 1:30 p.m., registration and lunch at 11:30 a.m. Willow Creek is one of Long Island's newest and most visually impressive golf courses. It has the look and feel of a destination golf course with sand and water everywhere. Please set up your foursomes and call the Bar Center for further information.

We will again be fishing on the Osprey V, a private charter boat, sailing out of Port Jefferson Harbor, that will include breakfast and lunch. Good fishing will abound. More information to follow.

FOCUS ON APPELLATE PRACTICE
SPECIAL EDITION

Suffolk County Bar Association

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Donna England	Past President Director (2019)
Sarah Jane LaCova	Executive Director

SCBA Calendar

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

OF ASSOCIATION MEETINGS AND EVENTS

JUNE 2016

15 Wednesday — Education Law, 12:15 p.m., Board Room.

16 Thursday — SCBA Charity Foundation presents: Million Dollar Quartet, Gateway Playhouse, 215 S. Country Road, Bellport. Dinner provided by Fireside Caterers, $100 per person ($52 is tax deductible). $25 raffle for Broadway tickets and dinner. Sign up on line at scba.org or call Bar Center.

28 Tuesday — Annual Surrogate's Court Committee Dinner, Ciro's Restaurant, 470 Wheeler Road, Hauppauge, 6:00 p.m. $65.00 per person/cash bar. Call Bar Center or sign up on line at scba.org.

Tri-County Elder Law Annual Dinner – Verdi's of Westbury, 680 Old Country Road, Westbury, 6:00 – 8:00 p.m., $70 per person (all Inclusive). Sign up on line at scba.org. or call Bar Center.

JULY 2016

20 Wednesday — Professional Ethics & Civility Ethics Night at the Movies, 6:00 p.m., Great Hall.

AUGUST 2016

8 Monday — SCBA's Annual Outing, Willow Creek Golf & Country Club, Mt. Sinai. Fishing out of Port Jefferson. Further details to follow.

SEPTEMBER 2016

21 Wednesday — SCBA's Annual Judiciary Night. 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."

DONATIONS

We acknowledge and deeply appreciation the following donations to the SCBA Charity Foundation and the SCBA Pro Bono Foundation:

Donor	In Honor Of:
Ethel & Alexander Nicholson Foundation	Sarah Jane LaCova (for her many years of devoted service to the SCBA)
Ethel & Alexander Nicholson Foundation	Donna England (for her exemplary work and leadership as the immediate past president)

Donor	In Memory Of:
Gustave Fishel III	Mary Bracken
Samuel J. Ferrara	Anna Quinn's father, Joseph Minore

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New SCBA President Will Focus on Pride in the Profession

By Laura Lane

John Calcagni, the new president of the Suffolk County Bar Association, has many plans for the upcoming year. His theme for the Association's 108th year is pride in the profession. Personable, deliberate, respectful and extremely intelligent, he is also modest, immune to the potential trappings of leadership.

"President Reagan had a sign in his office — 'There is no limit to what a man can do or where he can go if he does not mind who gets the credit,'" he said during a recent interview. "I'm someone who doesn't care about getting the credit. I recognize that what's important is the membership of our Association."

A partner at Haley, Weinblatt & Calcagni, LLP, with an A-V rating from Martindale-Hubbell, Mr. Calcagni, 70, is focused on issues relating to business. A former high school teacher, he's been an adjunct professor of business law teaching both "live" and online courses in the Graduate Management Studies Department at St. Joseph's College. He is completing his sixth year teaching online graduate legal issues and management courses.

Mr. Calcagni is versed in computer technology. He has six professional certifications in technology, which he said help him to stay current with it and the legal issues that arise as a result of changing technologies. It's no secret that the younger generation is usually adept in technology. Recognizing this, Mr. Calcagni is hoping to encourage younger attorneys to join the SCBA, which he sees as mutually beneficial.

"Many experienced lawyers don't understand technology, social media; the younger attorneys do," he explained. "They can teach the older attorneys, if they are open to it, how to use technology in their practice. We are trying to find a way to reach these younger attorneys who may not see the benefits of joining the Association, of sitting in a room with contemporaries exchanging ideas."

He is also committed to finding ways to implement diversity at the SCBA. "I believe the way to achieve diversity is to engender a spirit of inclusiveness, reach out to other bars associations to let them know we want them, that they are welcome," Mr. Calcagni said. "I will encourage our members to welcome them when they do come to our events. We've also provided a reduction in dues as an incentive to have them join."

The new president would like the members of the other bar associations to get involved in the SCBA's committees and put on programs with the Academy. Many of these lawyers, who are not members, would be beneficial to the SCBA.

"They would increase the cultural awareness of our bar association, an understanding of issues of people with different backgrounds," Mr. Calcagni explained. "We want to put out the welcome mat and say we want you here."

Mr. Calcagni joined the SCBA over 15 years ago, looking for "education and the ability to find out answers to questions from other attorneys." He became involved in the Academy almost immediately. Mr. Calcagni has never looked back.

He's a past dean of the Academy, served as an officer and director of the SCBA, was the chair of its Commercial and Corporate Law Committee, co-chair of the Bench-Bar Committee, and the managing director of the Pro Bono Foundation. Mr. Calcagni also served as a trustee of the SCBA's Lawyers' Assistance Foundation and as a member of the Judicial Screening Committee. He even received the SCBA's Directors' Award.

Having worn so many hats and successful at them all, Mr. Calcagni has much to offer the Association. He has several plans to carry forth the goal that he believes is of the utmost importance — pride in the profession.

"I would like to make attorneys aware of why we should be proud of being lawyers," said Mr. Calcagni, adding that the media's continual negative reporting on the profession may sway some attorneys to actually believe them. "Lawyers have played an indispensible role in creating civil society, helping individuals who may be taken advantage of by corporations or government. They stand up for the little guy and many are involved in charitable work."

Mr. Calcagni would like to see the lawyers who are doing good receive the recognition they deserve.

"I'd like to suggest to our members that when they see an attorney doing something for the betterment of society to take a picture of them," he said, adding they could send it to The Suffolk Lawyer and other publications.

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Photo by Jimmy Rea Photography

John Calcagni was sworn in as the next president of the SCBA by Appellate Presiding Justice Randall T. Eng on June 3.

Help Provided for Veterans at Volunteers for Veterans

By Laura Lane

The Suffolk County Bar Association, Pro Bono Foundation and Nassau Suffolk Law Services collaborated to make Volunteers for Veterans a success at the bar center on May 10.

Each of the 29 attorney volunteers brought with them years of experience in their particular area of law to assist veterans.

"I'm hoping we can help the people who spent so much time and effort serving," said Justin Block, the managing director of the Pro Bono Foundation. "If we can help educate them as to what's available, the legal services they may be eligible for and need, this will have been a huge success."

Last year Volunteers for Veterans was held in February. Several people came but the weather was not good. The hope was that holding the event in the spring would make it easier for veterans to get to the bar center.

The day included a consultation with an attorney and also suggestions from different organizations, like Nassau Suffolk Law Services, of places where veterans could receive additional help.

There isn't a typical veteran," said Maria Dosso, the Director of Communications and Volunteer Services at Nassau Suffolk Law Services. "They are all different ages and they have a wide range of issues."

Ms. Dosso said everyone worked hard to get the word out to the veterans about the event. Flyers were posted in various locations and residences where veterans lived were contacted with a request to provide transportation to the bar center.

When they arrived, veterans were asked to fill out an intake form and then they met with one of the attorneys. The consultation meetings were generally 20 minutes in length. Attorneys never told the veteran that they were their attorney, but instead said they were volunteering to provide guidance. But if an attorney did wish to later work pro bono for the veteran it could be arranged.

Ted Rosenberg and Judge Peter Mayer have been the co-chairs of the Military and Veterans Committee since its inception six years ago.

"The idea was to put on CLE pro-

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Photo by Laura Lane

Assisting a veteran at Volunteers for Veterans were Maria Dosso, from Nassau Suffolk Law Services and SCBA attorney Rick Stern.

BENCH BRIEFS

By Elaine Colavito

SUFFOLK COUNTY SUPREME COURT

Honorable Paul J. Baisley, Jr.

Application by the petitioner for an order directing the respondent, Suffolk County Department of Social Services, to return the subject infant to the petitioner, granting petitioner temporary custody pending further order of the court, and ultimately granting the petitioner full custody dismissed; petitioner did not have standing.

In *Roberta Williams v. Suffolk County Department of Social Services, Suffolk County Attorney's Office and Wanda Carter,* Index No.: 15954/2014, decided on March 30, 2015, the court denied the application by the petitioner for an order directing respondent Suffolk County Department of Social Services to return the subject infant to the petitioner, granting petitioner temporary custody pending further order of the court, and ultimately granting the petitioner full custody. In denying the application, the court concluded that the petitioner did not have standing to bring the application. In rendering its decision, the court stated that social services law §383(3) grants foster parents who have had continuous care of an infant through an authorized agency for more than 12 months the right to intervene in any proceeding involving the custody of that infant. That provision, which is grounded in the principle that foster parents are essentially contract-service providers, has been held to be inapplicable to former foster parents, who have consistently been held not to have standing, either to initiate a custody proceeding, or to intervene in one. While the court acknowledges with sympathy petitioner's deeply rooted emotional attachment to the infant and the heart wrenching separation that she was enduring, the court was nevertheless constrained to conclude that neither emotional relationship, nor petitioner's status as a former foster parent was sufficient to confer legal standing for the instant application. Since the court found that the petitioner did not have standing to maintain the instant application, it was unable to reach the issue of what was in the best interests of the child.

Elaine Colavito

Honorable Peter H. Mayer

Petition to enforce restrictive covenant denied; petitioner failed to meet burden.

In *In the Matter of the Application of Paul Gruskoff v. The County of Suffolk, Tim Laube, as the clerk of the Suffolk County Legislature, The Town of Huntington, and Anita S. Katz and Nick LaLota, as Commissioners of the Suffolk County Board of Elections,* Index No.: 6680/2015, decided on October 14, 2015, the court denied the petition to enforce a restrictive covenant. For the sake of brevity, the court noted the pertinent facts as follows: After the Suffolk County Legislature held a public hearing on establishing a sewer district for the property known as the Greens at Half Hollow, the Legislature adopted a Resolution authorizing the formation of the sewer district, subject to the "affirmative vote of a majority of the qualified electors who are resident within the proposed sewer district." Thereafter, the president of the intervener-respondent circulated a letter to the residents informing them that the costs to them would increase if the vote affirmed the adoption of the resolution.

The petition here contended that the referendum could not stand because a restrictive covenant running with the land existed in which the residents of the Greens were bound to consent to the formation of the district. In denying the application, the court stated that where one seeks to enforce a restrictive covenant, the petitioner must show that three conditions have been met in order for such covenant to run with the land: (1) it must appear that the grantor and grantee intended that the covenant should run with the land; (2) it must appear that the covenant is one touching or concerning the land in which it runs; and (3) it must appear that there is privity of estate between the promise or party claiming the benefit of the covenant and the right to enforce it and the promisor or party who rests under the burden of the

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COURT NOTES

By Ilene Sherwyn Cooper

APPELLATE DIVISION-SECOND DEPARTMENT

Attorney Resignations

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

Harold S. Bofshever
Marlies Braun
Gregory Thomas Brown
Sungah Annie De Chung
Rochelle Beth Hahn
Nicholas Brian Hoskins
Chris Jochnick
Miranda Blake Johnson
Tracy Jennifer Joselson
Tirtza R. Jotkowitz
Beth-Anne Keating
Christopher Lane
Steven Marchese
Joanna A. Medrano
Carlos J. Pimentel, Jr.
Kathleen Mary Scheidel
Michael Joseph Sinsky
Dominic Surprenant
Dennis Anthony Walter
Nancy Jear Waples

Attorney Reinstatements Granted

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

Jan Alex Dash
Stuart H. Finkelstein
Joseph J. Milano

Attorney Resignations Granted/Disciplinary Proceeding Pending:

Kevin R. Greco: By affidavit, respondent tendered his resignation as an attorney on the grounds that he was the subject of an investigation into his professional misconduct. He stated that he could not successfully defend himself on the merits against the charges. Further, respondent stated his resignation was freely and voluntary rendered, that he was fully aware of the implications of submitting his resignation, and that he was subject to an order directing that he make restitution and reimburse the Lawyers' Fund for Client Protection. In view of the foregoing, the respondent's resignation was accepted and he was disbarred from the practice of law in the State of New York.

Ilene S. Cooper

Voluntary Suspension

Edward J. Grossman: Motion by the respondent to be suspended voluntarily from the practice of law due to medical incapacity granted for an indefinite period of time until further order of the court.

Attorneys Suspended:

Janet E. Conroy: By decision and order of the court, the Grievance Committee was authorized to institute a disciplinary proceeding against the respondent and the matter was referred to a special referee. The petition alleged, *inter alia*, that the respondent misappropriated funds entrusted to her. The referee sustained the charges, and the Grievance Committee moved to confirm. The respondent failed to submit any papers in opposition or in relation to the motion. Accordingly, based on the evidence adduced, and the respondent's admissions, the court found that the special referee properly sustained the charges, and the motion to confirm was granted. In determining the appropriate measure of discipline to impose, the court noted that the respondent previously had an unblemished record, and had presented credible evidence of severe and chronic medical adversities. Nevertheless, the court concluded that the respondent had engaged in serious misconduct. Accordingly, under the totality of circumstances, the respondent was suspended from the practice of law for a period of six months.

Anthony D. Denaro: By decision and order of the court, the Grievance Committee was authorized to institute a disciplinary proceeding against the respondent and the matter was referred to a special referee. The referee sustained the charges, and the Grievance Committee moved to confirm. The respondent cross-moved to disaffirm the report. Based on the respondent's admissions, his sworn testimony and the other evidence adduced, the court found that the respondent failed to competently represent his client and neglected a legal matter. Accordingly, the court found that the special referee properly sustained the charges against the respondent, granted the committee's motion, and denied the respondent's cross-motion. Despite the respondent's claim of mitigating circumstances, the court noted the respondent's extensive disciplinary history, which included seven Letters of Caution and five Admonitions. Accordingly, under the totality of circumstances, the respondent was suspended from the practice of law for a period of six months.

Bill Tsoumpelis: Motion by the Grievance Committee to suspend the respondent from the practice of law granted based upon the papers filed in support of the motion and the respondent's failure to oppose or submit any papers in relation thereto.

Attorneys Disbarred

Donald C. Leventhal: By decision and order of the court, the respondent was authorized to institute disciplinary proceedings against the respondent based upon six charges of alleged professional misconduct, including failing to re-register as an attorney with the Office of Court Administration for three registration periods, and failure to cooperate with the Grievance Committee in its investigation of seven complaints. The respondent failed to serve and file an answer to the petition containing the allegations against him, and the Grievance Committee moved to deem the charges against the respondent established based upon his default. The respondent did not oppose or respond to the motion. Accordingly, the motion by the Grievance Committee was granted, and the respondent was disbarred from the practice of law in the State of New York.

Marijan Cvjeticanin: On June 29, 2015, the respondent was found guilty, after a jury trial, in the United States District Court, District of New Jersey, of nine counts of mail fraud. He was

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Chief Judge Judith S. Kaye: She is Forever in Our Hearts

By Hon. Victoria A. Graffeo

Note: Reprinted with permission from: Leaveworthy, published by the Committee on Courts of Appellate Jurisdiction, New York State Bar Association, One Elk Street, Albany, NY 12207.

Photo by Lisa Bohannon

Judith Kaye, the first female Chief Judge of the New York Court of Appeals, served for a record-breaking 15 years before retiring in 2008. She died on January 7, 2016 at the age of 77. Left: Judge Kaye holds granddaughter Shirin.

"Honorable" was truly an appropriate title for Judith S. Kaye. Chief Judge Kaye was an exceptional leader and legal scholar who inspired generations of female attorneys and earned the respect of the Bar, her fellow jurists, and the people of New York. She had "rock star" status in the legal community because she embodied the finest characteristics of professionalism and leadership. She was a true visionary, pushing New York's massive court system into the modern era by recognizing that courts do more than adjudicate legal rights; they also serve as a conduit for needed services to combat recidivism. Hence, the development of problem-solving, community and youth courts. Judith Kaye unquestionably had "true grit"— she persevered with boundless energy until her objectives were achieved. For someone with such authority, she had a rare sense of humanity.

FOCUS ON APPELLATE PRACTICE SPECIAL EDITION

Her desire to improve society went well beyond her caseload or administrative responsibilities, as evidenced by her efforts to push for improvements in the foster care system so that more children could have permanent homes.

And it was universally recognized that Judge Kaye had "class." She had a style all her own and a formality that reflected her commitment to excellence, but she also radiated warmth and concern for everyone she met. Her keen legal mind and clarity of written expression created a legacy of case law that is unsurpassed. Her career on the bench exemplified public service, and all of us who were fortunate to call her our "Chief" and our dear friend were truly blessed. Forever in our hearts. Chief Judge Kaye.

FAMILY LAW

New York Joins Handful of States Guaranteeing Paid Family Leave

By Arthur Yermash

Arthur Yermash

Governor Andrew Cuomo signed into law an unprecedented bill on April 4, that established a state-wide paid family leave program, adding New York to the short roster of states — including California, New Jersey, and Rhode Island — that guarantee paid family leave.

The law, part of the 2016-2017 State Budget, allows workers across New York State to take paid leave: to bond with a new child (during the first 12 months after the child's birth or adoption, or foster placement of the child with the employee); to care for a family member with a serious health condition; or in certain situations arising from a family member's participation in military active duty.

The law will be phased in over the course of several years. In 2018, workers will be eligible for up to eight weeks of leave; in 2019 and 2020, up to 10 weeks; and starting in 2021, up to 12 weeks. In 2018, employees will receive 50 percent of their average weekly wages, capped at 50 percent of the statewide average weekly wage. Over the following three years, this amount will increase to 67 percent of the employee's average weekly wage, capped at 67 percent of the statewide average weekly wage. (According to the New York State Department of Labor's Research and Statistics Division, the average weekly wage in New York State in 2015 was $1,296.48.)

The New York law is intended to provide added protections to the existing federal Family and Medical Leave Act (FMLA). Currently, FMLA provides unpaid job protection for employees in companies that employ 50 or more employees. New York's new policy will provide several additional layers of employee protection beyond what federal FMLA currently provides. First, New York's new policy provides for paid job protection. Second, and most notably, New York's legislation eliminates many of FMLA's exceptions and restrictions. The legislation covers workers regardless of their employer's size and regardless of the employee's full-time or part-time status (FMLA leave is available only to full-time workers). Additionally, the New York paid leave program covers workers who have worked for their employers for six months or more (less than the 12 months required for FMLA eligibility). The law also provides continuation of health insurance coverage. Biological mothers will also remain eligible for temporary disability insurance payments for pregnancy-related disability and recovery from childbirth. At their discretion, employers may elect to continue existing (or implement new) policies that are more generous than the state policy.

Small businesses operating with just a few employees will likely be impacted the most by this law because a smaller workforce will have to absorb the work of the employee on extended leave. Businesses, especially small businesses, are urged to plan ahead and have policies and procedures in place to seamlessly handle extended employee leave.

The actual pay received by employees while on leave will be funded by nominal employee payroll deductions (estimated to be around one dollar per week per employee), not employer contributions. In other words, employers will not have to pay employees directly. However, employers should prepare for the administrative costs of compliance, including the drafting and implementation of new policies as well as the costs stemming from extended employee absences.

Employers are advised to consult their existing employee handbooks, documented leave policies, and employment agreements to plan for possible modifications as the new rules come into effect. It is also recommended that employers document the duties and job descriptions of the various positions in the office to help facilitate a smooth transition when employees are out on leave and other

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The Suffolk Lawyer wishes to thank Appellate Practice Special Section Editor Patrick McCormick for contributing his time, effort and expertise to our June issue.

Finality in Bankruptcy Appeals

By Paula J. Warmuth

The District Court has jurisdiction to hear bankruptcy appeals (11 U.S.C. § 158(a)). A party may appeal as of right from a final judgment, order or decree (Rule 8003) but a party must seek leave of court to appeal from interlocutory orders or decrees (Rule 8004).

I was recently faced with an adverse order in the Bankruptcy Court, which only decided one issue — how the Net Investment Method was to be applied in the context of transfers of funds between Madoff customer accounts. I checked the rules and thought I must seek leave of court to appeal because this was not a final order. That was wrong. There were four other appeals from the same order and no one else sought leave of court. I followed suit. A notice of appeal was filed, the issue was briefed, the appeal was orally argued, and the District Court decided the appeal.[1] The issue of finality was never raised. The lesson learned is: In the Bankruptcy Court, the issue of finality is not clear-cut.

