THE SUFFOLK LAWYER

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Vol. 28 No. 1
September 2012

INSIDE...
SEPTEMBER 2012
Focus On Environmental Law

Advice from the Experts at SCBA

Includes 18 distinguished CLE lecturers & acclaimed Thomson Reuters Treatise

The Suffolk Academy of Law will present a very special CLE program on Thursday, October 11, 2012. The title of the program is "Advice from the Experts: Successful Strategies for Winning Commercial Cases in New York State Courts." The format is exciting, the speakers are superstars, and all registrants will receive a copy of the critically acclaimed six-volume treatise *Commercial Litigation in New York State Courts*, published by Thomson Reuters and the New York County Lawyers' Association, and a CD-ROM containing forms and jury instructions – a $680.00 retail value. The Suffolk Academy of Law's total package price for both the program and the treatise is $250 for Suffolk County Bar Association members ($300 for non-members).

Photo by Barry Smolowitz

Members of the SCBA enjoyed fishing aboard the Osprey V which sailed out of Port Jefferson at the annual outing.

At the program, an extraordinary panel of four distinguished judges, 13 well known commercial litigators, and a prominent in-house counsel for a major corporation will provide practical advice and strategies for winning commercial cases in New York State courts. The program will begin with a discussion of the strategic issues involved in case investigation and evaluation. The next topic will be the effective handling of motions and provisional remedies. The program additionally includes discussion of deposition techniques. Also covered will be ethics for business litigators. Trial advocacy and appellate advocacy will be discussed in

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PRESIDENT'S MESSAGE

Hitting the Ground Running

Arthur Shulman

By Arthur E. Shulman

During my first three months as your President, in between sunshine, thunder storms and rainbows, I have had the pleasure and honor of meeting many of my fellow bar leaders from around the state, including the presidents of the New York State, Brooklyn, Queens and Nassau County Bar Associations, at numerous functions and events from Brooklyn to the State House of Delegates meeting in Cooperstown, New York, and points in between, then back to Suffolk County. During my many meetings with my counterparts, I learned that every one of these bar associations and their individual members face many of the same continuing problems that the Suffolk County Bar Association and its members endure in the every day practice of law, resulting from the tough economic conditions facing this country as well as the financial pressures placed upon our court system by the budgetary cutbacks imposed upon the courts by the reduction of funds in the state and county budgets. Along with my Executive Committee and the members of the Board of Directors, we have committed ourselves to move forward with initiatives in a number of areas that hopefully will assist our member attorneys improve their ability to practice law in Suffolk County.

Your bar association has again been able to keep the same dues rate this year despite the substantial rise in many of the mandatory operating expenses we incur due to a combination of factors. First, our bar association staff, led by Executive Director Jane LaCova, have committed themselves to hold the line and/or reduce every discretionary operating expense possible. We have been able to reduce such costs as printing and postage by relying on the

(Continued on page 26)

BAR EVENTS

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

Author's Night - *Disrobed*
Thursday, Sept. 20,
SCBA Center
Disrobed, an inside look at the Life and Work of a Federal Trial Judge by the Hon. Frederic Block. Call the SCBA for details.

Lawyer Assistance Foundation Golf Outing
Monday, Sept. 24, 1:00 p.m. shotgun
Westhampton Beach

Judiciary Night
Oct. 18, 6 p.m
Lombardi's on the Bay, Patchogue

FOCUS ON
ENVIRONMENTAL LAW
SPECIAL EDITION

Suffolk County Bar Association

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E-MAIL: SCBA@SCBA.ORG

Board of Directors 2012-2013

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

SEPTEMBER 2012

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

10 Monday Executive Committee, 5:30 p.m., Board Room.

12 Wednesday Education Law Committee, 12:30 p.m., Board Room.
Professional Ethics & Civility Committee, 5:30 p.m., Board Room.

14 Friday Labor & Employment Law Committee, 8:00 a.m., Board Room.

18 Tuesday Solo & Small Firm Practitioners Committee, 4:30 p.m., Board Room.

19 Wednesday Board of Directors, 5:30 p.m., Board Room.
Real Property Committee, 6:30 p.m., E.B.T. Room.

20 Thursday Author's Night: Book Review *"Disrobed"* by Federal Court Judge Frederic Block. You must register to attend. Call Bar Center: 234-5511.

24 Monday Lawyer Assistance Foundation Annual Ira P. Block Memorial Golf Outing, Westhampton Country Club, Westhampton. Shotgun start at 12:30 p.m. Registration & Lunch begins at 11:00 a.m. Cocktails & Dinner only: $125 per person ($25 is tax deductible. Golf Package: $350 pp including Cocktails & Dinner ($75 is tax deductible). Register on line at scba.org or call the Bar Center at 234-5511.
Labor & Employment Law Committee, 8:00 a.m., Board Room.