Paula Warmuth

"In ordinary litigation in federal district court … the litigation ordinarily ends when the court issues its final decision. Bankruptcy cases, however, are different."[2] "'The standards for determining finality in bankruptcy differ from those applicable to ordinary civil litigation.'"[3] "This difference is due to the 'fact that a bankruptcy proceeding is umbrella litigation often covering numerous actions that are related only by the debtor's status as a litigant and that often involve decisions that will be unreviewable if appellate jurisdiction exists only at the conclusion of the bankruptcy proceeding.'"[3] "[C]onsiderations unique to bankruptcy appeals have led [courts] consistently in those cases to construe finality in a more pragmatic, functional sense than with the typical appeal."[4] "[B]ecause bankruptcy proceedings often continue for long periods of time, and discrete claims are often resolved at various times over the course of the proceedings, the concept of finality that has developed in bankruptcy matters is more flexible than in ordinary civil litigation."[5]

"Bankruptcy orders are appealable as final orders if they 'finally dispose of discrete disputes within the larger case.'"[6] The Second Circuit has "clarified that 'discrete dispute' in this context 'do[es] not mean merely competing contentions with respect to separate issues.'"[7] "Instead, the Bankruptcy Court must have resolved 'at least an entire claim on which relief may be granted.'"[7] The order must resolve all issues "including issues as to the proper relief."[5] The "dispute is not completely resolved until the bankruptcy court determines the amount of damages to be awarded."[5]

"[T]here is no 'bright-line or talismanic test by which … to assess the finality of a bankruptcy court determination.'"[8] "[W]ithin each discrete adversary proceeding in a bankruptcy, 'ordinary concepts of finality apply.'"[9]

The United States Supreme Court recently tackled the issue of finality in a bankruptcy case. The Supreme Court explained that the "rules are different in bankruptcy. A bankruptcy case involves 'an aggregation of individual controversies,' many of which would exist as stand-alone lawsuits but for the bankrupt status of the debtor."[10] The Supreme Court explained that "'Congress has long provided that orders in bankruptcy cases may be immediately appealed if they finally dispose of discrete disputes within the larger case.'"[10] The Supreme Court found support for this approach in the language of the statute which authorizes appeals as of right "not only from final judgments in cases but from 'final judgments, orders, and decrees … in cases and proceedings.' §158(a)."[10]

Non-final orders include an order finding a creditor liable for violating the automatic stay but not determining damages;[5] finding a judgment creditor in contempt of a discharge order but not calculating damages[5]; and an order denying a demand for a jury trial.[9]

Final orders include an order finding that the party did not violate the automatic stay;[6] an order which lifts the automatic stay;[3] and an order denying relief from the automatic stay.[3]

The United States Supreme Court, which held that denial of confirmation with leave to amend was not final, cited the late great Yogi Berra on the issue of finality. "'It ain't over till it's over.'"[10]

Note: Paula J. Warmuth is a partner at Stim & Warmuth, P.C. The firm engages primarily in commercial litigation and appellate practice. She is a graduate of St. John's University School of Law with a degree of Juris Doctor - cum laude. She is the former co-chair of the Appellate Practice Committee.

[1] *In re Bernard L. Madoff Investment Securities, LLC*, Dist. Ct. (SDNY 2016)
[2] *In re Lynch*, BAC (10th Cir. 2016)
[3] *In re Quigley Company, Inc.*, 676 F.3d 45 (2nd Cir. 2012)
[4] *In re Professional Insurance Management*, 285 F.3d (3rd Cir. 2002)
[5] *In re Fuzagy Express, Inc.*, 982 F.2d 769 (2nd Cir. 1992)
[6] *Scharf v. BC Liquidating, LLC*, Dist. Ct. (EDNY 2015)
[7] *In re MSR Resort Golf Course LLC* Dist. Ct. (SDNY 2015)
[8] *In re Food Management Group, LLC*, Dist. Ct. (SDNY 2015)
[9] *In re Gonzales*, 795 F.3d 288 (1st Cir. 2015)
[10] *Bullard v. Blue Hills Bank*, 135 S.Ct 1686 (2015)

Microsoft v. Baker: Federal Appellate Courts' Jurisdiction to Review Orders Denying Class Certification

By Jonathan "Jack" Harrington

In the October 2016 term, the U.S. Supreme Court will hear arguments in *Microsoft Corp. v. Baker, et al.* on appeal from the U.S. Court of Appeals for the Ninth Circuit. The question presented — whether a court of appeals has jurisdiction to review an order denying class certification after the plaintiffs voluntarily dismiss their claim — is an interesting one for federal practitioners with an interest in the procedural tactics of class-action litigation.

Jonathan Harrington

In *Baker*, owners of the Xbox 360 video game console filed five actions claiming the consoles scratched video game discs. Plaintiffs brought claims for breach of warranty and violation of state consumer protection statutes. After lengthy discovery, the district court denied class certification, finding that the individual particularities regarding causation and damages prevented certification. After the Ninth Circuit denied a petition for review, the parties settled on individual terms and the case was dismissed. The same lawyers later brought similar cases on behalf of new plaintiffs claiming that the law on class certification had changed. The district court granted Microsoft's motion to strike the class allegations based on the still sound reasoning of the earlier district court decision.

This time, however, after the Ninth Circuit again denied plaintiffs' petition for review, plaintiffs voluntarily dismissed their claims with prejudice and filed a notice of appeal from the dismissal, instead of prosecuting their individual claims to judgment. The Ninth Circuit held that it had jurisdiction over the appeal from the voluntarily dismissal and overturned the district court's class certification decision.

As with nearly every Supreme Court case, the implications of *Baker* extend far beyond the facts of the particular case. To date, six *amici curiae* briefs have been filed in support of Microsoft. The "friends of the court" are diverse and include, for instance, the U.S. Chamber of Commerce, the Pacific Legal Foundation, and a number of noted civil procedure scholars. According to the Chamber of Commerce, the Ninth Circuit's ruling gives plaintiffs an unequal advantage in seeking immediate appellate review of class certification decisions. The Pacific Legal Foundation also emphasizes plaintiffs' "litigation gamesmanship." And the civil procedure scholars emphasize that the Ninth Circuit's ruling undermines the history and purpose of Fed. R. Civ. P. 23(f), which grants appellate courts *discretion* to grant review of an order denying class certification.

The overarching theme of petitioner and its *amici* is that respondents found a tactical loophole under outlying Ninth Circuit law to get another bite at the class certification apple. Given the hurdles to federal class-action certification and the shift in leverage and settlement dynamics after class certification is granted, the question presented in *Baker* is a serious one. Other circuits have taken a different view from the Ninth Circuit. According to Microsoft's petition for certiorari, five circuits have held that a court of appeals lacks jurisdiction to review a denial of a class certification where plaintiffs have voluntarily dismissed their claims with prejudice. For instance, in *Camesi v. Univ. of Pittsburgh Med. Ctr.*, 729 F.3d 239, 245-47 (3d Cir. 2013), the Third Circuit equated the *Baker* plaintiffs' tactics to

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SIDNEY SIBEN'S AMONG US

On the Move…


Jacqueline Siben

Alyssa R. Wanser has joined Katz, Bernstein & Katz, LLP, located in Syosset, NY, as an Associate.

Stephen Angel, Carmela Di Talia and **Anthony Pasca** are pleased to announce the name of their firm has been changed to Esseks, Hefter, Angel, Di Talia & Pasca, LLP in recognition of Mr. Pasca's and Ms. Di Talia's contribution to the firm and their 10-year anniversary as partners.

John J. Roe, III has joined Egan & Golden, in Patchogue, as senior counsel. Pete, as he is known to most of us, will lead the firm's Trusts, Estates and Probate Group.

Congratulations…

Suffolk County Court Officer **Thomas A. Honey** is retiring after 33 years of exemplary and devoted service to the legal community.

Announcements, Achievements & Accolades…

James F. Gesualdi, had his article, "AWA Compliance: Understanding the Basic Framework," published in the June 2016 edition of *The Florida Bar Journal*. Additionally, Mr. Gesualdi spoke at the 2016 Northeast

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In Memoriam

Mary F. Bracken, wife of the late Hon. **Lawrence J. Bracken** and loved by seven children, including daughter and SCBA member Anne M. Bracken, 15 grandchildren and six great grandchildren, passed away on April 27, 2016. Mary was a great supporter of the SCBA and a tireless volunteer for numerous good causes. She was a board member of Good Shepherd Hospice and the recipient of the Spirit of Hospice Award. She truly exemplified the spirit of fraternity, to help the needy, to assist the distressed and support everything that is fine and noble.

It is with profound sorrow to learn of the passing of **Ralph** and past president **Sheryl Randazzo's** father, Phillip Albert Randazzo, on June 1, 2016. May the bereaved family find solace in the inspiring memories of the exemplary life of Al.

Long time SCBA member **Robert C. Mitchel**, Attorney in Charge of the Legal Aid Society past away following a brief illness on June 4, 2016. Donations in Bob's name may be made to the Innocence Project, 40 Worth Street, Suite 701, New York, NY 10013.

We were saddened to learn of the passing of the Honorable **Marilyn R. Friedenberg,** former Nassau County Family Court Judge. Judge Friedenberg was a devoted member of the SCBA for many years and her life leaves with us an example and inspiration for higher and nobler deeds.

– LaCova

New Members…

Congratulations to our new members and new student members who joined the SCBA between January 1, 2016 until May 16, 2016: **Gary S. Alpert, Andrea Amoa, Michele C. Antonelli, Jacklyn Aymong, Lisa A. Baker, Arshia Baseer, John Bruce Belmonte, Laura Blasberg, Gail Blasie, Angela Blekht, Linda M. Boggio, Maxine Broderick, Arthur J. Burdette, Glenn Caulfield, Barbara Walsh Clarke, Dennis G. Corr, Jeannie Virginia Daal, Patricia Dalmazio, Trisha M. Delaney, Anthony S. DeLuca, Rebecca Devlin, Andrew Dicioccio, Meghan Dolan, Craig Dolinger, Karen Faulkner, Jaren Fernan, Katelyn Fitzmorris, Korri Frampton, Elizabeth Franzone, Jason Gilbert, Alison Gladowsky, Stuart J. Goodman, Alexandra Hennessy, Kerri Hirschey, Jared P. Hollett, Amy Hsu, James Hurley, Alonzo G. Jacobs, Stefan Josephs, Edward J. Karan, Petrushka Khiamal, Joseph H. King, Hanna Kirkpatrick, Andrew S. Koenig, Alan Krystal, Patrick Lanciotti, John J. Leonard, Bryan F. Lewis, Andrew P. Manfredonia, Brittany C. Mangan, Rubaiat Mashraq, Heather McGee, Michael James Mills, Devon Palma, Anthony Parisi, III, Riley T. Perry, Joseph W. Prokop, Gisella Rivera, Peter Romero, Giuseppe Rosini, Joel R. Salinger, Robert A. Santucci, Andrew Saraga, Evan Scott Schleifer, Abbe C. Shapiro, Kenneth Silverman, AnnaElena Sinatra, Michael Stanton, Brittni Sullivan, Jennifer Tierney, Michael D. Tryon, Tiffany Villalobos, Lynn Cosma Wenkert, Brian Wilson and Arthur Yermash.**

The SCBA also welcomes its newest student members and wishes them success in their progress towards a career in the law: **Hana Boruchov, Kathryni Burkart, Christine Kummer and Rose Nankervis.**

Court of Appeals Ponders "Extreme and Outrageous" Conduct

By Patrick McCormick

If it isn't extreme and outrageous to film a trauma patient's last minutes alive, the pronouncement of his death, and the family notification, then to broadcast those intimate moments on national television in the name of entertainment, all without consent – then what is?

A recent decision from the New York State Court of Appeals leaves the legal community — and the family of that trauma patient — asking that very question.

A sanitation truck struck Mark Chanko, 83, in April of 2011, as he crossed York Avenue to buy milk at a local deli. He was still conscious and able to speak when he arrived at the emergency room of New York-Presbyterian Hospital/Weill Cornell Medical Center, but died within an hour. Chief surgery resident Sebastian Schubl pronounced Mr. Chanko dead and notified his devastated family.

Unbeknownst to the Chankos, ABC News employees filming a medical documentary series, "NY Med," had recorded Mr. Chanko's treatment in the ER — including deeply personal moments such as moans of pain, asking if his wife knew what happened, and his actual death — as well as the family receiving the shattering news.

Patrick McCormick

One evening over a year later, Mr. Chanko's wife, Anita, turned on an episode of "NY Med." She recognized Dr. Schubl, and then suddenly heard her husband's voice. The image was blurred and no name was used, but there was no doubt that she was witnessing her husband's final moments. Eventually she heard someone say, "Are you ready to pronounce him?"

Shocked by the fact that the worst night of their lives was televised to millions of people across the country without their knowledge, Mr. Chanko's family filed complaints with the New York State Department of Health, the hospital, a hospital accrediting group, and the United States Department of Health and Human Services. New York State eventually cited the hospital for violating Mr. Chanko's privacy, and the family decided to commence a lawsuit against ABC, the hospital, and Dr. Schubl, among others.

The Supreme Court ultimately dismissed all but the causes of action for breach of physician-patient confidentiality against the hospital and Dr. Schubl and intentional infliction of emotional distress against those defendants and ABC. The defendants appealed, and the Appellate Division dismissed the complaint in its entirety. *Chanko v. American Broadcasting Cos. Inc.*, 122 A.D.3d 487 (1st Dep't 2014). The Chankos were granted leave to appeal.

The Court of Appeals reinstated the breach of physician-patient privilege claim, determining that the plaintiffs had sufficiently alleged the elements for that cause of action, namely: "(1) the existence of a physician-patient relationship; (2) the physician's acquisition of information relating to the patient's treatment or diagnosis; (3) the disclosure of such confidential information to a person not connected with the patient's medical treatment, in a manner that allows the patient to be identified; (4) lack of consent for that disclosure; and (5) damages." *Chanko v. American Broadcasting Companies Inc.*, __ N.E.3d__ (2016). The court rejected the defendants' argument that the disclosed medical information must be of an embarrassing nature to support such a cause of action. The court also rejected the argument that the blurring of Mr. Chanko's face on screen and the fact that his name was not used warranted dismissal of the breach of confidentiality claim. Not only had someone outside the family recognized Mr. Chanko on the episode, but sensitive medical information and the patient's identity had been revealed to the ABC employees themselves throughout the filming and editing process. The court surmised that additional information would come out in discovery to either support or negate the plaintiffs' claim, but that they had met their burden to defeat the motion to dismiss.

Things got murkier, however, when the court turned to the intentional infliction of emotional distress claim. The court revisited the four elements of the cause of action: "(i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress." *Chanko* (2016), quoting *Howell v. New York Post Co.*, 81 N.Y.2d 115, 121 (1993). "'Liability has been found,'" the court warned, "'only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.'" *Id.*, quoting *Howell*, 81 N.Y.2d at 122.

The court ultimately determined that while the plaintiffs' allegations facially addressed all of the required elements of the claim, the allegations "do not rise to the level necessary to satisfy the outrageousness element." *Id.* While the court found the defendants' conduct "offensive," it was not "so atrocious

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FOCUS ON APPELLATE PRACTICE SPECIAL EDITION

Standing After *Aurora v Taylor*

By Glenn P. Warmuth

The New York State Court of Appeals issued a decision in the case of *Aurora Loan Services v Taylor*[1] on June 11, 2015. The main issue in *Taylor* was the proof required for a foreclosure plaintiff to overcome the affirmative defense of lack of standing. The Court of Appeals held that it is the note which is the dispositive document with respect to the issue of standing and that a foreclosure plaintiff can prove standing either by establishing that it was in physical possession of the note prior to the commencement of the action or that the note had been assigned to the plaintiff prior to the commencement of the action.

Since that time the Appellate Division, Second Department has cited *Taylor* many times including 37 cases where the issue was standing. In 33 of the 37 cases (89 percent) the court held either that the plaintiff had proven standing or the defendant had failed to prove that there was not standing.

Glenn Warmuth

The plaintiff was the appellant in nine of the 37 appeals. The plaintiff prevailed in eight of those cases. Seven involved orders, which denied plaintiff's motion for summary judgment based on a finding by the lower court that the plaintiff had failed to prove standing. All seven of those cases were reversed with the Appellate Division holding that the plaintiff had established standing by submitting an affidavit in which the affiant stated that the foreclosure plaintiff was in physical possession of the note prior to the commencement of the action.

The eighth case, *New York Community Bank v McClendon*, involved an order, which granted a defendant's motion to dismiss for lack of standing. In reversing the dismissal of the foreclosure action the Appellate Division noted that the foreclosure plaintiff had no burden of establishing standing when opposing a defendant's motion to dismiss. On such a motion the burden is on the defendant to establish that the plaintiff lacks standing.[2]

Only one plaintiff-appellant lost on the issue of standing. In *HSBC v Roumiantseva*[3] the Appellate Division affirmed the lower court's order, which dismissed plaintiff's action for lack of standing. *Roumiantseva* involved a perfect storm of evidentiary problems for the foreclosure plaintiff. First, the foreclosure plaintiff had obtained its interest in the mortgage from Mortgage Electronic Registration Systems, Inc. (MERS). MERS held only the mortgage and not the note. As such, MERS had no ability to transfer the note. Second, although the foreclosure plaintiff had an endorsed note, the endorsement was attached to the note with a paperclip. The Appellate Division held that a paperclip was insufficient and that the endorsement was not "firmly affixed" to the note as required by UCC 3-302. Third, the Appellate Division ruled that the affidavit submitted by the plaintiff was an improper surreply and should not have been considered. It is noteworthy that the dismissal was not the end of the dispute. HSBC initiated a new foreclosure action against Ms. Roumiantseva, which is currently pending.[4]

Of the cases where the defendant was the appellant, the Appellate Division affirmed the finding that there was standing in 25 out of 28 cases. In 15 of the cases, the Appellate Division affirmed the lower court's granting of summary judgment to the plaintiff and held that the plaintiff had established standing by submitting an affidavit, which established the plaintiff's physical possession of the note prior to the commencement of the action. In four cases the Appellate Division affirmed the denial of defendant's motion to dismiss. In three cases the Appellate Division affirmed the denial of defen-

(Continued on page 23)

Is the Court of Appeals Above the Law?

By Lance R. Pomerantz

In 2015, the New York Court of Appeals made waves with its decision in *Faison v. Lewis*, 25 NY 3d 220 (2015), *reh'g denied* 26 NY 3d 946 (2015). The case established the groundbreaking proposition that "a claim against a forged deed is not subject to a statute of limitations defense."[1] Relying primarily on out-of-state cases, and despite an impassioned dissent by then-Chief Judge Lippmann, the majority swept away more than a century of black letter law.

An appellate court overturning established precedent is expected in the common law tradition. In this particular case, however, it appears the court exceeded its authority.

FOCUS ON APPELLATE PRACTICE SPECIAL EDITION

The Civil Practice Law and Rules

The CPLR establishes a comprehensive scheme of statutes of limitation within which any "action … must be commenced" unless "a different time is prescribed by law." CPLR §201. Indicative of this comprehensive nature is the extensive list of specific causes of action and the statute of limitation corresponding to each found in CPLR Article 2, §§206, 211-217A, inclusive.

Lance R. Pomerantz

In addition to these 17 sections and their many subsections, numerous other statutes prescribe limitations applicable to particular causes of action (*e.g.* Public Authorities Law § 1212 (2); Highway Law §205 (2); CPLR §9802).

Recognizing the possibility there may be causes of action to which none of the CPLR Article 2 limitations and none of the other prescribed limitations apply, the CPLR includes a residual (or "catch-all") provision for "an action for which no limitation is specifically prescribed by law." CPLR 213(1).

As defined in to CPLR §105(o), "[t]he word 'law' means any statute or any civil practice rule." Thus, in both CPLR §201 and CPLR §213(1), the phrase "prescribed by law" means "prescribed by any statute or any civil practice rule." Accordingly, the common law cannot supply or alter the statute of limitations applicable to a particular action.[2]

The Holding in Faison is beyond the power of the court

"While courts have discretion to waive other time limits for good cause (*see* CPLR 2004), the Legislature has specifically enjoined that '[n]o court shall extend the time limited by law for the commencement of an action (CPLR §201….)" *McCoy v. Feinman*, 99 N.Y.2d 295, 300-301 (2002). The Court of Appeals, as much as any inferior court, is bound by legislative limits upon its power as set out in New York Constitution Art. VI, §30 and Judiciary Law §2-a.

The Court of Appeals expressly recognized the §201 limitation on its own power in *Fourth Ocean Putnam Corp. v. Interstate Wrecking Co., Inc.*, 66 N.Y.2d 38 (1985). In *Fourth Ocean*, the plaintiff sought to have the court apply a "discovery rule" to triggering the 18-month statute of limitation imposed by CPLR §9802. The court refused to do so, pointing out that "to adopt the discovery rule for which plaintiff contends would be inconsistent … with the mandate of CPLR 201 that, "No court shall extend the time limited by law for the commencement of an action," and with the implication arising from the enactment by the Legislature of discovery provisions in those cases in which it deemed discovery the proper rule…" 66 N.Y.2d 38, at 43. The court went on to emphasize that "[a]ny departure from the policies underlying these well-established precedents is a matter for the Legislature and not the courts," 66 N.Y.2d 38, at 43, *citing Fleishman v Lilly & Co.*, 62 N.Y.2d 888, 890 (1984) and *Thornton v Roosevelt Hosp.* 47 N.Y.2d 780 (1979).

By pronouncing in *Faison* that "a claim against a forged deed is not subject to a statute of limitations defense," the court has indefinitely extended the time limited by law for the commence-

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ENTERTAINMENT

And The Beat Goes On

By Cornell V. Bouse

Music seems to be a commonality among attorneys, judges, court officers and court staff. Never is it difficult to engage a discussion while awaiting a calendar call on current events in music or reminiscing on music from our younger years, music that thankfully will last forever. Bands organized by lawyers and even judges combine this love of music, the gift of talent, the spirit of giving together with the effort of members of the bar. This combination converts to proceeds donated to charity. This giving of time and talent is just another facet of the legal community giving back.

Beach Drive, a Huntington based band founded in 2006, included three lawyers at one time. In addition to monthly bar and beach gigs, they play fundraising events for the

Lloyd Harbor Historical Society, the Caumsett Foundation and The Wounded Warrior Project. Beach Drive annually raises substantial amounts of money through their performances, including an annual performance at Caumsett's Marshall Field mansion that one-year topped $22,000 for one night's performance.

Just Cause, a band founded by Suffolk County District Court Judge James Matthews, includes the judge, four lawyers and a court officer. The band plays benefits, charity functions, fire department functions, March of Dimes fund-raisers, and bar association events raising money for, among numerous other charities, Rock-Can-Roll, a feed the hungry charity.

Law Rocks is an international charitable organization bringing lawyer based rock and roll bands together for the purpose of charity. The mission of Law Rocks is to benefit local nonprofit organizations in cities around the globe through their epic fund-raising concerts, which star competing bands of talented legal professionals-turned-rockstars.

Cornell Bouse and Ron Cook at The Paramount in January.

Before the holidays, Law Rocks raised over $150,000 at the Gramercy Theatre in New York. The performing bands, which included Just Cause, had a lawyer talent base and rallied in the competition all for the benefit of various charities chosen by the given band. The recent Law Rocks concert in Manhattan, of which Just Cause was a substantial part, raised more funds than any other Law Rocks event across the globe.

The music performed by all of these lawyer-based bands bring people together as they rock in the dollars, all of which trickle down to a good cause. SCBA members are encouraged to get on the following email lists for notification of charitable events: beachdriveband@gmail.com and info@justcause.banD.

FUTURE LAWYERS FORUM

Law School Reform: Thinking Outside of the Box

By George Pammer

This column in the past has recounted the challenges law students face such as rising debt, changing bar exams, adding requirements for New York Bar admission, and employment in the field, just to name a few. All of the changes that the Court of Appeals have put in place over the last three years has done nothing to address the largest issues: debt and employment.

There has been much discussion on law schools being two years instead of the current three years. In fact this discussion dates all the way back to May 1963 in an article in the American Bar Association Journal[i]. This article, "A Proposal: Legal Education in Two Calendar Years" by David Cavers, a Fessenden Professor of Law at Harvard Law School[ii], addresses issues such as curriculum, the number of students enrolled in law school, the cost of law school and the quality of applicants. Those issues are all still being discussed 53 years later.

President Barack Obama also addressed the completion of law school in two years. The president, addressing students at Binghamton University in upstate New York, said, "I believe that law schools would probably be wise to think about being two years instead of three years. Now, the question is, can law schools maintain quality and keep good professors and sustain themselves without that third year? My suspicion is that if they thought creatively about it, they probably could."[iii]

Geiorge Pammer

Almost three years later all New York State has done was change the bar exam, add a separate New York Law Exam component and require specific elements of experiential learning in addition to the existing of pro bono requirements. The only real benefits are to the bar preparation companies and law schools. Mr. Cavers, in his 1963 article, points out that there would have to be adjustments in what is considered a semester, possibly with smaller breaks in between. Law schools and professors would need to adjust, but that certainly should not inhibit revitalizing legal education.

There is an answer, one that benefits all the issues mentioned above. Not only can you make law school two years, the third year should be a residency program. There is a desperate need in access to justice programs for representation. Residency programs can be established in public interest, the courts and private practice firms. Students would be employed, yes employed, meaning paid, in their third year before taking the bar exam, but after earning their Juris Doctorate. Imagine asking a doctor to work for free?

Compensation for such a residency should be on par with the medical field. According to the Albert Einstein College of Medicine in the Bronx, New York, a first year resident is paid $55,900 a year [iv]. There are four weeks of vacation provided a year, $15 a day in meal allowance, and malpractice insurance is provided as well as other benefits. A residency program of this nature, that is paid, addresses the major issues facing law schools and students.

Law schools would benefit by reversing the trend in declining applications and the speculation of a lower quality of a candidate. A student entering law school, knowing after completion of two years would be employed, is an incentive that is paramount. Lowering the J.D. requirement to two years realistically lowers the debt load on a student making law school financially attractive to students once again. In fact, even if law schools did not change the per credit cost, they would be financially better off by attracting more students and a better quality student.

The New York requirements would most likely be achieved successfully in the implementation of a residency program. The one-year residency would certainly satisfy the experiential learning requirement creating practice ready attorneys. In many of the residency locations, the concentration would be on New York law. Employment statistics, a very important tracking marker for the American Bar Association, would certainly rise. Preparation for the bar exam would even improve by having students working in the field for a year. Most importantly, the quality of legal service provided to clients would improve. Access to justice programs would be better staffed and clients that are economically disadvantaged would be able to have representation. The result of better representation is less strain on the court system, especially by lowering the amount of pro se litigants and adding new attorneys that have essentially become practice ready day one after the bar exam.

There are certainly going to be detractors from such a plan. Some will say you cannot squeeze three into two, some will say professors have tenure and such a drastic change cannot be made, and others will declare this is financially unfeasible. What is unfeasible is sustaining the current model. We need to start thinking out of the box before the box collapses on us.

Note: George Pammer is a 3rd year law student at Touro Law School. George is a part-time evening student and the president of the Student Bar Association. He has also held the position of vice-president in the SBA as well as in the Suffolk County Bar Association – Student Committee, where he was one of the founding members.

[i] American Bar Association Journal, Volume 49, No. 5, May 1963

[ii] ABA Journal, Volume 49, No. 5, May 1963, page 475

[iii] New York Times, August 23, 2013 "Obama Says Law School Should Be Two, Not Three, Years"

[iv] https://www.einstein.yu.edu/departments/medicine/education/residency/salary-benefits.aspx

PRACTICE MANAGEMENT

Improving and Managing Your Firm's Cash Flow

By Allison C. Shields

Good cash flow management means managing payments and collections to increase control, reduce costs and maximize the use of your money. Reviewing your cash flow can reveal a lot about the financial health of your firm, including:

- The profitability of the firm as a whole, of a particular practice area, client or matter.
- The firm's overall rate of return.
- Problems with a firm's liquidity.
- The financial risks associated with a new practice area or other initiative.

Inconsistent billing practices, long delays on accounts receivable and languishing WIP (work in process - work that has been completed, but not billed) can wreak havoc on a firm's finances.

Establish and communicate good billing practices

Good billing and financial management practices can help you to reduce receivables and eliminate or drastically reduce your collections. This begins with the initial consultation with the client and a frank discussion about fees. Many clients' complaints about legal bills arise out of surprise or lack of understanding of the original agreement, rather than a true objection to the work performed or the fee.

Allison M. Shields

It is your job as the attorney to ensure that your clients understand, acknowledge and agree to your billing practices before any work is performed. If you are hesitant, unsure or unclear about your fees, the method or timing of payment or other terms, clients will not take your fees seriously.

Don't rely solely on your retainer agreement to communicate billing and collections basics to clients; review them in your initial consultation so that you can answer any questions, clear up any misconceptions, and identify clients who are unwilling to pay. Discuss how your fees will be calculated, what the bill will contain, when clients should expect to receive bills or statements, and when and how they will be expected to pay. Don't be afraid to let clients voice their objections. It is better to lose a potential client who is not willing to pay for the work required than it is to take on a client who fails to pay after the work has already been performed.

Send bills clients understand. Your bills should always clearly state what was done, by whom and why, the fee charged, payment due date, outstanding previous balance, remaining retainer balance, and how payments can be made. Don't use legal jargon. If the client cannot understand the work your bill represents, they will be less likely to want to pay for it.

Make it easy for clients to pay by accepting credit cards or electronic payments. Consider sending clients an electronic bill that allows them to pay online.

Follow through and be consistent

Deliver bills at the same time each month and be consistent. Even if you receive payment up front, send regular statements so that clients can see the work being performed on their behalf and the status of their retainer or advance payments. If you can't be bothered to send your bill on time, why should the client pay on time? There are many good billing programs on the market that can help automate this process, reducing the length of time between completion of work and the time the bill is sent.

Establish procedures to automatically follow up with clients for unpaid amounts, whether they represent work already performed or additional advance retainer funds required.

Keep tabs on bills that are not sent or matters in which no activity was performed in order to ensure that the lack of billing or activity does not signal a problem that should be addressed immediately with the client. Don't hold bills because you're afraid to tell

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Learn how to improve your billing and collections practices

Join the Suffolk Academy of Law this summer for our "Getting Paid - Better Billing" series of lunch and learn programs. The series will cover retainer/engagement agreements, good billing practices, fee arrangements (including alternative fees), withdrawing from representation, retaining and charging liens, collections, and fee disputes.

Annual Meeting Recognizes Active Participation

Photos by Barry Smolowitz

By Laura Lane

Each year the Suffolk County Bar Association holds the Annual Meeting, a time to elect the officers, directors and members of the Nominating Committee, as well as recognize certain members with a special award. This year's meeting was held on May 2 at the bar center.

Immediate Past President Donna England presented several Awards of Recognition, including the Diamond Jubilee, given to members who have served the legal community for over 60 years. Gustave Fishell, III, a past president from 1982-83 was among them.

"My uncle who practiced in 1912 was a member of the SCBA," said Mr. Fishel, adding that before the Association had a permanent home in Hauppauge meetings were held at a restaurant. "It was understood I'd be a member. This award to me represents the efforts of so many people who advanced the Association spending countless hours for the benefit of us all. It's astonishing to see how big it is now. I am humbled by the whole thing."

Ryan Riezenman and Michael J. Brown were recognized for their work as special section editors for The Suffolk Lawyer. "I asked them to do a special section and both were happy to do it and did an excellent job," Ms. England said.

Lynn Kramer presented the Scholarship Award to Olivia N. Tockarshewsky, who attends Smithtown High School West. There were over 100 applications.

"This year the entries were fabulous," said Ms. Kramer. "Each and every one you would have loved to read. But this is the only one I picked up and said to my husband, 'You gotta hear this one.'"

Dean Harry Tilis presented Eileen Coen Cacioppo with the first Eileen Coen Cacioppo Award for Excellence to Curriculum Development, which will be presented annually. "The person receiving this award will be chosen by the Academy's board," Mr. Tilis said. "The recipient will be a person that has chosen high quality programs for the Academy, which Eileen has done along with anything I asked her to do."

After distributing several awards Ms. England summed up the reason why the SCBA possesses a stellar reputation in the legal community. "Those who give of their time and volunteer are the reason why we are the best bar association in the state of New York," she concluded.

SCBA High School Essay Contest Winner

By Olivia N. Tockarshewsky
Smithtown High School West

I will turn 18 years old in June. At 18years old, I will have most of my legal rights and responsibilities of adulthood. Among these rights include voting in the 2016 election — possibly the most controversial election to date. It will be the fifth election I am alive for; yet the first I can vote in. With this election at the forefront of the media, it is unavoidable, and I find myself becoming more wrapped up in it…

I live in one of the most conservative towns in one of the most liberal states. But regardless of my personal beliefs, I continually hear "this is the most divided the county has been since the civil war." People say this so nonchalantly; as if they don't understand the weight of these words. It amazes me that people are so consumed by their own beliefs that they fail to realize what is happening around them. We forget that this country is founded on compromise. We spend so much time making our problems larger rather than working towards a solution. Every day I watch debates break out, only to end in arguments. There have been times I have felt afraid to express my views because of the rebuke I will receive.

Smithown High School West's Olivia N. Tocharshewsky won the High School Scholarship Award.

But, the problem isn't our differences. Differences are what ignite great discoveries and spark solutions. The problem is our botched patriotism and our failure to take action. Coming from a family with two United States veterans, it is a shame to watch the disrespect they receive. We are losing sight of what is really important and instead allowing our hate and rage to overshadow our desire and determination.

Our opinions should not define us. They should not make or break our relationships. I watch adults bicker with each other like children. They complain about my generation, yet this is the example that was set for us. I find it disgusting that the people I should be looking up to are only concerned with trying to enforce their views on me.

So as this election approaches, I feel ashamed when I should feel proud. I feel intimidated when I should feel empowered. It seems that the more I try to inform myself the more confused I become.

At 18 years old, I should have the world at my fingertips. I should be able to meet new people and learn their different beliefs and ideas. I should be making connections and coming to conclusions on my own. At 18 years old I should be discovering who I am.

Yet, as an 18 year old kid I am watching my country in disbelief. So with little guidance, I attempt to choose a candidate to vote for in the 2016 election. All I can hope is that the next president will do a better job unifying America for my generation and the next generations to follow.

CIVIL RIGHTS

Surveiling Police Surveillance — Gaining Access to Police Body and Dash Cameras

By Cory Morris

Police Body Cameras are now being utilized by state and local law enforcement agencies. As novel as they are, practitioners and citizens are becoming increasingly aware that such video exists and that it should be accessible to the public vis-à-vis the New York State Freedom of Information Law ("FOIL").

"[A] free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions. The more open a government is with its citizenry, the greater the understanding and participation of the public in government."[1] Although different in degree, records of Police Body Camera footage can and should be requested via FOIL.

Police Body Cameras arrived when public outcry for government accountability was at an all time high. Since the killing of Michael Brown, some have suggested that federal funding should be allocated for state and local Police Body Cameras.[2] Statistical data regarding police killing is resounding: "In 2011, police killed six people in Australia, two in England, six in Germany and, according to an FBI count, 404 in the United States."[3] In New York, largely in response to the high profile death of Eric Garner, Gov. Andrew Cuomo indicated that New York State will be paying for these body cameras ('bodycams') and training the police who wear the same.[4] With utilization of such expansive and detailed technology, the amount of records and information held by the government is growing exponentially.

Cory Morris

Arguments exist on each side of regulating Police Body Camera disclosure. Advocates argue police bodycams could provide a similar level of accountability — a layer of extra oversight that could put citizens and officers on their best behavior. They refer to statistics garnered from the Rialto Police Dept. in California as an example. In the first year after the cameras were introduced in February 2012, the number of complaints filed against officers fell by 88 percent in comparison with the previous 12 months. And statistics indicate that use of force by officers fell by almost 60 percent over that same period.

Certain groups, such as the American Civil Liberties Union, are concerned about police officer control, the ability to stop and start a recording at one's choosing and the ability to edit footage before its review and/or release. They argue that "[p]eople across the country have demanded more openness from authorities and note that recordings have at times directly countered police versions of events. The move toward secrecy is dashing any hope that the public would have instant replay following allegations of police misconduct."[5]

Proponents against disclosure argue that the sheer amount of data coupled with the potential for misuse requires some safeguarding. They point out that officials in more than a dozen states — as well as the district — have proposed restricting access or completely withholding the footage from the public. They cite privacy concerns and the time and cost of blurring images that identify victims, witnesses or bystanders.

Still, officials in other states find enormous value in such programs and disclosure, with some believing cameras may offer more benefits than merely reduced complaints against a police force. They are trying to find out if using video evidence in court has also led to more convictions. While weighing the pros and cons of disclosure is often difficult, it is beyond discussion that, once recorded, the camera footage becomes a police agency record subject to New York's Freedom of Information Law.

Celebrating the 40th anniversary of the New York Freedom of Information Law, the executive director of the New York State Committee on Open Government "recognize[d] that our police do a remarkable service for the citizens of this state, but current laws keep vital information about police activities from the public. This corrosive lack of transparency about police activities undermines accountability and diminishes public trust. Greater transparency is urgently needed."[6] In this same vein, The New York Times did an expose article[7] that highlighted the incredible potential the Police Body Camera has to uncover government abuse. Some argue this is not much different from the footage caught by police cruisers. The question may well become that if video is accessible via the dashboard camera then why not the police officer itself?

Other states have allowed for public access to Police Body Cameras in varying degrees. The Seattle Police Department posts body camera videos on YouTube, using a computer program to block audio and blur most of the footage. Although people can request a clearer video by completing a public-records request, officials said those requests are now more selective. There is great utility in release of some of these videos. For instance, law enforcement officials acknowledge that Dashboard Cameras have exonerated officers in over 90 percent of complaints.[8] Aside from this,

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FAMILY LAW

Reviving "Unemancipation" Status in Child Support Applications

By Vesselin Mitev

Mom and Dad settle their divorce and agree on boilerplate conditions of emancipation for the children: turning 21, or becoming independent through full-time employment, or marriage, or entry into the military service. Because they have fancy lawyers, two other conditions are also written in, "conduct as set forth in the seminal case of *Roe v. Doe*, 29 NY 2d 188 (1971) and, separately, conduct as set forth in the case of *Cohen v. Schnepf*, 94 Ad2d 783 (2d Dept. 1983)" dealing with constructive emancipation of the children.

The oldest child then enters the U.S. Army, triggering the bargained-for contractual emancipation clause of "entry into the military service." This event is also memorialized in a court order dealing with arrears of child support add-ons. Sometime later, the child is discharged (honorably, let's say) prior to turning 21 and returns to live with non-custodial parent Dad. Dad, although the monied (ex) spouse, wastes no time in hustling back to court to file a support petition for the child.

As Mom's attorney, do you a) advise your client that she owes the child support; or b) move to dismiss and seek attorneys' fees for the inconvenience of having to oppose an obtuse application?

Choice "a" might seem like the obvious, easy answer. But there is plenty of grist for the mill should you choose option "b." While parents have a duty to support their child(ren) until age 21, (Family Court Act 413, it is equally well settled that parties can arrange their obligations vis a vis each other via a legally binding contract, which is the stipulation of settlement. At least one court has held that a court absolutely lacks the authority to reform the parties' contract under the guise of interpreting it, even with respect to child support, *Mark D. v. Brenda D.*, 27 Misc. 3d 713 (Sup. Ct. Nassau County 2010).

Vesselin Mitev

But the overarching issue is can a child's unemancipated status be "revived" by dint of an emancipation event ending, absent such an agreed-upon provision in the parties' agreement. Only one of the standard, boilerplate emancipation events is truly set in stone: turning 21. All others can revert back to "unemancipation" status, e.g., a full-time employment can be lost, a married child can be divorced, and an armed forces entrant can be discharged, but obviously, a child will never go back to being 19 after turning 21.

Self-evidently, such oscillations between statuses (emancipated vs. unemancipated) would, taken to their logical conclusions, grind the courts to a halt, should a petition be filed each time status changed, i.e., Bobby is 19, fully independent by dint of his full-time job, loses said job on Tuesday, is unemployed through Friday, then regains another full-time job on Monday; is anyone on the hook for those five days during which Bobby reverted back to "unemancipated" status? Since the law does not concern itself with trifles, the inquiry is academic.

Few courts have bothered with this analysis and the takeaway standard is as generic as it is unhelpful, at least at first blush: "…a child's unemancipated status may be revived, provided there has been a sufficient change in circumstances to warrant the corresponding change in status" see *Bogin v. Goodrich*, 265 A.D.2d 779 (3d Dept. 1999).