OCTOBER

1 Monday St. John's Distinguished Alumni Dinner honoring Hon. Andrew A. Crecca, Irish Coffee Pub, 131 Carleton Avenue, East Islip. $85 - RSVP by 9/20 by calling 718-990-6066 & for more information.

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

10 Wednesday Education Law Committee, 12:30 p.m., Board Room.

15 Monday Executive Committee, 5:30 p.m., Board Room.

16 Tuesday Small Claims Arbitrators Training, 5:30 p.m., Great Hall.

17 Wednesday Real Property Committee, 5:30 p.m., Board Room.

18 Thursday Council of Committee Chairs, 6:00 p.m., Great Hall.

19 Friday Labor & Employment Law Committee, 8:00 a.m., Board Room.

24 Wednesday Professional Ethics & Civility Committee, 5:30 p.m., Board Room.

29 Monday Board of Directors, 5:30 p.m., Board Room.

30 Tuesday Solo & Small Firm Practitioners Committee, 4:30 p.m., Board Room.

Our Mission

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

An SCBA Welcome

The SCBA welcomes Patricia Salkin who was named Touro Law Center's dean on July 30. She replaces Dean Lawrence Raful who stepped down to join the faculty full time after serving as dean for eight years. Ms. Salkin is the fifth dean appointed at Touro Law, and is the first female dean in the school's history. She is a nationally renowned legal scholar.

Patricia Salkin

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

Thomas More Group Twelve-Step Meeting

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

LAWYERS COMMITTEE HELP-LINE: 631-697-2499

THE SUFFOLK LAWYER

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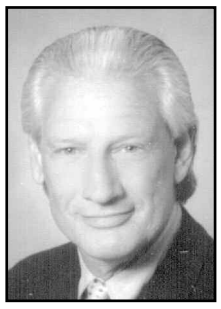
NY State Legislature Passes Uniform Notice of Claim Act

NYS Bar Association lauds Legislature for passing Act

By A. Craig Purcell

Before retiring for the summer in June, The New York State Legislature passed a very important piece of legislation known as The Uniform Notice of Claim Act, which was supported by the committee I co-chair for the New York State Bar Association, The Committee on the Tort System. The purpose of this bill is to provide plaintiffs with a uniform, fair and statutorily consistent procedure for serving a Notice of Claim of Intention to Commence a proceeding in the courts of the State of New York for damages suffered by an aggrieved party, and similarly provide for a consistent statute of limitations applicable to all such actions. The bill is presently on the Governor's desk awaiting his signature.

The statutes which have been in effect until this legislation was enacted for filing of notices of claim and commencing actions or proceedings against public corporations have been confusing, inconsistent and unfairly difficult, especially for private practitioners. The time limits for filing notices of claim, and for commencing actions against various municipalities, have been governed by many statutes, including the CPLR, The General Municipal Law, The Environmental Conservation Law, The Public Authorities Law, The Education Law, The Mental Hygiene Law and The Private Housing Finance Law. Just one example of the inconsistency of these statues is that an action pursuant to The General Municipal Law against a municipality such as the State of New York or County of Suffolk had to be commenced within one year and 90 days of the incident. Under The Public Authorities Law, actions against The Metropolitan Transit Authority (including The Long Island Railroad) had to be commenced within one year and 30 days of the incident. This and other inconsistencies have caught many practitioners by surprise and deprived litigants of their day in court.



A. Craig Purcell

The purpose of the new statute is to finally end this inconsistency. All notices of claim will now have to be filed within 90 days of the triggering event, and all actions will have to be commenced within one year and 90 days. This includes any claim or statute of limitation requirement contained in any of the statutes listed above. In addition, the new legislation provides that service against any municipality can be made on the Secretary of State of the State of New York. All public corporations must provide the Secretary of State's office with an address the Secretary of State can mail notices and summonses and complaints. Service will be complete upon the practitioner properly serving the Secretary of State. However, service directly upon the municipality is still available. This corrects another inconsistency and problem for practitioners who frequently run all over the municipality in question trying to ascertain exactly where to serve the Notice of Claim or Summons and Complaint (or Petition where that is the appropriate way to commence the action).

While the legislature is often criticized for wasting time and general inaction, its members clearly got it right when they enacted this statute, making it easier for the public to gain access to justice. This is something the New York State Bar Association has been advocating for years, and it applauds the legislature for its action.