Dissecting those three lines reveals, importantly, that reversion is not mandatory but discretionary — "may be revived" — and that further, such discretion hinges on whether there has been a "sufficient change in circumstances" to warrant the corresponding change in status.

Provided that the agreement between the parties did not contemplate a discharge from military service as a reverting event, a solid argument may be made that the parties necessarily anticipated that discharge was a possibility (as was a divorce in the event of a child's marriage, or a loss of full-time employment) and that they chose not to include such language in their binding contract.

To be sure, the standard is "unanticipated and unreasonable" change in circumstances resulting in a concomitant need, where the parties have come to an agreement regarding child support, thus mounting an even thornier obstacle to the reversion argument. Parenthetically, it appears that only one court, out of the Fourth Department, (in a strained, circular decision) has held that a child's return to the *non-custodial* parent constituted a sufficient change in circumstances to revive the unemancipated status, *Baker v. Baker*, 129 AD3d 1541 (4th Dept. 2015).

In short, it is far from automatic that simply because a child has lost its emancipated status, that either party is responsible for payment of any child support. Instead, the case law suggests a detailed, factual analysis must be undertaken by the court that includes, as a preliminary matter, deciding whether inquiry into the matter is foreclosed due to any bargained-for terms and provisions in the parties' agreement; then consideration of whether the change is "unanticipated and unreasonable" and has resulted in a concomitant need, before deciding that revival of the emancipation status "may," not "should" occur.

Note: Vesselin Mitev is a partner at Ray, Mitev & Associates, a New York litigation boutique with offices in Manhattan and on Long Island. His practice is 100 percent devoted to litigation, including trial, of all matters including criminal, matrimonial/family law, Article 78 proceedings and appeals.

Deflategate Revisited

Lisa Pomerantz

By Lisa Renee Pomerantz

As reported in my October 2015 column, U.S. District Judge Berman had vacated an arbitral award of NFL Commissioner Roger Goodell suspending New England Patriots quarterback Tom Brady for four months for his involvement in the deflation of playoff game footballs below league inflation requirements. On April 25, 2016, by a two to one majority, the Court of Appeals reversed Judge Berman's ruling and directed that the award be confirmed.

Key to the Court of Appeals' decision were the specific provisions of the NFL Players Collective Bargaining Agreement granting the commissioner broad authority to preserve the integrity of the game and investing him with a multitude of responsibilities in the disciplinary process. Specifically, Article 46 of the CBA "empowers the Commissioner to take disciplinary action against a player whom he 'reasonable judge[s]' to have engaged in conduct detrimental to the integrity of, or public confidence in, the game of professional football.'" This broad authority negated Brady's argument that the suspension was not authorized by the specific policy on Uniform and Equipment Violations distributed to the players that provided for "fines" for initial offenses. The Court of Appeals also ruled that Article 46 was sufficiently broad to authorize the imposition of discipline for Brady's failure to cooperate with the investigation and his destruction of his cell phone purportedly containing relevant communications with the equipment managers.

The Court of Appeals also rejected Brady's argument that the arbitration procedure under which Commission Goodell heard the appeal from his own disciplinary ruling was essentially unfair. The court observed that the CBA specifically authorized the commissioner to investigate rule violations, impose sanctions, and hear appeals challenging such sanctions. It commented: "Although this tripartite regime may appear somewhat unorthodox, it is the regime bargained for and agreed upon by the parties ... " The court similarly rejected various objections to the commissioner's evidentiary and procedural rulings as arbitrator, noting that the CBA specified no procedural rules other than the exchange of exhibits by the parties. Thus, the CBA granted both broad substantive and procedural discretion to the commissioner in his capacity as arbitrator.

While Brady's objections to the arbitral process may not have been sufficient to overturn the commissioner's rulings, they do state legitimate concerns that parties should consider in crafting dispute resolution provisions in commercial or employment agreements. Especially given the lack of judicial review of arbitral decisions, the parties should incorporate provisions to ensure the neutrality of the arbitrator and the fairness of the process.

Note: Lisa Renee Pomerantz is a business and employment attorney in Suffolk County, New York. She is a mediator and arbitrator on the AAA Commercial Panel, represents clients in settlement discussions, mediations and arbitrations, and serves on the Advisory Council of the Commercial Section of the Association for Conflict Resolution. She can be reached at lisa@lisapom.com or (631) 244-1482.

LITIGATION

Serving as a Financial Expert in a Wrongful Death Case

By Andrew P. Ross

Our firm was recently hired as an expert for the defendant in a wrongful death case. The decedent was an individual who, while assisting a distressed individual at the roadside, was struck and killed by the driver of an automobile driven by the defendant. We were retained to estimate the decedent's future lost earnings.

What made this matter most challenging was that the decedent's income tax return, for the year of death, reflected gross income that was many times higher than that of any of the prior years. The largest portion of the decedent's gross income was comprised of his self-employment earnings from primary occupation. Additionally, the decedent's income tax return reflected interest and dividend income along with the income from the surrender of an annuity. At the time of death, both the decedent and his wife were collecting social security. These benefits were also included on the income tax filing.

The plaintiff's Bill of Particulars included a computation of alleged damages based on all of the components of income discussed above. Also included in this computation was an additional amount of pro-rata self-employment earnings for the remaining months of the year subsequent to the death of the decedent. In other words, the plaintiff's estate claimed that since the decedent had self-employment earnings of $420,000 through September 30, the date of death, then presumably, he would have earned another $140,000 for the remainder of the year, should he have lived. This resulted in claimed self-employment earnings of $560,000 for the year.

Andrew Ross

The first task was to understand the nature of the $420,000 of self-employment earnings reported on the decedent's income tax return. This was critical because this amount was many times higher than what the decedent ever earned in the years leading up to his death. Fortunately, the decedent's long-time accountant and business confidant was scheduled to be deposed. Defendant's counsel received assistance in developing specific accounting and tax questions that would get to the heart of the matter. At the accountant's deposition it was learned that the decedent had worked on a few very large projects that spanned multiple years. These specific projects provided for large payouts at the end of the respective assignments rather than over the years as the decedent's services were provided. These payouts indeed occurred in January of the year the plaintiff was killed and therefore, because the decedent reported his income on the cash-basis, was reported on his final income tax return. This had the impact of deferring several year's worth of earnings into a year where little or no related services were provided, thus grossly distorting his annual earnings.

This valuable information validated the propriety of using the average of the reported income over the past several years up to his date of death. This average better reflected the decedent's expected future self-employment earnings. Employing this methodology resulted in annual future self-employment earnings of just under $140,000, not $560,000 as stated in the Bill of Particulars. The challenge became articulating to the jury the difference between the concepts of income "received" versus income "earned." This would require a bit of rehearsing since experts should not overcomplicate issues when articulating the conclusions to a jury.

Just prior to the drafting of the Expert Report a "data dump" was just received from the decedent's accountant. Shortly thereafter, an email chain was located between the accountant and an actuary who had just been retained to put in place a pension plan that was intended to be implemented in the ensuing months. These emails occurred just months before the death of the decedent. The actuary emailed the accountant asking if $350,000 in compensation was a reasonable estimate for the future. The accountant replied that $150,000 is a much better estimate to use. This was a valuable piece of information that buttressed the $140,000 conclusion of future annual self-employment earnings.

The Expert Report described in detail the calculations in arriving at the $140,000 of future annual self-employment earnings. The email exchange was included as an exhibit in the report. Next, it was demonstrated that the concept of including in the damage calculation the interest and dividend income (as well as the annuity income) was incorrect. This was later conceded by the plaintiff.

The defendant's forensic expert never made it to the witness stand. Like so many cases, this one settled the night before he was scheduled to testify. Defendant's counsel stated that the Expert Report played a positive role in achieving a favorable settlement.

Note: Andrew P. Ross, CPA, CFE, CVA, PFS, is a Partner at Gettry Marcus CPA, P.C. He is a Certified Public Accountant, Certified Fraud Examiner and Certified Valuation Analyst and a member of the firm's Business Valuation & Litigation Services Group. With over 30 years of experience, Mr. Ross provides audit, tax and litigation services to his clients, many of whom are in the service, manufacturing and wholesale industries. Andy can be contacted at aross@gettrymarcus.com or (516) 364-3390 x246.

TAX

The "Independent Investor Test"

By Louis Vlahos

This is part two of a two part series.

I'm sure you are familiar with the basic economic principle that the owners of an enterprise with significant capital are entitled to a return on their investment. Thus, a corporation's consistent payment of salaries to its shareholder-employees in amounts that leave insufficient funds available to provide an adequate return to the shareholders on their invested capital indicates that a portion of the amounts paid as salaries is actually a distribution of earnings.

The "independent investor test," the court noted, recognizes that shareholder-employees may be economically indifferent to whether payments they receive from their corporation are labeled as compensation or as dividends.

From a tax standpoint, however, only compensation is deductible to the corporation; dividends are not. Therefore, the shareholder-employees and their corporations generally have a bias toward labeling payments as compensation rather than dividends, without the arm's-length check that would be in place if nonemployees owned significant interests in the corporation.

Louis Vlahos

Thus, the courts consider whether ostensible salary payments to shareholder-employees meet the standards for deductibility by taking the perspective of a hypothetical "independent investor" who is not also an employee.

Ostensible compensation payments made to shareholder-employees by a corporation with significant capital that "zero out" the corporation's income, and leave no return on the shareholders' investments, fail the independent investor test. An independent (non-employee) shareholder would probably not approve of a compensation arrangement pursuant to which the bulk of the corporation's earnings are being paid out in the form of compensation, so that the corporate profits, after payment of the compensation, do not represent a reasonable return on the shareholder's equity in the corporation.

The record established that taxpayer had substantial capital even without regard to any intangible assets, although taxpayer's expert witness admitted, at trial, that a firm's reputation and customer list could be valuable entity-level assets.

Invested capital of the magnitude described in the decision, the court said, could not be disregarded in determining whether ostensible compensation paid to shareholder-employees was really a distribution of earnings. The court did not believe that taxpayer's shareholder-attorneys, were they not also employees, would have forgone any return on this invested capital. Thus, taxpayer's practice of paying out year-end bonuses to its shareholder-attorneys that eliminated its book income failed the independent investor test.

Exemption from the Independent Investor Test?

Taxpayer observed that its shareholder-attorneys held their stock in the corporation in connection with their employment, they acquired their stock at a price equal to its cash book value and they had to sell their stock back to taxpayer at a price determined under the same formula upon terminating their employment. Taxpayer suggested that, as a result of this arrangement, its shareholder-attorneys lacked the normal rights of equity owners.

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HEALTH AND HOSPITAL

ERISA Impacts States' Ability to Collect Healthcare Data

By James G. Fouassier

Last month I wrote about the U.S. Supreme Court's recent decision holding, that ERISA precluded a nationwide patient class action arising out of the massive *Anthem Health* data breach because the claims asserted in the class action were based on violations of state statutes and state common law. ERISA preempts state law based causes of action, and employer funded health plan "beneficiaries" (meaning the member patients and their proper provider assignees) are relegated solely to the remedies that are established in ERISA.

This month I report on yet another ERISA case that continues the trend of the U.S. Supreme Court in stripping state law of any meaningful impact on payment and eligibility decisions rendered by ERISA qualified health plans. This time the case involves a state law requiring a variety of health insurers, plans and payors to report payments related to health care claims for inclusion in an "all payer" health care data base. Those of you who have some familiarity with New York's new *Fair Health* data repository understand the rationale. New models of health care delivery invest patients with more responsibility for their health care choices. This, in turn, requires that the patient have access to quality and cost transparency data. In addition, the nagging issue of how much plans, payers and patients should have to pay "out of network" providers, and what constitutes "usual and customary" or "fair and reasonable" charges, are everyday problems with which state regulators continue to grapple. Resolutions depend in considerable part on the accumulation, analysis, and public availability of large quantities of health care quality and payment data.

James G. Fouassier

Some time ago Vermont enacted a law requiring all health insurers and plans operating within that state covering more than 200 members to report data on the costs for health care utilization and services provided in the state and, for Vermont residents, provided outside the state. In doing so it joined 17 other states that have similar reporting requirements (including New York). The precise types and quantities of data to be reported were dictated by a state regulatory agency called the *Vermont Healthcare Claims Uniform Reporting and Evaluation System*. The implementing regulations require health plans and their third party administrators to report medical claims data, pharmacy data, member eligibility data, provider data and much more.

Liberty Mutual Insurance Company covers its employees and their families in all 50 states. In Vermont the Liberty Mutual plan is administered by BlueCross BlueShield of Massachusetts ("BCBSM"). Although the plan itself covers fewer than 200 members, BCBSM is a third party administrator for several thousand Vermont members covered by a number of health plans, thus is included in the scope of the reporting requirements.

Vermont ordered BCBSM to report data for the Liberty Mutual plan in 2011. The plan fiduciary, concerned that disclosure might violate confidentiality, directed BCBSM not to comply, and instituted an action for declaratory relief in the federal district court. In brief, the plan argued that ERISA preempts the application of Vermont law because the law impermissibly interferes with the administration of a health plan that is intended by Congress to be regulated solely by federal law.

The district court granted summary judgment to the state, finding that although the law had some "indirect" impact on the ERISA plan its effect was so peripheral that the regulation could not be considered an attempt to interfere with the administration of the plan and hence did not run afoul of ERISA preemption. (A state law, regulation or cause of action must have more than a slight or "indirect" impact on an ERISA plan to invoke preemption.) *Liberty Mutual Insurance Co. v. Kimbell*, 2012 U.S. Dist. LEXIS 161069 (D. Vt. 11-9-12)

The Second Circuit reversed in a decision dividing on the preemption issue. The majority found that if one of ERISA's core functions — reporting data — were the subject of different laws and regulations in each state, then

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TRUSTS AND ESTATES UPDATE

By Ilene Sherwyn Cooper

Removal of co-trustee Denied

In *In re Burack*, one of the decedent's four children, a co-trustee of the testamentary trust created for the benefit of the decedent's surviving spouse, petitioned the Surrogate's Court, New York County, seeking the removal of one of her co-fiduciaries.

The terms of the subject trust, of which the petitioner, the decedent's spouse, and the respondent were co-trustees, provided principally for the decedent's spouse during her lifetime, and for his children and grandchildren upon her death. The trust was funded with two of the decedent's apartments, one, located in New York, and the other in Florida, and gave the decedent's surviving spouse the right to live in one or both of the properties, or to direct the trustees to sell same and to use the proceeds thereof to purchase a replacement property.

In support of her application for removal, the petitioner alleged that the respondent was ineligible to serve as trustee by virtue of his disbarment from the practice of law in 1995, as a result of his commingling of client funds. In addition, the petitioner claimed that the respondent engaged in self-dealing by approving a loan of trust funds to the decedent's spouse in order to facilitate her purchase of a home to be used as her residence.

The court noted that courts are required to exercise the power of removal sparingly and to nullify the testator's choice of fiduciary only upon a clear showing of serious misconduct that endangers the safety of the estate. Within this context, the petitioner alleged that the respondent's disbarment for the mishandling of client funds was evidence of his dishonesty that put the assets of the trust estate at risk. The court opined that as a general matter, an attorney's disbarment, particularly for conduct involving dishonesty, fraud, deceit or misrepresentation, would raise reasonable apprehension that the funds of an estate would be in jeopardy, or at the very least, create cause for concern.

Nevertheless, the court found the facts and circumstances of the case alleviated any apprehension that the trust estate was in danger. More specifically, the court noted that the respondent was one of three trustees and could not act alone. Additionally, the record indicated that the respondent had voluntarily resigned from the practicing bar after acknowledging that he was the subject of an investigation that he had commingled client funds. Although petitioner alleged that the respondent had deceived the decedent and his family into believing that he was still an attorney at the time he executed his will and after relinquishing his license, the court found that petitioner had failed to demonstrate the truth of these allegations, and that, instead, the record revealed that the decedent regarded the respondent as a friend and employed him for his services as an accountant and financial advisor, rather than as an attorney. In fact, it appeared that the decedent had sought legal advice from someone other than the respondent in connection with his estate plan and legal affairs.

Ilene S. Cooper

In addition to the foregoing, petitioner claimed that the respondent should be removed for aiding and abetting the self-dealing of his co-trustee, the decedent's spouse. Specifically, the petitioner pointed to the fact that in order to purchase her home, the decedent's spouse was required to advance her personal funds to the estate as a loan, pending the sale of the two apartments owned by the trust in New York and Florida. The record reflected that when those properties were sold, the decedent's spouse was repaid, without interest.

Based on the foregoing, the court concluded that the advance of funds to the trust by the decedent's spouse as a loan, in order to facilitate the purchase of a new home upon the sale of the decedent's apartments, was not an act of self-dealing, but rather, was in keeping with the terms of the trust. Indeed, the court held that the subject loan did not constitute self-dealing as the decedent's spouse did not personally benefit from the transaction, nor place her interests in competition with those of the trust.

Accordingly, the court concluded that petitioner had failed to demonstrate that the respondent had neglected his fiduciary duties, and denied her application for removal.

***In re Burack*, NYLJ, Sept. 11, 2015, at p. 23 (Sur. Ct. New York County)(Sur. Mella).**

Quantum of Proof Necessary to Invalidate Elective Share Defined.

In *Matter of Berk*, the Appellate Division, Second Department, modified an order of the Surrogate's Court, Kings County (Johnson, S.), by (1) adding as an issue of fact to be tried the question of whether the petitioner, the decedent's surviving spouse, exercised undue influence upon the decedent to induce him to marry her for the purpose of obtaining pecuniary benefits from his estate, and (2) replacing so much of the order, as imposed the burden of proof on appellants, the executors of the estate, by clear and convincing evidence, with a provision that placed the burden of proof on appellants by a preponderance of the credible evidence.

The underlying proceeding involved a petition by the surviving spouse of the decedent for a determination of the validity and effect of her exercise of her right of election against his estate, pursuant to EPTL 5-1.1-A. In their answer, the appellants, the executors of the estate, asserted as an affirmative defense that the decedent was incompetent to enter into a marriage, that the petitioner knew that he was incapable of entering into a marriage, and that the petitioner had exercised undue influence over the decedent to convince him to marry her.

On a prior appeal, the Appellate Division, Second Department, reversed an order granting summary judgment to the petitioner, finding that there was an issue of fact as to whether the petitioner had forfeited her right of election by her alleged wrongdoing; that is, by marrying the decedent knowing that he was mentally incapable of consenting to a marriage for the purpose of obtaining pecuniary benefits from his estate. The court further ruled that the appellants' counterclaims alleging undue influence were improperly dismissed.

On remitter to the Surrogate's Court, Kings County, the parties submitted proposed statements of the issues to be determined at trial, as well as proposals concerning the burden and quantum of proof on the issues. In the order appealed from, the Surrogate's Court limited the issues for trial to whether the decedent was mentally incapacitated and incapable of consenting to his marriage to the petitioner, and if so, whether the petitioner took unfair advantage of him by marrying him for the purpose of availing herself, as his surviving spouse, of his estate at death. The Surrogate further ruled that the appellants/executors had the burden of proof on the issues by clear and convincing evidence. The Surrogate did not include the issue of undue influence as a matter to be determined. The executors appealed.

The court opined that the issue of whether the petitioner had forfeited her elective share under the circumstances raised by the proceeding was based on the equitable doctrine that the petitioner should not profit from her own wrongdoing. Where a claim of wrongful conduct is made, the parties asserting same, i.e. the appellants, have the burden of proving the wrongdoing by a preponderance of the evidence. The court further held that evidence of a confidential relationship between the petitioner and the decedent, by virtue of their marriage, was not, in itself, proof of the petitioner's wrongdoing, and, as such, did not shift the burden of proof to the petitioner to prove otherwise.

Additionally, the court held that an alternative ground for forfeiture of the right of election was whether, the petitioner exercised undue influence upon the decedent to induce him to marry her. Again, the court determined that the appellants had the burden of proof on this issue by a preponderance of the credible evidence.

***Matter of Berk*, NYLJ, Nov. 30, 2015, at p. 25 (App. Div., 2d Dep't).**

Attorney-client privilege

In *Stevens v. Cahill, Jr.*, the Surrogate's Court, New York County, was confronted with a motion to quash a subpoena served by the defendants on counsel for the plaintiff, and for a protective order. The underlying action, which was transferred from the Supreme Court to the Surrogate's Court, involved ownership of four works of art, which the plaintiff claimed were gifted to her by the decedent, who was her long-term romantic partner. Also at issue was the ownership of shares in a New York condominium, as well as the contents of the condominium unit, and the proceeds of a bank account.

On the return date of the motion, the plaintiff was directed to provide, for the court's *in camera* examination, the documents she withheld from production on the grounds of privilege, including correspondence between her and her attorney. Upon such review, the court noted the subject documents related to invoices from the gallery at which the subject artwork was purchased.

According to the defendants, certain of these invoices were modified or revised after the decedent's death and were given by the plaintiff to her counsel, who then provided them to defendants' counsel. More specifically, although identically dated and referring to the same works of art, one set of invoices listed the plaintiff's name alone, and a second set listed the decedent's name on two invoices, the decedent and plaintiff's name on another invoice, and the decedent's place of employment on yet another invoice. Further, it appeared that upon receipt of the invoices listing plaintiff's name alone, plaintiff's attorney prepared bills of sale and an affidavit for approval by the gallery through which plaintiff obtained the artwork.

Based upon the foregoing, the defendants sought to depose plaintiff's counsel, and to obtain from him correspondence with the plaintiff, as well as other attorneys representing her. Claiming that the crime-fraud exception applied, the defendants argued that the attorney-client privilege and work product privilege did not preclude production of the information.

The court opined that the attorney-client privilege and the privilege accorded work product prepared in anticipation of litigation may yield to an adversary's need for discovery when the information sought "involves client communications that may have been in furtherance of a fraudulent scheme, and alleged breach of fiduciary duty, or an accusation of some other wrongful conduct." (*citations omitted*). Within this context, the court found that the documents submitted for *in camera* review provided adequate reason to apply the foregoing exception to the privilege rules. Significantly, in this regard, the court found that the communications were relevant to the issue of whether the invoices were tampered with, and that there was "probable cause to believe" that they involved possible client wrongdoing, and furtherance of such wrongdoing by counsel. The fact that counsel may have been unaware of such wrongdoing did not prohibit discovery from the attorney under the exception. Accordingly, the court directed production of all documents relating to the subject invoices.

On the other hand, the court held that the defendants had not made a sufficient showing to allow an examination of plaintiff's counsel, to wit, that no other means existed to obtain the information

(Continued on page 27)

CYBER

An introduction to ESI and E discovery

By Victor John Yannacone Jr.

You create ESI — Electronically stored information — every time you log on to your desktop computer, laptop, tablet or smart phone regardless of whether you enter information or merely read e-mail or search the web.

ESI can be found in many places and appears in many forms limited only by the ingenuity of software engineers and marketing efforts of the companies offering "solutions" to complex problems through computers.

E-discovery is all about ESI. ESI is more than just e-mail and social media. It is the content of every other form of electronic communication used today and those that have not yet become commercially available but soon will be. Attorneys must always remember that the "e" in E-discovery as in e-mail really means "evidence!"

Just a few preliminary questions

You do have the security features enabled on your mobile devices, don't you?

A login using some kind of password or code is required, isn't it?

Your passwords are complex and secure, aren't they?

Cybersecurity considerations are always on your mind whenever you access the World Wide Web (www), a network, or open your device to the Internet, aren't they?

Victor John Yannacone Jr.

E-discovery a critical area of cyberlaw

The modern era in E-discovery began in 2003 when Laura Zubulake was awarded $29.3 million due to an "adverse inference" instruction.[i] New York Courts follow the *Zubulake* rules.

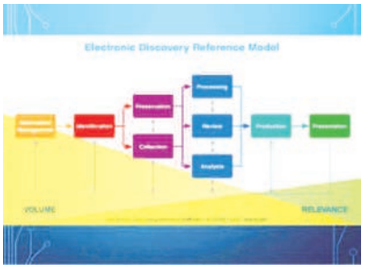
E-discovery is expensive and it can quickly become *very* expensive. If you represent a business, an individual engaged in business, or a not-for-profit organization, any of which use computers of any kind, including smart phones and tablets, you must advise your clients that they have a duty to protect and, to a limited extent, preserve ESI.

One of the most important cyberlaw obligations of any attorney is to advise their clients to establish, maintain, and rigorously monitor a formal document retention and destruction schedule.

Without it, your clients may face almost unlimited costs for ESI production during e-discovery when they eventually become involved in any kind of litigation.

The model

There is actually a generally accepted "Electronic Discovery Reference Model."



Privacy and privilege

In 2006, Rule 16 and Rule 26 of the *Federal Rules of Civil Procedure* were amended to specifically include ESI, and the more recent amendments of December 2015 further address ESI issues and underline their importance in modern litigation.

The courts are moving towards a position that there can be no expectation of privacy associated with unencrypted electronic data. The controversy between the FBI and Apple Computer over a password-protected iPhone indicates that from the perspective of law enforcement, no electronic communication or ESI is "private" and may have to be produced on demand. The other federal alphabet agencies to more such as SEC, EPA, and OSHA are not far behind.

Although electronic communications and ESI may not be private, they may be subject to assertion of a privilege particularly where attorneys are parties to the communication or responsible for creation of the ESI. Fortunately, Rule 502 of the *Federal Rules of Evidence* provides some protection of attorney client privilege in cases of inadvertent disclosure during litigation.

Attorneys are expected to be aware of the information that will eventually be extracted from the metadata associated with ESI, particularly that contained in their own electronic communications. Metadata is essentially the

(Continued on page 26)

Pride in the Profession *(Continued from page 1)*

by preserving the Union, was a lawyer.

In 1870, just five years after the end of the Civil War, a group of lawyers in Manhattan formed the first Bar Association in America, the New York City Bar Association. Only seven years later in 1877, the charter of the New York State Bar Association was filed in Albany, followed by the creation of the American Bar Association in 1878. And in 1908, during a meeting in Riverhead, N.Y., Walter H. Jaycox, the Hon. Timothy Griffing and the Hon. Joseph Belford prepared a charter that was filed in Albany thereby creating the Suffolk County Bar Association. This year we proudly celebrate our 108th year.

Jumping 45 years or so ahead, we saw that when the federal and state government did not stop segregation in the schools, it was lawyers who took action through the courts to end segregation. Their efforts culminated in the Supreme Court's 1954 decision in *Brown vs. The Board of Education*, a case many believe led inexorably to the enactment of the Civil Rights Act of 1964, ten years later.

But a principal theme I would like to promote during my year as president, is "Pride in the Profession." So rather than look only at some of the historical reasons to be proud, let's look at what lawyers do today that justifies a sense of pride.

We practice our profession within the largest, most complex economy in the world and in one of the most complicated legal systems in history. Our government was founded on the principle of federalism, the idea that the federal executive, legislative and judicial branches have certain designated powers and the states and the people have all powers not delegated in the Constitution to the federal government.

And so, we have a United States Code and codes in each of the 50 states. In each state there are local codes, often within each county in the state. Nor does the complexity stop there. In addition to statutory law, there is judge- made law, which carries with it the principles of binding precedent and *stare deci*sis. As lawyers, we are called upon to represent our clients in this regulatory maze. And we respond to this call every day, acting on behalf of our clients to the best of our professional ability.

We practice our profession in a free society in which every individual, both citizen and non-citizen alike, has rights protected by law. Each day in our society a multitude of disputes involving government, business and human rights arises. It is we lawyers who are charged with the responsibility of reconciling these conflicting interests and devising strategies and solutions that work for citizens, consumers, businesses and government. Without lawyers many of these disputes would remain unresolved or would be resolved through non-lawful means.

Being a lawyer often means righting wrongs and protecting others from those with more power. It is through the efforts of lawyers that the ordinary citizen is protected from governmental overreach or erroneous criminal prosecution.

Frequently laws are written or influenced by lobbyists for big business who stack the odds in favor of their clients. It is the lawyer's skill and knowledge that is the equalizer in these David and Goliath battles.

While most corporations are good corporate citizens and are socially responsible, some put a higher value on the bottom line than on public safety. Lawyers know that the right to a trial by jury is a powerful equalizer that allows an individual to prevent an imprudent corporation from selling a dangerous product or punishing those that do.

When peoples' lives are transformed or lost due to grave medical error, it is the lawyer who seeks compensation for them or their families.

It is also the lawyer who guides people through the emotionally wrenching experiences that arise when a marriage ends or a loved one dies and his or her estate needs to be managed and distributed, often to heirs that seem more focused on their inheritances than their loss of the decedent.

It is the lawyer who protects the financial interest of business partners when they wish to create, sell or dissolve their business, or when once friendly partners can no longer get along and the assets of the business need to be divided.

It is the lawyer who helps the child with special needs who is denied an individualized education plan because of a misguided intent to save money.

I'm sure many of us here tonight can think of a myriad of other ways that attorneys help people with the financial and emotional challenges they face every day.

In addition to protecting the rights of individuals, lawyers are also called upon to resolve complex societal, political and cultural issues. Thanks to the genius of people like Bill Gates, Steve Jobs, Marc Zuckerberg and Jeff Bezos, our economy is not only complex, but dynamic, with new technologies seeming to be introduced almost daily. These technologies bring with them a host of novel issues whose legal parameters need to be defined. Who else but members of the Bench and Bar is there to do that?

Although Facebook and Twitter have created new connections never before possible, they have also given rise to societal problems such as sexting, cyberbullying and on-line defamation. As we travel with our smart phones and surf the web, we leave digital fingerprints in our wake. How far can government or those who would take economic or social advantage of us by tracing these fingerprints go without an unwelcome and unlawful incursion into our private lives?

Should an employer be able to use social media to discover information about a prospective hire that may be used for discriminatory purposes? How should drones be regulated? Should a policeman involved in an ordinary traffic stop be permitted to search the contents of our smartphone? It is up to us as lawyers to provide answers to these questions.

Just a few days ago, the Fourth Circuit was called upon to decide whether a law enforcement agency's request to a cell phone carrier for the cell phone records of a suspect in order to track the suspect's location data is a search protected by the Fourth Amendment.

Reasoning that there was no reasonable expectation of privacy for information voluntarily provided to a third party cell phone carrier, the Fourth Circuit ruled in a 12-3 *en banc* decision that the Fourth Amendment did not protect such a search. This momentous decision, affecting millions, was reached through the efforts of 15 jurists, their law clerks, and the attorneys advocating for the parties on each side of the issue.

As members of the Bench and the Bar we have been, are, and will be called upon to devise solutions to these types of complex and consequential issues. I have no doubt that we will be successful because we lawyers have a flair for analysis, an ability to look at facts critically and dispassionately, a talent for inventiveness, and a deep understanding of the need to protect and preserve human rights and dignity.

In addition to the roles lawyers have played throughout history and continue to play today in protecting individual rights and devising solutions that allow people to adapt to an ever changing society, my experience with members of our Bar Association over the years has convinced me that we have another reason to be proud.

Contrary to the media-generated image of the "greedy" lawyer, I have found that lawyers give generously of their time, knowledge and talents for the public good. In my experience, these contributions are often unheralded and unknown.

We have many examples of the generosity of lawyers right here in our Bar Association. This year over 60 of our members volunteered their time and expertise to act as judges and coaches in a high school moot court competition involving 25 high schools across the Island. The program was headed by a former Dean of our Academy of Law, Alan Todd Costell, who has organized and administered the program for 25 years.

Another member of our Association, Charles Russo, started a charitable endeavor known as "Holiday Magic" over 30 years ago. The program delivers toys and other gifts to children who are homeless, in foster care or living in shelters. During the years that Charlie has been running this program, it has grown so that over 7,500 children each year receive a gift during the holiday season. In 2008 the New York State Bar Association awarded Charlie the Root/Stimson Award, which is given to a lawyer in New York State who demonstrates outstanding commitment to the community.

The attorney volunteers of our Bar Association's Charity Foundation use an endowment and organize fundraisers to purchase duffle bags for children who are removed from abusive or neglectful homes so that these children don't have to pack their belongings in paper bags when leaving their homes. The funds raised by the Foundation are also used to purchase portable cribs for infants who are being placed in foster care and for gift cards so that children placed in foster care and their parents can enjoy lunch together.

Several members of our Association serve as legal guardians for people who are unable to care for themselves or manage their finances in cases where there is no money to pay these attorneys for their services. These appointments often take countless hours of time, sometimes over a span of years.

Volunteers in our Association's Pro Bono Project work with Nassau-Suffolk Law Services to provide free legal services in matrimonial and bankruptcy matters and Veterans' affairs to people who cannot afford to hire an attorney.

Lawyers in our Academy of Law and on our Bar Committees donate their time, knowledge and talents to educating the public and other attorneys by lecturing or writing in newspapers and journals. The motto that appears on the Academy's logo, "Justitia per Eruditionem"– Justice through Knowledge — tells all we need to know about what motivates these volunteer lawyers.

Members of our Association also serve on the boards of community service, charitable and other public interest organizations. In many cases they also provide legal advice and services to such organizations without charge.

Although these are examples of *pro bono* work done through our Bar Association, go to the website of other Bar Associations across the country and you'll find similar volunteer programs undertaken by attorneys for the public good.

For all of these reasons and more, I am truly thankful and proud that I can call myself a lawyer. I suggest to you that we should ignore the media's caricature of lawyers and judge the worthiness of our profession by the overwhelming evidence of its nobility and stature that has withstood the test of time.

Shakespeare died 400 years ago in 1616. Even more than four centuries ago then, the importance of lawyers in maintaining the civil society was evident. So the next time you hear an errant Shakespearean authority repeat Dick the Butcher's infamous line, ask them to tell you what they think would happen to our society if people actually followed Dick's advice.

Installation evokes ‘Pride in the Profession’

Photos by Jimmy Rea Photography

CONSUMER BANKRUPTCY

Court Allows Transfer to IRA on Eve of Filing

By Craig D. Robins

Let's get right to the facts: Less than two weeks before filing for Chapter 7 relief, a consumer debtor empties his $44,000 bank account that he jointly holds with his wife.

He uses $13,000 of the proceeds to supplement his Individual Retirement Account; he transfers $22,000 into his wife's bank account, and he pays his attorney $4,585 as a retainer. The debtor does not disclose the transfer to the IRA in his Statement of Financial Affairs, nor does he disclose it at the meeting of creditors, although he does exempt the IRA, which now contains $30,000.

The debtor, who was a stockbroker charged with numerous FINRA violations, filed a bankruptcy petition that was over 300 pages long, including a Schedule F of 176 pages, which listed unsecured claims exceeding two million dollars.

Several months later, after Trustee Marc Pergament discovered the transfer, he objected to the debtor's IRA exemption, indirectly claiming that the debtor engaged in a fraudulent transfer while he was insolvent, and did so in bad faith by converting $13,000 of non-exempt cash into an exempt IRA on the eve of filing. The trustee did not object to the debtor's discharge.

The debtor, who was represented by Garden City attorney Stuart P. Gelberg, defended with three arguments. First, moving money from a checking account to an IRA is not a "transfer" under the Bankruptcy Code. Second, even if the trustee were to recover the $13,000, it would only generate a *de minimis* distribution to creditors; and third, debtor's pre-bankruptcy planning, even if orchestrated with the aid of counsel, may not be used to deny the debtor's exemption claim under the Supreme Court's 2014 decision in *Law v. Siegel*.

Craig Robins

In a decision that left some questions, Judge Alan S. Trust, sitting in the Central Islip Courthouse, held for the debtor and dismissed the trustee's objection, stating, "While Debtor is not to be applauded for his conduct, the Exemption Objection will be denied." *In re: Joseph Louis Castellano* (E.D.N.Y. Case No. 15-71661-ast, April 25, 2016).

However, it was perplexing that the judge did not elaborate on what conduct he found troubling. Judge Trust also addressed the debtor's first two arguments with dicta commentary in the form of footnotes, which may create some concern for practitioners regarding certain disclosures.

In his analysis, Judge Trust noted that the trustee, as the objecting party, carries the burden of demonstrating that the debtor's exemption was improperly claimed. A trustee can object to any objection on the basis that it was fraudulently asserted, and he can do so up to one year after the case is closed.

However, the trustee was not asserting that the exemption claim itself was fraudulently claimed; instead, the trustee argued that "stuffing the IRA was done in fraud of creditors." Judge Trust stated that recent decisions have noted that *Law v. Siegel* prohibits the bankruptcy court from disallowing exemptions or amendments to exemptions due to bad faith or fraud.

The judge held that *Law v. Siegel* requires the court to deny the exemption objection. In that High Court case, the California debtor engaged in fraudulent conduct in an attempt to insulate his homestead exemption. The Chapter 7 trustee in that case incurred substantial legal fees to uncover this fraudulent conduct and sought attorney's fees as a surcharge against the debtor's exemption. However, the Supreme Court prevented the Chapter 7 trustee from disturbing the homestead exemption as doing so contravened the provision of the Bankruptcy Code that permitted debtors to exempt assets.

Judge Trust did not elaborate on what conduct the debtor in *Castellano* engaged in that was problematic. Was it his pre-bankruptcy planning or was it his failure to list the transfer of funds in the petition and testify about it at the meeting of creditors? In a footnote, Judge Trust states: "Debtor challenges whether the transaction at issue here constitutes a transfer. See 11 U.S.C. sec 101(54). Although it is not material to the outcome of this ruling, the court rejects that contention and will use the phrase transfers."

One can only wonder how significant this dicta is. If a debtor removes funds from one account and deposits them in another account, is that a "transfer" that must be reported on the Statement of Financial Affairs?

It seems that based on past local practice and procedure, consumer bankruptcy practitioners do not believe so. Yet, one can only wonder whether the court is sending a message to the bar that debtors have to disclose the pre-petition movement of funds from one account to another. In reviewing the decision with Mr. Gelberg, he queried, "Do we have a whole new definition as to what has to be disclosed in the SFA?"

In Judge Trust's second footnote, which addressed the debtor's argument that a $13,000 gross estate in which unsecured claims exceed $2,000,000 would result in *a de minimis* distribution, the judge stated, "There is simply no viability to Debtor's argument that because he owes so much money, the Trustee should not bother himself with complying with his statutory obligation to recover assets for the benefit of creditors." Although that may be true, the judge does not mention anything of the generally accepted notion that a trustee should only administer an estate if there is a reasonable distribution to creditors that makes the process cost efficient for all concerned.

Note: Craig D. Robins, a regular columnist, is a Long Island bankruptcy lawyer who has represented thousands of consumer and business clients during the past twenty-nine years. He has offices in Melville, Coram, and Valley Stream. (516) 496-0800. He can be reached at CraigR@CraigRobinsLaw.com. vsit his Bankruptcy Website: www.BankruptcyCanHelp.com and his Bankruptcy Blog: www.LongIslandBankruptcyBlog.com.

Celebrating the Profession *(Continued from page 1)*

dean, a director and officer. It is only fitting that he be installed as the 108th president."

Appellate Presiding Justice Randall T. Eng installed Mr. Calcagni, who received a standing ovation. The membership is truly behind their next president.

The evening also included the presentation of two directors' awards by Immediate Past President Donna England, who said, "We couldn't just give one this year."

The honorees were Leonard Badia and the Hon. Andrew A. Crecca.

"Len has been managing director of our Charity Foundation for several years and we want to congratulate him for all that he does," Ms. England said. "He also won an award from the Suffolk Legislature."

Also deserving of the Director's Award, Ms. England said, is the Hon. Crecca. "He has told our board that no matter when we call on him he will be there and he's always willing to do whatever needs to be done," she said.

The President's Award was given to Lynn Poster-Zimmerman, who is the chair of the Attorney for the Child Task Force and was installed as the SCBA Second Vice President. Ms. England has been an attorney for the child for 29 years. Being able to honor someone like Poster-Zimmerman, who is so committed to children, meant a great deal to her. "Those who represent children are doing an honorable job, like Lynn," Ms. England said.

Then Ms. England presented a Lifetime Achievement Award to David H. Besso, "not because he is old but because he has given to us for a lifetime."

Ms. England was presented with a lovely pendent by Mr. Calcagni to thank her for her stellar year of leading the SCBA. "I had a spectacular year and thank all of you," said Ms. England. "I know John will be a fabulous president."

Mr. Calcagni said his nickname for Ms. England was Margaret Thatcher, who he admires. "She is respectful and strong and always knows how to take a stand," Mr. Calcagni said. "Although Donna is caring, she's also a very courageous person."

Pride in the Profession *(Continued from page 3)*

"We've formed a media subcommittee to find ways to let the public know of the good work attorneys are doing. They do these things just because they are good things to do."

He's also looking for input from the membership; to share any ideas they might have on ways to improve the Association. "Even if the ideas couldn't be achieved this year, they may provide areas we can work on in future years," he said.

Mr. Calcagni described himself as a problem-solver.

"I'm not confrontational," he said, "but if someone is being unreasonable or overreacting I discount them. And I don't waste time trying to reform them. I am committed to finding a different way to solve problems."

Having been around business his entire career Mr. Calcagni has an understanding of what is needed to be an effective leader.

"You take the information, consult with the experts and once you have relevant facts you make a decision," he explained. "I've been given the opportunity to lead this Association and my obligation is to it and to its members. That is the starting point for any decision."

Note: Laura Lane has been the Editor-in-Chief of The Suffolk Lawyer for many years. She has won many awards for excellence in journalism both locally and statewide. Ms. Lane has written for the New York Law Journal, Newsday and is the editor of the Oyster Bay Guardian.

LETTER TO THE EDITOR

To the Editor:

Although I am almost 10 years retired from Winkler, Kurtz and Winkler and living out of state I have proudly remained a member of our Bar Association.

I wish to thank you for each and every monthly issue of the *The Suffolk Lawyer*.

It keeps me up to date on the Association, the courts and the many friends I made practicing law in Suffolk County.

My best to Jane and the staff of the Bar Association.

Sandy Kurtz

FREEZE FRAME

Jade makes eight

We aren't sure how our frequent contributor Elaine Colavito has the time to write for us each month but we are grateful to have her do so! She gave birth to her eighth baby, Jade Elizabeth, on April 29, 2016. Jade weighed 5 lb 11 oz, and was 19 inches long. Congrats!

FREEZE FRAME

New Trotto baby a joy

SCBA member Janessa M. Trotto and her husband Christopher Morris, welcomed their son Michael Christopher Morris on March 16, 2016. He was 8 lbs. 15 oz., and 21 inches long. Michael is also the grandson of SCBA member Hon. Hertha C. Trotto and Salvatore Trotto.

FREEZE FRAME

Bouse's son to carry on the tradition

Clinton Van Nostrand Bouse graduated from Fordham University May 21 and will be attending Hofstra Law School in the fall. Clint is the son of SCBA member Cornell V. Bouse and grandson of famed criminal defense lawyer F. Courts Bouse.

FREEZE FRAME

Bonhurst receives Gold Cord

When the SCBA chose Smithtown High School West student Cameron Bonhurst to work as its office executive assistant they knew they chose a winner. And they were right! Not only has Cameron done a great job, but he is also being recognized at his graduation with the Gold Cord, a service award given to the Spanish Honor Society President. As the Class President, Cameron will also be addressing his graduation class. He will be attending Boston University this August. Congrats from the SCBA!

Standing After Aurora v Taylor *(Continued from page 8)*

dant's motion to amend the answer to assert the affirmative defense of standing. Amendment was not permitted because the defense was found to be patently devoid of merit. In two cases the Appellate Division affirmed the granting of summary judgment to the plaintiff where the party who moved for summary judgment was not the original plaintiff but had purchased the loan during the pendency of the action and then continued the action in the name of the original plaintiff. The Appellate Division held that it is the standing of the original plaintiff that matters and that a subsequent purchaser can continue the action in the name of the original plaintiff pursuant to CPLR §1018.

The defendant-appellant prevailed in only three appeals. In *LaSalle Bank v Zaks*[5] the Appellate Division held that the foreclosure plaintiff failed to submit evidence sufficient to establish standing. No description is given in the decision as to what evidence was submitted by the plaintiff so it is not clear why it was insufficient.

In *Deutsche Bank v Weiss*[6] the Appellate Division held that the affidavit submitted by the plaintiff lacked "any factual details of physical delivery;" that the affidavit failed to state that the plaintiff was in possession prior to the commencement of the action; that the endorsement on the note was undated; and that the written assignment of mortgage assigned only the mortgage and not the note. There are nearly identical issues cited in *Deutsche Bank v Idarecis*.[7]

The holding in *Taylor* has had a significant impact on the viability of the standing defense in mortgage foreclosure actions. All foreclosure counsel and litigants should consider this impact.

Note: Glenn Warmuth is a partner at Stim & Warmuth, P.C. where he has worked for 30 years. He has successfully handled dozens of foreclosure related appeals. He has served as a director of the Suffolk County Bar Association, an officer of the Suffolk Academy of Law and as co-chair of the Appellate Practice Committee. He can be contacted at gpw@stim-warmuth.com.

[1] 25 NY3d 355 (2015)
[2] 2016 NY Slip Op 02790 (2nd Dept. 2016)
[3] 130 AD3d 983 (2nd Dept. 2015)
[4] Kings County Index No. 505250/2016
[6] 2016 NY Slip Op 02779 (2nd Dept. 2016)
[6] 133 AD3d 704 (2nd Dept. 2016)
[7] 133 AD3d 702 (2nd Dept. 2016)

Microsoft v Baker *(Continued from page 6)*

"manufactured finality" and noted that such "procedural sleight-of-hand" does not confer appellate jurisdiction.

Although the case may appear postured as a plaintiff-versus-defense-bar issue, it is not necessarily going to render a split decision along ideological lines. Although the future composition of the Supreme Court is currently uncertain, petitioner has argued that the Ninth Circuit's ruling is a backdoor attempt to revive the "death knell" doctrine that the Supreme Court rejected in 1978 in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978). The Livesay opinion held that a district court's determination regarding class certification is a final decision within the meaning of 28 U.S.C. § 1291. It is worth noting that Justice Stevens wrote the *Livesay* opinion on behalf of a *unanimous* court.

While some may ultimately relegate the *Baker* opinion to the annals of 1L Civil Procedure exams, those who litigate and defend federal class action cases should stay tuned.

Note: Jonathan "Jack" Harrington, chairs the International Regulation, Enforcement & Compliance practice at Campolo, Middleton & McCormick, LLP. He counsels multinational corporations and individuals in securities, white-collar, anti-money laundering, and Foreign Corrupt Practices Act (FCPA) matters. He also represents clients in litigation, appeals, and commercial arbitrations, often with an international component. Contact jharrington@cmmllp.com or (631) 738-9100.

Court Notes (Continued from page 4)

sentenced to 57 months of imprisonment and three years of supervised release, and ordered to forfeit funds. The court found that the respondent's federal conviction of mail fraud, based upon the allegations of the indictment and the trial record, was essentially similar to the New York felony of grand larceny in the second degree, a Class C felony. Accordingly, by virtue of his felony conviction, the respondent was automatically disbarred from the practice of law in the State of New York. The court found the respondent's argument to the contrary to be unavailing.

Jay M. Lipis: Application by the Grievance Committee to impose reciprocal discipline upon the respondent based upon his indefinite suspension from the practice of law in the State of Massachusetts granted, without opposition by the respondent. Accordingly, the respondent was disbarred from the practice of law in the State of New York based upon his agreed-upon suspension for an indefinite period in Massachusetts.

Lester Wayne MacKay: By decision and order of the court, the respondent was immediately suspended from the practice of law and the Grievance Committee was authorized to institute disciplinary proceedings against him based upon 13 charges of professional misconduct, including misappropriation of client funds, and failure to cooperate with the Grievance Committee. Proceedings were instituted by verified petition, which was personally served upon the respondent. The respondent failed to file an answer, although given an extension of time to do so. In addition, he was personally served with a copy of the motion to adjudicate him in default, and failed to respond to that as well. By virtue of his default, the charges against the respondent were deemed established. Accordingly, the respondent was disbarred from the practice of law in the State of New York.

Phillip D. Miller: By decision and order and judgment on motion of the court, the Grievance Committee was authorized to institute disciplinary proceedings against the respondent. In addition, the court adjudicated the respondent in civil contempt, imposed a fine, and sentenced him to a term of imprisonment for six months, staying execution thereof for thirty days in order for respondent to purge his contempt. Thereafter, the respondent was suspended from the practice of law. Upon the commencement of the disciplinary proceeding, the respondent was directed to serve and file an answer to the petition. He failed to do so in a timely fashion. Thereafter, the respondent sought a modification of the court's decision, judgment and order, alleging that he no longer resided in New York, and had moved to Florida due to his mother's declining health and for his own health and finances. The respondent further stated that his own health precluded him from traveling to New York, though no medical documentation was submitted. The respondent additionally requested that he be permitted to submit an affidavit of resignation. By letter, the Clerk of the Court advised the respondent that he should file an answer to the petition, as directed in the court's prior order, or file his resignation by a date certain. He failed to timely do so. Instead he moved to file a late answer, which answer indicated that he had no further desire to practice law. Accordingly, in view of the history of the case, the respondent's failure to cooperate with the Grievance Committee, his refusal to comply with two judicial subpoenas, his adjudication in contempt, and continued contempt and failure to purge himself, the court granted the Grievance Committee's motion to adjudicate the respondent in default was granted, the charge in the petition was deemed established and he was disbarred from the practice of law in the state of New York.

Steve Farrell Weinstock: On April 8, 2015, the respondent pled guilty in the Supreme Court, Nassau County, to grand larceny in the second degree, a Class C felony, criminal possession of a forged instrument in the second degree, a Class D felony, and offering a false instrument for filing, a Class E felony. Accordingly, by virtue of his felony convictions, the respondent was automatically disbarred from the practice of law in the State of New York.

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

Improve Your Billing and Collections (Continued from page 11)

a client that a mistake has been made or the firm has failed to deliver what was promised. Avoiding these kinds of difficult conversations for fear that the client will be angry (or possibly file a grievance) only makes them worse.

Don't let contingent matters fall through the cracks. Conduct periodic reviews of all open files to ensure that actions are taken to move cases toward resolution. Require monthly progress reports to the client; these reports will highlight matters that require attention and will ensure that all matters are reviewed at least monthly.

Review key indicators regularly

Key financial indicators help you spot (and correct) problems early, develop an understanding of the ebbs and flows of your practice areas, and plan for leaner times. Create reports that provide a financial snapshot of your firm and review them regularly, including:

- WIP (work done but not billed).
- Accounts receivable and aged accounts receivable (work billed but not yet collected).
- Total billings and collections.
- Write-downs and write-offs.
- Unbilled disbursements.
- Realization (rate actually collected vs. rate billed).
- Utilization (percent of time actually billed).
- Actual vs. budgeted costs.
- Leverage (ratio of non- partners to partners).
- Billable hours.
- Client trust account balances.
- A profit/loss summary.

By establishing and implementing good billing practices, improving communication with clients about billing and collections and reviewing key financial indicators, you will have a better handle on your firm's cash flow in the future. As always, review the ethical rules of any jurisdiction in which you practice before implementing new billing routines.

Note: Allison C. Shields, Esq. is the Executive Director of the Suffolk Academy of Law and the President of Legal Ease Consulting, Inc., which provides productivity, practice management, marketing, business development and social media training, coaching and consulting services for lawyers and law firms nationwide. A version of this article originally appeared in the Simple Steps *column of* Law Practice Magazine.

"Extreme and Outrageous" (Continued from page 8)

and utterly intolerable" to support the claim. *Id.* The decision includes a highlight reel of conduct that the Court of Appeals and Appellate Divisions have deemed similarly not outrageous enough, such as a newspaper's publication of a photo of a patient in a psychiatric facility (thus publicizing that person's status as a patient there) and a TV station showing recognizable images of rape victims after repeatedly promising that they would not be identifiable. *Id.*

This decision highlights what some may view as the dangers of an appellate court — in this case, New York's highest — evaluating the facts on the merits, rather than considering only the sufficiency of a pleading (and leaving it to a trial judge or jury to sift through the facts). The case also serves as a warning: if you're ever headed to the emergency room, make sure to wear something you wouldn't mind being photographed in.

Note: Patrick McCormick leads the robust Litigation & Appeals practice at Campolo, Middleton & McCormick, LLP, where he is a partner. He was recently elected to the Board of Directors of the Suffolk County Bar Association and chairs the Appellate Practice Committee. Patrick's practice focuses on complex commercial litigation, landlord-tenant matters, and state and federal appellate advocacy. He can be reached at pmccormick@cmmllp.com or (631) 738-9100.

Paid Family Leave (Continued from page 5)

workers pitch-in to handle those responsibilities.

Despite these costs and challenges, however, advocates of the new law argue that workers who do not have to worry about affording diapers for their newborn or rushing back to work within days of childbirth, for example, will return to work as more engaged, healthy, and productive. The true impact remains to be seen, but until then, employers are encouraged to begin preparing for the new family leave policy before it takes effect.

Note: Arthur Yermash, is an attorney at Campolo, Middleton & McCormick, LLP, where he counsels clients in all areas of labor and employment law including compliance with federal, state, and local laws affecting the workplace. Arthur drafts and negotiates employment and related agreements, and also represents clients in investigations by regulatory and government agencies. Contact Arthur at ayermash@cmmllp.com.

Court of Appeals Above the Law? (Continued from page 9)

ment of an action predicated on an allegation of forgery. Such a pronouncement violates the "mandate" of CPLR §201 "enjoined" upon the courts by the legislature.

Other states are different

Because of the dearth of New York precedent, the court buttressed its decision with the rationale that "this is the prevailing approach in other jurisdictions," citing to cases from Florida, West Virginia and Idaho. None of these jurisdictions restrains its courts to the same extent CPLR §201 restrains New York courts.[3] Hence, cases from those jurisdictions cannot justify a result expressly prohibited in New York.

Don't make a bad situation worse

Forgery and "identity theft" appear to be widespread problems that produce sympathetic victims and vexing legal conundrums. The Court of Appeals clearly believed its intervention was required "to ferret out forged deeds and purge them from our real property system" (*Faison*, 25 NY 3d 220, at 230). It determined "there is no reason to impose barriers to those who seek to vacate such deed as null and void" (*id.*), in part because forgeries "undermine the integrity of our real property system," (*id.* fn. 6). Laudable as these policy choices might be, implementing them in the fashion of the *Faison* Court risks undermining the integrity of the CPLR.

Note: Lance R. Pomerantz is a sole practitioner in Sayville, N.Y. The views expressed in this piece are his and do not necessarily reflect the views of any of his clients or the Suffolk County Bar Association.

[1] Some cases have mistakenly characterized instances of continuing trespass or other forms of continuing violation as "not subject to the statute of limitations." In those cases, the limitation period actually applies, but is deemed to begin anew each day the violation continues. The facts in *Faison* do not admit of a continuing violation analysis, nor did the Court base its decision on one.

[2] CPLR §201 permits the parties to *shorten* the applicable statute of limitations by written agreement, but that provision has no application to *Faison*.

[3] S*ee* Fla. Statutes, Title VII (chapters 93-96, incl.); W. Va. Code, Ch. 55, Art. 2; Idaho Statutes, Title 5, Chap. 2 (§ 5-201 - §5-248, incl.

The "Independent Investor Test" (Continued from page 16)

Contrary to taxpayer's argument, the court noted, the use of book value as a proxy for market value for the issuance and redemption of shares in a closely-held corporation to avoid the practical difficulties of more precise valuation hardly meant that the shareholder-attorneys did not really own the corporation and were not entitled to a return on their invested capital. Any shareholders who were not also employees would generally demand such a return.

More generally, taxpayer's argument that its shareholder-attorneys had no real equity interests in the corporation that would have justified a return on invested capital proved too much. If taxpayer's shareholder-attorneys were not its owners, who was? If the shareholder-attorneys did not bear the risk of loss from declines in the value of its assets, who did? The use of book value as a proxy for fair market value deprived the shareholder-attorneys of the right to share in unrealized appreciation upon selling their stock—although they were correspondingly not required to pay for unrealized appreciation upon *buying* the stock.

But acceptance of these concessions to avoid difficult valuation issues did not compel the shareholder-attorneys to forgo, in addition, any current return on their investments based on the corporation's profitable use of its assets in conducting its business.

Taxpayer's arrangement effectively provided its shareholder-attorneys with a return on their capital through amounts designated as compensation. The court believed that, were this not the case, the shareholder-attorneys would not have been willing to forgo any return on their investment.

Court's conclusion

The court concluded that the independent investor test weighed strongly against the claimed deductions. The independent investor who had provided the capital demonstrated by the cash book value of petitioner's shares — even leaving aside the possibility of valuable firm-owned intangible assets — would have demanded a return on that capital and would not have tolerated taxpayer's consistent practice of paying compensation that zeroed out its income.

The classification of a law practice as a business in which capital is not a material income-producing factor, the court said, did not mean that *all* of an attorney's income from his or her practice was treated as earned income and that any return on invested capital was ignored.

The court did not doubt the critical value of the services provided by employees of a professional services firm. Indeed, the employees' services may be far more important, as a factor of production, than the capital contributed by the firm's owners. Recognition of these basic economic realities might justify the payment of compensation that constitutes the vast majority of the firm's profits, after payment of other expenses — as long as the remaining net income still provides an adequate return on invested capital.

But taxpayer, the court said, did not have substantial authority for the deduction of amounts paid as compensation that *completely* eliminated its income and left its shareholder-attorneys with *no* return on their invested capital.

Because taxpayer did not have substantial authority for its treatment of the year-end bonuses it paid during the years in issue, the disallowance of a portion of the deductions taxpayer claimed for those payments represented a 'substantial understatement' for each year."

Postscript

The tax adviser turned back from the window and looked at the client. The client's head was resting against the back of the chair. Was that drool trickling from the side of her mouth?

He cleared his throat. Nothing. He cleared it again, this time more forcefully. Her head was now upright. He looked meaningfully into her eyes. "They were lifeless eyes," he thought, "like a doll's eyes."

He realized he was channeling Captain Quinn from "Jaws."

Then she blinked, or tried to — she winced in pain, moved her hands to her face, seemed to fiddle with something, rubbed her eyes, then focused on the adviser.

"You've always told me that clients, like me," she said, "base hiring decisions on the reputation of the individual lawyer rather than upon that of the firm at which the lawyer practices. If I heard you correctly just now."

She doubted anything she might have heard by that point but added, "The goodwill of a law firm may be an asset of the firm, rather than of its individual partners, is that right?"

"In the right circumstances, that's correct," the tax advisor said. "That's one of many reasons why most firms operate as a pass-through entity, like a partnership, for tax purposes."

He went to the shelf behind his desk, and as he began to remove a volume on "choice of entity" issues, the door slammed. He turned, but the client was gone.

Who can blame her for wanting to avoid another long-winded lecture, but she should have stuck around a while longer. The message of the decision described above is not limited to the personal service business, though it is chock-full of guidance for such a business.

Taxpayers have long sought structures by which they could reduce the double tax hit that attends both the ordinary operation of a C corporation and the sale of its assets.

Many of you have come across the concept of "personal goodwill," probably in the context of a sale by a corporation. Some shareholders have argued that they own personal goodwill, as a business asset that is separate from the goodwill of their corporation. They have then attempted to sell this "personal" asset to a buyer, hoping to realize capital gain in the process, and — more to the point of this post — also hoping to avoid corporate level tax on a sale of corporate goodwill.

Of course, the burden is on the taxpayer to substantiate the existence of this personal goodwill and its value, not only in the context of the sale of the corporate business, but also in the sale of his or her services to the corporate business. The best chance of supporting its existence is in the circumstances of a business where personal relationships are paramount, or where the shareholder has a reputation in the relevant industry or possesses a unique set of skills.

The right circumstances may support a significant compensation package for a particular shareholder-employee, either on an annual basis or in the context of an asset sale by his or her corporation. In each case, a separate, corporate-level tax would not be imposed in respect of the portion of the payments made to the shareholder-employee.

However, before a taxpayer, hell-bent on avoiding corporate-level tax, causes his or her corporation to pay compensation in an amount that wipes out any corporate-level tax, he or she needs to be certain that the existence and value of the personal goodwill — the reasonableness of the compensation for the service rendered — can be substantiated. The taxpayer needs to plan well in advance.

Note: Louis 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@farrell-fritzcom.

Congratulations to Suffolk's New Commissioner of Jurors

Lawrence "Larry" F. Voigtsberger was recently appointed as Suffolk County Commissioner of Jurors by the Suffolk County Jury Board. The position carries a four term and Larry serves in a confidential capacity, supervising juror qualification summonses, noncompliance enforcement and juror enquiry response.

Larry has worked his way up through the ranks of the New York State Unified Court System beginning his career in 1993 as a senior court officer for New York City. He came to Suffolk in 1998 as a senior court clerk and was promoted to associate court clerk in 2000. Larry has been in his current position as case management coordinator since 2009. He was the recipient of our Bar Association's prestigious Alan D. Oshrin Award of Excellence in 2014, awarded to non-judicial personnel by the SCBA.

Congratulations Larry!

Among Us (Continued from page 7)

Regional Conference of the International Marine Animal Trainers' Association on April 25, 2016, where he presented *Taking Responsibility for Moving Forward*. Gesualdi has also been named a Deputy Managing Editor for the American Bar Association, Section of Administrative Law and Regulatory Practice, *Administrative Law & Regulatory News*.

Karen Tenenbaum of Tenenbaum Law, P.C. in Melville has been selected as a recipient of the first Annual Judge Gail Prudenti Top Women in Law Award, presented by Hofstra University School of Law, Center for Children, Families, and the Law. Additionally, Ms. Tenenbaum and **Jaime Linder** recently spoke before the Long Island American Payroll Board on the topic of "What you Should Know about Responsible Person Assessments and Trust Fund Recovery Penalties."

Condolences…

Mary A. Toner's mother, **Bridget O. Toner**, a retired Suffolk County attorney and SCBA member, passed away on March 16, 2016 after a brief illness. She is survived by her four children and four grandchildren.

Introduction to ESI and E discovery (Continued from page 19)

"DNA" of ESI and can be used exactly the way DNA evidence is used in modern forensics and crime scene investigation.

Litigation holds and litigation hold letters

There is a great deal of controversy today over "litigation holds" and "litigation hold letters." Caution dictates, however, even in the absence of any presently recognized potential for litigation, every attorney, regardless of their area of practice, should routinely issue the equivalent of a "litigation hold letter" to their clients.

The general litigation hold letter — before any actual litigation is contemplated or has commenced — alerts your clients to their need to observe cybersecurity "best practices" and protect ESI in accordance with a written data preservation, retention, and destruction policy.

A general litigation hold letter is nothing more than a written directive for the preservation of ESI. It really has nothing to do with actual litigation; but everything to do with ESI.

You should send a general litigation hold letter to each of your clients who use the Internet in the regular course of business or who conduct electronic communications of any kind in any form on any device with clients and customers.

You should also send general litigation hold letter reminders to your clients on a regular basis every three to four months.

When is a litigation hold letter *required*?

Not only must an attorney issue a litigation hold letter as soon as their client receives notice of pending litigation, but also as soon as their client *anticipates* becoming involved in litigation whether as a plaintiff, defendant or material third party.

The litigation hold letter must explain to the client what kind of information must be preserved, how long it must be preserved and emphasize the need for the client to immediately establish a document retention policy and a document destruction schedule if such programs are not already in place, as they should be.

The attorney who prepares a litigation hold letter should make sure that the client confirms that the letter was received and understood. It is wise and prudent to post the client case file with a detailed memorandum of the circumstances surrounding delivery and discussion of the litigation hold letter with the client.

This is also the time for attorneys to advise their clients to create an inventory management and tracking program for all electronic devices used by or on behalf of their business, even copiers, printers and scanners, all of which contain discoverable ESI.

A few other routine litigation hold practices

Attorneys should regularly inquire of their clients whether they anticipate undertaking any litigation or whether they are aware of any threats of litigation to which they may become a party. In either case, a follow-up litigation hold letter specific to the potential litigation is required.

The general litigation hold letter should advise your client about dealing with ESI which may have been created or handled by employees who have left or are about to leave the client. This is particularly important if an employee is about to be terminated or has just recently been terminated.

Attorneys should advise their clients to notify them immediately if there are any changes in their IT management. This is particularly important with smaller clients who rely upon third-party IT vendors. If there is a change in IT management at the client, it is important for the attorney to address a litigation hold letter to the new IT manager and discuss the subject with them as soon as possible.

For any attorney representing a business entity or not-for-profit organization on an ongoing basis, the client file should contain a "cyberlaw" section organized according to a checklist of cyberlaw issues.

Attorneys must understand that litigation hold letters may not be privileged and may be "discovered" during the course of actual litigation.

E- discovery issues during litigation

E-discovery issues arise as soon as litigation is contemplated or filed whether your client is a plaintiff or defendant. Litigation hold notices must be served quickly and certainly prior to the first scheduled pretrial conference.

The issues of ESI production format, cost shifting, and protective orders should be raised at the initial pretrial conference and made a part of any scheduling order. ESI production format often irrevocably determines the overall cost of E-discovery for you.

Under the revised *Federal Rules of Civil Procedure*, judges have extraordinary power and almost unlimited discretion in directing the course of discovery and under Rule 37, can impose substantial sanctions against any party who fails to obey their E-discovery orders.

A non-party has standing to seek a protective order or ask that the party demanding production of ESI pay the entire cost of ESI production.

To be continued…

Note: Victor John Yannacone Jr. is an advocate, trial lawyer, and litigator practicing today in the manner of a British barrister by serving of counsel to attorneys and law firms locally and throughout the United States in complex matters. Mr. Yannacone has been continuously involved in computer science since the days of the first transistors in 1955 and actively involved in design, development, and management of relational databases. He pioneered in the development of environmental systems science and was a cofounder of the Environmental Defense Fund. Mr. Yannacone can be reached at (631) 475–0231, or vyannacone@yannalaw.com, and through his website https://yannalaw.com.

[i] Laura Zubulake, filed suit against her former employer UBS Warburg, alleging gender discrimination, failure to promote, and retaliation. The rulings by United States District Court Judge Shira Scheindlin in *Zubulake* v. *UBS Warburg*, are the most often cited in the area of electronic discovery even though they were issued prior to the 2006 amendments to the *Federal Rules of Civil Procedure*. They are commonly known as *Zubulake I*, 217 F.R.D. 309 (S.D.N.Y. 2003); *Zubulake III*, 216 F.R.D. 280 (S.D.N.Y. 2003); *Zubulake IV*, 220 F.R.D. 212 (S.D.N.Y. 2003); and Zubulake *V*, 2004 WL 1620866 (S.D.N.Y. July 20, 2004). Judge Scheindlin's opinions in *Zubulake*, including definitions of accessible and inaccessible data, the seven factor balance test for cost shifting and definition of counsel's obligation for preserving data, have been referenced in numerous cases since then.

Trusts and Estates Update (Continued from page 18)

other than through an examination of counsel; that the information sought was relevant and privileged; and that the information was crucial to preparation of the case. Specifically, the court found that through the production of documents and the deposition of the plaintiff, the defendants had obtained the information they sought through other means, and had not demonstrated that the deposition of plaintiff's counsel was crucial to their defense.

Accordingly, the motion to quash was granted, in part, and denied, in part, to the extent that document production was directed, and discovery from plaintiff's counsel was denied.

***Stevens v. Cahill, Jr.*, NYLJ, Oct. 13, 2015, at 21 (Sur. Ct. New York County)(Mella, S.)**

Note: Ilene S. 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-Chair of the New York State Bar Association Trusts and Estates Law Section, and a past-President of the Suffolk County Bar Association.

Police Body, Dash Cameras (Continued from page 14)

Dashboard Cameras are cited by law enforcement agencies for, *inter alia*, enhancing officer safety, simplifying incident review and enhancing new recruit and in-service training. Similar to Dashboard Cameras, perhaps the transparency provided by Police Body Cameras will allow for greater government accountability and improve officer training and safety.

New York's "Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law."[9] Dashboard camera footage should be considered by the courts as analogous to body camera footage and should be available pursuant to State and Federal Freedom of Information Law.

Should the government fail to turn over records, including those in electronic format, it must articulate the reasons disclosure can be withheld. FOIL requires a "particularized and specific justification" for denying access to demanded documents. While the government may turn over certain documentation, it may elect to redact portions of the documentation within the above mentioned exceptions. Police Body Camera footage should be no different.

The debate in New York is taking form. On the one hand are the guided protections against public disclosure afforded by the legislature and the civil right afforded by the Freedom of Information Law. The Committee on Open Government predicts that "in New York police agencies may attempt to block access based on Civil Rights Law §50-a which makes confidential '[a]ll [police] personnel records used to evaluate performance toward continued employment or promotion...' " One should note, however, that "police departments who investigate persons who are no longer their employees are not conducting investigations of 'personnel' within the meaning of Civil Rights Law § 50-a (1). The plain meaning of the word personnel identifies individuals with some current employment relationship with an organization."[10] Accordingly, once an officer is dismissed, one may be able to gain access to certain records, including video footage. Even still, recent decisions may require an in-camera inspection of such records to determine whether Civil Rights Law applies.

While the Committee on Open Government asks for the outright repeal of Civil Rights Law Section 50-a or, alternatively, its amendment, New York courts have yet to decide its scope of its full protection and whether the need to safeguard Police Body Camera footage will overcome FOIL's presumption of openness and the public's right to know. With bodycams coming to a municipality near you, it is likely that we shall soon find out.

Note: Recently named a SuperLawyer Rising Star, Cory H. Morris maintains a practice in Suffolk County and is the co-chair of the Suffolk County Bar Association's Young Lawyers Committee. He serves as a Nassau Suffolk Law Services Advisory Board Member and is an adjunct professor at Adelphi University. (www.coryhmorris.com).

[1] Public Officers Law, Section 6.
[2] See Andrea Peterson, *President Obama Wants to Spend $75 Million to Buy Police Bodycams*, Wash. Post (Dec. 1, 2014), https://www.washingtonpost.com/news/the-switch/wp/2014/12/01/president-obama-wants-to-spend-75-million-to-buy-police-bodycams/.
[3] Jay Stanley, *Police Body-Mounted Cameras: With Right Policies in Place, a Win For All*, ACLU, P. 2 (Mar. 2015), accessible at: https://www.aclu.org/sites/default/files/field_document/police_body-mounted_cameras-v2.pdf.
[4] Bredderman, Will, *"Fairness for All: Cuomo Seeks Criminal Justice and Prison Reform"*, Observer News (January 21, 2015), http://observer.com/2015/01/fairness-for-all-cuomo-seeks-criminal-justice-and-prison-reform/.
[5] Peter Hermann and Aaron C. Davis, As police body cameras catch on, a debate surfaces: Who gets to watch?, Wash. Post (Apr. 17, 2015),https://www.washingtonpost.com/local/crime/as-police-body-cameras-catch-on-a-debate-surfaces-who-gets-to-watch/2015/04/17/c4ef64f8-e360-11e4-81ea-0649268f729e_story.html.
[6] New York DOS, Committee on Open Government, *supra* note __, p. 3.
[7] Erica Goode, *For Police, a Playbook for Conflicts Involving Mental Illness*, N.Y. Times (Apr. 25, 2015), http://www.nytimes.com/2016/04/26/health/police-mental-illness-crisis-intervention.html.
[8] Int'l Assoc. Of Chiefs of Police, *The Impact of Video Evidence on Modern Policing*, P. 15, available at: http://www.theiacp.org/portals/0/pdfs/IACPInCarCameraReport.pdf.
[9] Committee on Open Government FOIL, Advisory Opinion 12579 (Mar. 16, 2001).
[10] Matter of Hearst Corp. v NY State Police, 132 AD3d 1128, 1130 (3rd Dept 2015).

Bench Briefs (Continued from page 4)

covenant. The court concluded that the petitioner failed to satisfy his burden of showing by clear and convincing proof the legal requisites necessary to enforce the alleged restrictive covenant.

Article 78 petition dismissed; untimely; even if timely, no prima facie case established.

In *In the Matter of the Application of Sabrina Lilienthal v. General Counsel State Division of Human Rights*, Index No.: 533/2015, decided on May 19, 2015, the court dismissed the Article 78 action filed by the petitioner. In rendering its decision, the court noted that the petition was not filed within the 60-day limitation set forth in Executive Law §298. The court further noted that the petitioner did not file her original Article 78 action challenging the order until more than 18 months after its service upon her. Accordingly, the action was dismissed as untimely. The court continued and found that even if it had been timely filed, the action would have been dismissed as she failed to establish a prima facie case of discriminatory treatment by the hospital or that the respondent's November 30, 2012 order was arbitrary or capricious.

Honorable William B. Rebolini

Motion to dismiss granted; notice of conference given to all parties; plaintiff failed to appear.

In *Recep Kocyigit v. Robert Allmen and Robert J. Allmen*, Index No.: 13361/2014, decided on October 5, 2015, the court granted the motion to dismiss the action. In rendering its decision, the court noted that this matter appeared on the compliance conference calendar on September 30, 2015 pursuant to order of this court dated July 6, 2015. The court further pointed out that proof of notice of such conference having been given to plaintiff, Recep Kocyigit, by letter sent to him by his former attorneys at his last known addresses on July 16, 2015. In granting the application, the court found that the defendant appeared at the conference and plaintiff failed to appear. Accordingly, the action was dismissed without costs or disbursements.

Motion for preclusion denied; failure to set return date in notice of motion deemed substantial defect.

In *Robert Love v. Thomas Spota, Suffolk County District Attorney, Paul Squire, Staff Writer-Riverhead News Review*, Index No.: 2668/2014, decided on April 8, 2015, the court denied the plaintiff's motion for preclusion. In denying the motion without prejudice, the court pointed out that the notice of motion failed to set a return date for the motion. This was a substantial defect. The court reasoned that the failure to set a return date in the notice of motion frustrated the core principles of apprising the defendants with notice of the application so as to afford them an opportunity to present their objections.

Motion to compel granted; defendant entitled to information to enable her to verify credit card debt claimed to be owed.

In *New Century Financial Services, Inc. v. Sharon A. Marino*, Index No.:7859/2014, decided on August 11, 2015, the court granted the defendant's motion to compel. In granting the motion to the extent provided therein, the court noted that this action was to recover monies allegedly owed on a credit card account. The defendant denied having a credit card with Citibank or the plaintiff. During discovery, the defendant sought more particular information about the account in an effort to verify the debt. Plaintiff failed to provide the requested information about the purchases allegedly made to her account. In granting the application the court stated that since the law recognized that this court has general authority to supervise disclosure, it was appropriate that plaintiff be compelled to provide the specific account information that had been requested by the defendant.

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

Note: Elaine Colavito graduated from Touro Law Center in 2007 in the top 6 percent of her class. She is an associate at Sahn Ward Coschignano, PLLC in Uniondale and concentrates her practice in matrimonial and family law, civil litigation and immigration matters.

Volunteers for Veterans (Continued from page 3)

grams to give lawyers basic training to provide assistance with common legal problems that veterans experience," Mr. Rosenberg said. "We also tried to recruit volunteers to provide legal services. Calls come in and they are directed to people that can help them."

The only way the program has changed over the years, said Mr. Rosenberg, is that it has become more successful. More people know the program exists.

George Roach, a SCBA past president, is very involved with helping veterans. He visits them at the VA hospital.

"Lots of times veterans will contact the bar association and I go over and see them if they need me," Mr. Roach said. "They are so grateful for the right information. It saves them a lot of grief."

Mr. Block believed the day was a success.

"The hope is that people who came today will tell everyone they know that is a veteran that the SCBA and Nassau Suffolk Law Services are here to help," he said. "We are here to give them legal services without any charge."

SUFFOLK ACADEMY OF LAW

OF THE SUFFOLK COUNTY BAR ASSOCIATION

SUMMER/EARLY FALL 2016 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 are some of those that will be presented during the summer and early Fall of 2016.

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 (www.scba.org)**.**

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. 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(c)(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, call the Academy at 631-233-5588.

INQUIRIES: 631-234-5588.

SEMINARS & CONFERENCES

Lunchtime Program

FEDERAL HI-TECH ACT

AND THE BATTLE OVER COPYING FEES-LOWERING THE COST OF OBTAINING MEDICAL RECORDS FOR YOUR CLIENTS

June 13, 2016 12:30-2:15 pm

Personal injury lawyers, medical malpractice lawyers, workers compensation lawyers and Social Security Disability lawyers who regularly purchase medical records need to be aware of the current legal battles raging over medical record copying fees. This program will focus on the federal Hi Tech Act, which requires health care providers to supply digital copies of electronic medical records "at cost." It will touch on the 2 class action cases currently pending over copying fees, discuss the provisions of the Hi Tech Act and the Public Health Law as they pertain to obtaining medical records, discuss how administrative complaints over copying fees can be made to the federal Office of Civil Rights and provide form letters. The Lunch and Learn will also include a discussion about what the hospital requires to quickly and efficiently deliver medical records to requestors, how the hospital deals with requests for the records of deceased patients, what the hospital requires for, and how the hospital handles subpoenas for medical records and radiographs.

Faculty: Michael Glass, Esq.**;** Stepahnie Musso-Mantione, Chief Information and Privacy Officer, SUNY Stony Brook; Christopher Glass, Esq. (moderator); Program Coordinator: Michael Glass, Esq.
Time: 12:30-2:15 p.m. (Registration from 12 p.m.)
Location: Suffolk County Bar Association, 560 Wheeler Road, Hauppauge, NY
MCLE: **2 Hours** (1 Professional Practice, 1 Skills) [Transitional or Non-Transitional]; $60

Evening Program

BYE, BYE BYPASS TRUSTS

June 14, 2016 5:00-7:00 pm

As of April 1 of this year, the NYS basic exclusion amount goes up from $3,125,500 to $4,187,500. That will affect whether or not NYS residents need bypass trusts, which are most commonly used to pass assets from parents to children at the time of the second parent's death. Presenter David DePinto will discuss the income tax consequences of using Bypass Trusts and Credit Shelter Trusts for planning.

Faculty: David DePinto, Esq.; Program Coordinator: Eileen Coen Cacioppo
Time: 5:00-7:00 p.m. (Registration from 4:30 p.m.)
Location: Suffolk County Bar Association, 560 Wheeler Road, Hauppauge, NY
MCLE: **2 Hours** (1 Professional Practice, 1 Skills) [Transitional or Non-Transitional]; $60

Lunchtime Courthouse Program

THE ART AND SCIENCE OF NEGOTIATION:

SETTLEMENT AND DECISION-MAKING

June 16, 2016 12:30-2:15 pm

Join the Neuroscience and the Law Committee and the Academy for this lunchtime Courthouse program with Dan Weitz of the Office of Court Administration, an expert on Alternative Dispute Resolution, who will speak about how and why we make decisions and how those decisions impact our practice. Participants will learn how their brain function impacts their perceptions, and thereby their decisions. Special pricing is available for attorneys in public service.

Faculty: Dan Weitz, Esq., Deputy Director, Professional and Court Services; Statewide ADR, Division of Court Operations; Program Coordinator: Hon. Richard I. Horowitz, Court of Claims Judge and Acting Supreme Court Justice, Suffolk County;, Co-Chair, Neuroscience and the Law Committee
Time: 12:30-2:15 p.m. (Registration from 12 p.m.)
Location: District Court Jury Room, Cohalan Court Complex, Central Islip
MCLE: **1.5 Hours** (Professional Practice) [Transitional or Non-Transitional]; $45 members; $15 Public Interest Lawyers

Summer Lunch and Learn Series

GETTING PAID-BETTER BILLING SERIES

Nobody likes talking to clients about money, but one of the cornerstones of a good attorney-client relationship is a good understanding on both sides of the financial obligations involved in the representation. This series covers everything from your initial consultation and engagement agreement to good billing practices to collections and best practices for handling a fee dispute, should one arise. Each session provides 1.5 MCLE credits (1 credit in Professional Practice OR Skills, and .5 credits in Ethics) suitable for both Transitional and Non-Transitional Attorneys

Summer Lunch and Learn Series

GETTING PAID-BETTER BILLING: PART 1 - RETAINER AGREEMENT BASICS

July 13, 2016 12:45-2:30 pm

This session will cover engagement agreements and include tips about your initial consultation with the client to limit misunderstandings about fees and billing issues. Attendees will learn what should and should not be included in a basic engagement agreement, what some alternatives to the billable hour might look like, more.

Faculty: Allison C. Shields, Esq., Academy Executive Director and President, Legal Ease Consulting, Inc.
Time: 12:45-2:30 p.m. (Registration from 12 p.m.)
Location: SCBA Great Hall, 560 Wheeler Road, Hauppauge, NY
MCLE: **1.5 Hours** (1 Hour Professional Practice; .5 Hours Ethics) [Transitional or Non-Transitional]; $45 members

Summer Lunch and Learn Series

GETTING PAID-BETTER BILLING: PART 2 – BETTER BILLING PRACTICES

July 27, 2016 12:45-2:30 pm

This session will cover issues including: how and when to bill clients; "best practices" for invoices; what to include in you billing entries, and more.

Faculty: Jeffrey Horn, Esq.
Time: 12:45-2:30 p.m. (Registration from 12 p.m.)
Location: SCBA Great Hall, 560 Wheeler Road, Hauppauge, NY
MCLE: **1.5 Hours** (1 Hour Professional Practice; .5 Hours Ethics) [Transitional or Non-Transitional]; $45 members

Summer Lunch and Learn Series

GETTING PAID-BETTER BILLING: PART 3 – RETAINING AND CHARGING LIENS

August 3, 2016 12:45-2:30 pm

In addition to starting a plenary action against a client, attorneys have two remedies when a client fails to pay after the attorney withdraws from the representation or is discharged by the client: the statutory charging lien; and the common—law retaining lien. This session will discuss these two remedies and what lawyers should consider when choosing a rem-

SUFFOLK ACADEMY OF LAW

OF THE SUFFOLK COUNTY BAR ASSOCIATION

edy.

Faculty: Bob Cohen, Esq.
Time: 12:45-2:30 p.m. (Registration from 12 p.m.)
Location: SCBA Great Hall, 560 Wheeler Road, Hauppauge, NY
MCLE: **1.5 Hours** (1 Hour Professional Practice; .5 Hours Ethics) [Transitional or Non-Transitional]; $45 members

Summer Lunch and Learn Series

GETTING PAID-BETTER BILLING: PART 4 – FEE DISPUTES

August 10, 2016 12:45-2:30 pm

This program will cover the fee dispute process, what attorneys can expect, how they should prepare, and what the fee arbitrators look for.

Faculty: Diane Carroll, Esq. and Nicholas Gabriele, Esq..
Time: 12:45-2:30 p.m. (Registration from 12 p.m.)
Location: SCBA Great Hall, 560 Wheeler Road, Hauppauge, NY
MCLE: **1.5 Hours** (1 Hour Professional Practice; .5 Hours Ethics) [Transitional or Non-Transitional]; $45 members

Summer Lunch and Learn Series

GETTING PAID-BETTER BILLING: PART 5 – WITHDRAWING FROM REPRESENTATION

August 17, 2016 12:45-2:30 pm

When the attorney-client relationship breaks down, sometimes the best course of action is to withdraw from the representation. This program will discuss how, when and why attorneys should withdraw from a client's case.

Faculty: Howard Leff, Esq.
Time: 12:45-2:30 p.m. (Registration from 12 p.m.)
Location: SCBA Great Hall, 560 Wheeler Road, Hauppauge, NY
MCLE: **1.5 Hours** (1 Hour Professional Practice; .5 Hours Ethics) [Transitional or Non-Transitional]; $45 members

Summer Lunch and Learn Series

GETTING PAID-BETTER BILLING: PART 6 - COLLECTIONS

August 24, 2016 12:45-2:30 pm

Learn what to do when your client fails to pay – what options are available to attorneys, what methods can be used to collect outstanding fees prior to starting a plenary action or attempting to enforce a lien, how and when to begin an action against the client for failure to pay the fee, and how your malpractice carrier might view your attempts to collect..

Faculty: Les Taroff, Esq.; David Welch, Esq.
Time: 12:45-2:30 p.m. (Registration from 12 p.m.
Location: SCBA Great Hall, 560 Wheeler Road, Hauppauge, NY
MCLE: **1.5 Hours** (1 Hour Professional Practice; .5 Hours Ethics) [Transitional or Non-Transitional]; $45 members

Evening Program

ETHICS NIGHT AT THE MOVIES 2016

July 20, 2016 6:00-9:00 pm

One of our most popular annual programs, this summer treat features clips from current movies and television shows chosen to highlight important ethical issues attorneys face on a regular basis. Participants discuss the ethical issues raised in each scenario in small groups, using the New York Rules of Professional Conduct as a guide, and then share their findings with the larger group. Our esteemed panel of attorneys and judges will then weigh in with their thoughts on each issue.

This lively, interactive session is an entertaining way to obtain three full ethics credits, whether you're a newly admitted attorney or a seasoned veteran

Faculty: Members of the SCBA Professional Ethics Committee
Time: 6:00-9:00 p.m. (Registration from 5:30 p.m.)
Location: SCBA Great Hall, 560 Wheeler Road, Hauppauge, NY
MCLE: **3 Hours** (Ethics) [Transitional or Non-Transitional]; $45 members

COMING THIS FALL:

Evening Programs

EVIDENCE SERIES

September 15, 2016 6:00-9:00 pm
October 20, 2016 6:00-9:00 pm
November 7, 2016 6:00-9:00 pm

This three part Evidence series will cover how to find social media evidence ethically (September 15), a demonstrative evidence demonstration (October 20), including admission of electronic information such as social media posts, text messages, etc. into evidence, and an Evidence Update, presented by Professor Alexander of St. John's University School of Law. Each program will provide 3 MCLE credits at a cost of $90 for SCBA members. Check the Academy website and watch out for our Academy e-blasts for further information over the summer.

Lunch and Learn Program

EFFECTIVE COMMUNICATION

September 22, 2016 12:30-2:00 pm

The Rules of Professional Conduct and the Rules of Civility establish expectations regarding attorney communications with clients, opposing counsel and others. Moreover, effective communications are key to obtaining good results, especially in negotiations, and to client satisfaction with the representation. This program will focus on four aspects of effective communication: planning for communications; active listening; attacking the problem not the person; and responding rather than reacting.

Faculty: Lisa Pomerantz, Esq.; Dona Rutowicz, LCSW, Executive Coach
Time: 12:30-2:00 p.m. (Registration from 12 p.m.)
Location: SCBA Great Hall, 560 Wheeler Road, Hauppauge, NY
MCLE: **1.5 Hours** (1 Hour Skills; .5 Hours Ethics) [Transitional or Non-Transitional]; $45 members

SPRING 2016 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	12 Sess. Pass	CLE Bundle	DVD	Audio CD	Printed Course Materials
The Hi-Tech Act and the Battle Over Copy Fees	$60	$0	$80	Yes	Yes	$80	$80	$25
Bye Bye Bypass Trusts	$60	$0	$80	Yes	Yes	$80	$80	$25
The Art and Science of Negotiation: Settlement and Decision-making	$45	$0	$60	Yes	Yes	N/A	N/A	$25
Getting Paid-Better Billing Complete Series	$225	$0	$300	Yes	Yes	$300	$300	$150
Getting Paid-Better Billing Part 1: Retainer Agreement Basics	$45	$0	$60	Yes	Yes	$60	$60	$25
Getting Paid-Better Billing Part 2: Better Billing Practices	$45	$0	$60	Yes	Yes	$60	$60	$25
Getting Paid-Better Billing Part 3: Retaining and Charging Liens	$45	$0	$60	Yes	Yes	$60	$60	$25
Getting Paid-Better Billing Part 4: Fee Disputes	$45	$0	$60	Yes	Yes	$60	$60	$25
Getting Paid-Better Billing Part 5: Withdrawing from Representation	$45	$0	$60	Yes	Yes	$60	$60	$25
Getting Paid-Better Billing Part 6: Collections	$45	$0	$60	Yes	Yes	$60	$60	$25
Ethics Night at the Movies	$90	$0	$120	Yes	Yes	$120	$120	$25

** **MATERIALS**: All materials will be provided electronically via an internet link to a PDF. Bring your laptop or other mobile device if you wish to access the materials during the program. Printed materials can be provided for an additional charge *(see above)* and must be ordered in advance.

FINANCIAL AID: Call 631-234-5588 for information.

Name: _____

Address: _____

Phone: _____ Email: _____

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

METHOD OF PAYMENT ____Check *(check payable to Suffolk Academy of Law)* ____ Cash ____ 12 Session ____ CLE Bundle

Credit Card: __American Express __MasterCard __VISA __Discover
Account #_____ Exp. Date:_____ Signature: _____

ACADEMY OF LAW NEWS

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

13 Monday — **The Federal Hi-Tech Act and the Battle Over Copy Fees**, 12:30 p.m. - 2:15 p.m., 2 credits Professional Practice/Skills, $60. A light lunch will be served.

14 Tuesday — **Bye Bye Bypass Trusts**, 5:00 p.m. - 7:00 p.m., 2 credits Professional Practice, $60. A light supper will be served.

16 Tuesday — **The Art and Science of Negotiation**, 12:30 p.m.-2:15 p.m., 1.5 credits skills, $45. In the District Court Jury Room, Central Islip. A light lunch will be served.

JULY

13 Wednesday — **Getting Paid-Better Billing Series Part 1: Retainer Agreement Basics**, 12:45 p.m. - 2:30 p.m., 1.5 credits (1 Skills, .5 Ethics) $45. A light lunch will be served.

20 Wednesday — **Ethics Night at the Movies**, 6:00 p.m. – 9:00 p.m., 3 credits Ethics $90. Movie night munchies will be served.

27 Wednesday — **Getting Paid-Better Billing Series Part 2: Better Billing Practices**, 12:45 p.m. - 2:30 p.m., 1.5 credits (1 Skills, .5 Ethics) $45. A light lunch will be served.

AUGUST

3 Wednesday — **Getting Paid-Better Billing Series Part 3: Retaining and Charging Liens**, 12:45 p.m. - 2:30 p.m., 1.5 credits (1 Skills, .5 Ethics) $45. A light lunch will be served.

10 Wednesday — **Getting Paid-Better Billing Series Part 4: Fee Disputes**, 12:45 p.m. - 2:30 p.m., 1.5 credits (1 Skills, .5 Ethics) $45. A light lunch will be served.

17 Wednesday — **Getting Paid-Better Billing Series Part 5: Withdrawing from Representation**, 12:45 p.m. - 2:30 p.m., 1.5 credits (1 Skills, .5 Ethics) $45. A light lunch will be served.

24 Wednesday — **Getting Paid-Better Billing Series Part 6: Collections**, 12:45 p.m. - 2:30 p.m., 1.5 credits (1 Skills, .5 Ethics) $45. A light lunch will be served.

SEPTEMBER

15 Thursday — **Gathering Social Media Evidence and Social Media Social**, 5:30 p.m. - 9:00 p.m., 3 credits, $90. A light supper will be served, along with networking and social opportunities.

22 Thursday — **Communicating Effectively with Clients and Adversaries**, 12:30 p.m. - 2:00 p.m., 1.5 credits (1 Skills, .5 Ethics), $45. A light lunch will be served.

Please note: **Materials for all Academy programs are provided online and are available for download in PDF format prior to or at the time of the program. Printed materials are available for an additional charge.**

Learn How to Get Paid with the Academy

Nobody likes talking to clients about money, but one of the cornerstones of a good attorney-client relationship is a good understanding on both sides of the financial obligations involved in the representation. The Academy of Law's 2016 summer series will be all about billing. The series, held on Wednesday afternoons at lunchtime during July and August, covers everything from retainer agreements and good billing practices to fee disputes, collections and retaining and charging liens. Each session will provide 1 ½ CLE credits; 1 credit in Skills and ½ credit in Ethics. All of the programs will be recorded and webcast.

Here's a run-down of our summer series:

Kicking off our Getting Paid-Better Billing series on July 13 is a program on Retainer Agreement Basics with Academy Executive Director Allison Shields. The program will cover engagement agreements and include some tips about how to conduct an effective initial consultation with the client to limit misunderstandings about fees and billing issues. Attendees will learn what should and should not be included in a basic engagement agreement, what some alternatives to the billable hour might look like, and more.

Next in line is a session on July 27 on Better Billing Practices with Jeffrey Horn, Esq. This session will cover issues how and when to bill clients; "best practices" for invoices; what to include in your billing entries, and more.

On August 3, Bob Cohen, Esq. will present Retaining and Charging Liens. In addition to starting a plenary action against a client, attorneys have two remedies when a client fails to pay after the attorney withdraws from the representation or is discharged by the client: the statutory charging lien, and the common-law retaining lien. This session will discuss these two remedies and what lawyers should consider when choosing a remedy.

On August 10, 2016, Diane Carroll, Esq. and Nicholas Gabriele, Esq. will educate lawyers about the fee dispute process. Although no one likes to be involved in a fee dispute, our panel will let you know what attorneys can expect from the process, how they should prepare, and what the fee arbitrators look for when making an award.

Howard Leff, Esq. will present a program on withdrawing from representation on August 17, 2016. When the attorney-client relationship breaks down, sometimes the best course of action is to withdraw from the representation. This program will discuss how, when and why attorneys should withdraw from a client's case.

Our series concludes with a session covering Collections with Les Taroff, Esq. and David Welch, Esq. You'll learn what to do when your client fails to pay, including what options are available to attorneys, what methods can be used to collect outstanding fees prior to starting a plenary action or attempting to enforce a lien, how and when to begin an action against the client for failure to pay the fee, and how your malpractice carrier might view your attempts to collect.

Ethics Night at the Movies

In addition to our summer billing series, as usual, the Academy will be holding our *Ethics Night at the Movies* program this summer. The program, one of our most popular, is scheduled for July 20, 2016. Come join us for fun film clips and lively discussion, along with popcorn and other movie munchies to get three ethics credits in a fun and enjoyable atmosphere!

Missed a Program? Online, On-demand and Recorded CLE

(Continued on page 31)

ACADEMY OF LAW OFFICERS

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ERISA Impacts States' Ability to Collect Healthcare Data (Continued from page 17)

the plan impermissibly would "be laden with burdens, subject to incompatible, multiple and variable demands, and freighted with risk of fines, breach of duty and legal expense," all of which ERISA preemption was intended to preclude. 746 F.3d 497, 510.

SCOTUS granted *certiorari* and affirmed, with Justices Thomas and Breyer concurring in separate opinions and Justice Ginsburg dissenting. *Gobielle v. Liberty Mutual Insurance Company,* 577 US ___; 136 S.Ct. 936, 194 L.Ed. 2d 20, 2016 U.S. LEXIS 1612 (2016).

The majority starts by stating the basis of ERISA pre-emption. ERISA preempts "any and all state laws insofar as they may now or hereafter relate to any employee benefit plan." 29 USC 1144(a). Supreme Court precedent has described two categories of state laws that ERISA preempts. The first is laws that have "reference" to ERISA plans, *i.e.*, where a state law acts "immediately and exclusively" upon an ERISA plan or where the existence of the ERISA plan is "essential to the law's operation" (citations omitted.) The second is where a state law has an "impermissible connection" with the ERISA plan, meaning that the state law impacts upon a "central matter of plan administration" or "interferes with nationally uniform plan administration." It is on this last point, the majority finds, that the Vermont law must yield.

ERISA does not establish or guarantee any substantive benefits. What it does is mandate as an "exclusive federal concern" certain oversight systems and other procedures that have uniform application throughout the country. Consequently, requiring an ERISA plan administrator to comply with different laws in each of the 50 states and possibly contend with litigation based on a wide variety of different, overlapping and often conflicting state laws would "undermine the congressional goal of minimizing the administrative and financial burdens on plan administrators — burdens ultimately borne by the beneficiaries" (citations omitted).

Just why is "reporting data" an essential part of the core functions of an ERISA plan? The U.S. Secretary of Labor has established extensive data reporting requirements with which ERISA plans must comply, and the Secretary can change the requirements as the need arises. Current requirements include data on payment of different types of claims, and plan fiduciaries must maintain extensive documentation. Civil and criminal penalties are imposed for violations. Decisions respecting these requirements and obligations are for federal authorities, not each of the separate states. All of this, the court held, evidences that reporting, disclosure and record keeping are "an essential part of the uniform system of plan administration" contemplated by Congress when it enacted ERISA. As a consequence, Vermont's reporting requirements intrude upon "a central matter of plan administration" as well as constitute an interference "with nationally uniform plan administration" in violation of congressional intent.

The court rejected Vermont's argument that the cost of compliance, if any, was modest and "indirect." Cost is not the issue; rather, it is the possible impact of a series of "disuniform" state reporting laws or an accommodation of multiple state agencies with different processes for reporting even if the data is the same. Similarly, just because the state reporting requirement purports to have different objectives does not change its nature as a preempted "direct regulation of a central matter of [ERISA] plan administration" (citation omitted). The bottom line is that the state statute and regulations impose duties that are inconsistent with the central design of ERISA to provide a single uniform national scheme for the administration of ERISA plans and, therefore, are preempted.

Justice Thomas observes that the Constitutional antecedent for ERISA is the "interstate commerce" clause. Just because Congress can regulate interstate commerce, however, does not mean that Congress can exempt ERISA plans from state regulations that have nothing to do with interstate commerce. But the court has moved away from any analyses based on this historical foundation. Instead, in cases such as *New York State Conference of Blue Cross and Blue Shield Plans v. Travelers Insurance Company*, 514 US 655, the question became one of whether a state law "impermissibly relates to an ERISA plan due to some connection with that plan." This determination, in turn, depends upon an examination of the objectives of the ERISA statute and the nature and effect of the state law on ERISA plans. Unfortunately, Justice Thomas finds, this shift has become increasingly more difficult to reconcile with preemption jurisprudence:

> "Until we confront whether Congress had the constitutional authority to pre-empt such a wide array of state laws in the first place, the Court — and lower courts — will continue to struggle to apply [section] 1144." (citation omitted)

Justice Breyer questions why the Secretary of Labor cannot simply develop reporting requirements that satisfy the states' needs. Better yet, he suggests that the department simply "delegate" to a particular state the department's authority to obtain data (which, by the way, I observe is a common practice in many areas of federal-state relations, such as designating a state's health department to perform a variety of Medicaid functions, the principal way in which the Medicaid program has been implemented nationally).

Justice Ginsburg dissents. The majority acknowledges that in enacting ERISA Congress did not intend to supplant state law, especially if the state action arises in the context of "traditional" areas of state concern such as health care. She finds that the Vermont program, like that of the 17 other states that are developing "all payer" databases, advances a "compelling" state interest that should outweigh the operational concerns raised by the majority. More and more, states are advancing their interest in improving health care quality while holding the line on spiraling costs. Yet the majority's decision would work precisely to the opposite effect:

> "Stopping States from collecting claims data from self-insured employer health care plans would thus hugely undermine the reporting regimes on which Vermont and other States depend to maintain and improve the quality, and hold down the cost, of health care services." (citation omitted)

Vermont's law and ERISA serve completely different purposes, Ginsburg holds, and therefore Vermont's law is not the kind of state law that Congress intended that ERISA preempt. In addition, Liberty Mutual has failed to show that it would suffer any kind of direct or actual burden, let alone a burden that is sufficient to trigger ERISA preemption. Consequently, the Vermont statute does not interfere with the ERISA plan's administration of benefits. "Where regulatory compliance depends upon the use of evolving technologies it should be incumbent on the objector to show concretely what the alleged regulatory burden in fact entails." (citation omitted). This the plan has failed to do.

The impact on the validity of the Vermont "all payer" database by the exclusion of the few self-funded employee benefit plans operating in the state is likely to be minimal. For states such as New York, however, where estimates put ERISA health plan beneficiaries at some 50 to 60 percent of all health plan covered lives, the impact of exclusion is dramatic. Simply put, of what value is an "all payer" data base such as *Fair Health* if relevant, even critical, data from half the patient population of the state potentially is excluded from consideration?

Note: James Fouassier, Esq. is the Associate Administrator of Managed Care for Stony Brook University Hospital and Co-Chair of the Association's Health and Hospital Law Committee. His opinions and comments are his own and may not reflect those of Stony Brook University Hospital, State University of New York or the State of New York. james.fouassier@stonybrookmedicine.edu.

Spring at the Academy of Law (Continued from page 30)

Programs

In addition to our live programs, the Academy also offers live webcasts of many of our programs, as well as a full array of online, on-demand CLE programs and CLE programming available on DVD or CD. These additional formats allow attorneys to take advantage of the learning opportunities and CLE credits available from the comfort of their home or office (or even on the road!).

To view the online, on demand programs available, go to scba.org, click on ***MCLE*** and then ***Online video replays and live webcasts*** to search for the programs. If you prefer to purchase a CD or DVD of one of our programs, you can go to scba.org, click on ***MCLE*** and then ***DVDs and CDs of prior programs*** to access our recorded program library.

Want to learn about upcoming programs?

If you're missing Academy programs, perhaps it's because you're not receiving our email blasts! The Academy has "gone green" and is no longer sending out paper flyers for our programs. Instead, you can find information on upcoming Academy programs by reading *The Suffolk Lawyer*, by looking at our Academy calendar at scba.org, or by receiving our email blasts. Blasts are usually sent twice a week and include links to view the electronic flyers and to register for our programs. If you're not receiving our email blasts, please email allison@scba.org and let us know you want to be added to our Academy email list.

The Academy of Law is on Facebook

In addition to the Suffolk County Bar Association website, scba.org, you can find information about upcoming Academy programs and other information that may prove useful to your practice by heading over to the Academy's Facebook page, (Facebook.com/SuffolkAcademyofLaw). Links from each event to registration and detailed flyers are available (if applicable).