The committee of the New York State Bar Association that I co-chair deals with all kinds of issues pertaining to the practice of tort law in New York State. We have in the past dealt extensively with civil justice reform (i.e., tort reform) and other issues. We are pleased to discuss any important issue which affects practitioners and the public's access to justice, and urge you to contact the committee through the New York State Bar Association.

Note: A. Craig Purcell is a past president of the SCBA, a past dean of the Suffolk Academy of Law, and Co-Chair of the New York State Bar Association Committee on the Tort System.

Membership Dues are Overdue!!!

Act before the 2012-13 Membership Directory goes to print

September is here, and the SCBA's fiscal year has entered its second quarter. If you have not paid your annual dues, please do so immediately. If you have misplaced your membership application, lost your committee preference form, or need any other information to keep your membership active and in good standing, please call Mary Shannon, Membership Administrator, at (631) 234-5511. Act now before our 2012-13 annual Membership Directory goes into print…without your name included.

– LaCova

Meet Your SCBA Colleague

Richard A. Weinblatt, an elder attorney, was originally a CPA. Reading tax decisions led him to decide to become a member of the legal profession. Now he takes a great deal of pride in making a difference in people's lives.

By Laura Lane

Why were you reading tax decisions while working as a CPA? I needed them for my job and was going for a master's degree in taxation. A tax research course got me interested in the law. I found that looking at the legal procedures and the law was a great deal more interesting than looking at numbers.

They always say you never know how important people will be in your life. Your longtime friend John Calcagni is an example of that for you. I met John initially when I was an accountant. He was the assistant in-house general counsel and later went on to start his own practice. After I became an attorney I opened up a small firm with a law school friend and we shared office space with John. He'd been an attorney for eight or nine years prior to me and we were close friends. I learned a lot from John and joined his firm as a partner January 1994.

How did your background benefit you? I already had a tax background so trusts and estates was a natural area for me to go into. I started attending estate seminars and a new area of law was being discussed – Elder Law. It is a very challenging practice because laws are complex and constantly changing. You deal with Medicaid eligibility rules and tax issues and unfortunately, with people living longer, there are many family disputes over finances.

What do you enjoy about being an Elder Law attorney? I am very interested in helping families in financial crisis. And these cases can be difficult. Today what traditionally went on in surrogate court is now in guardianship court. And I've handled every aspect of guardianships. You are often dealing with families at their worst time so it can be very rewarding to help them.

In what respect are they at the worst time in their lives? You meet with people who come to see you with feelings or expectations that they are about to lose everything. Their spouse is going into a nursing home, they are worried they will lose their house, and they aren't sure about their assets. They are worried about their spouse and themselves. When I can navigate through the rules which are complex, give them some peace of mind, and assure them that they'll be o.k. I provide a great service. Government benefits, trusts and estates, tax and guardianship laws are all something you need to have knowledge of to do this job. I like to help people.

When did you join the SCBA? I joined early on in my career as a member that wasn't active so I could go to the committee meetings and for the education that the association provides.

How did you become one of the leaders? I became an officer at the Academy and then an associate dean. I got more involved because I enjoyed the people, the continuing education and what the association was involved in. After my time at the Academy I applied to become a director of the bar and served on the board for three years. At the same time I became more active in the Elder Law section of the New York State Bar. Two years ago I became the treasurer for the State Bar's Elder Law section. Now I'm the Vice Chair.

Why would you encourage people to join the SCBA? The SCBA provides a great deal for their membership. Education-wise you can get at minimum CLE programs but you can also go to the committee meetings. There you will be able to share information and ideas, discuss issues in practice that will benefit your clients. You come to know so many people you can call and discuss the issues you have in your practice. I get many calls from other SCBA Elder law practitioners for the same reason. If you aren't a member, you don't have that network.

Richard A. Weinblatt

You have made many friends at the SCBA too, right? There are many nice people and good lawyers in the organization. People in the SCBA are passionate about their careers. I love being a lawyer and enjoy the profession; look at it as more of a profession than a business. I can't think of another job I'd like to have.

VIEWS FROM THE BENCH

Not so Obvious Mistakes in Criminal Trials – Jury Selection

Time restriction in multiple felony case deemed prejudicial

By Hon. Stephen L. Ukeiley

Stephen L. Ukeiley

Note: This is part one of a two part series

As the adage goes, a criminal defendant is entitled to a fair trial, not a perfect one. When considering trial errors, common mistakes such as the improper admission of evidence regarding the defendant's past conduct may come to mind.

This month's column is the first of a two part series on reversible error from a different perspective - atypical or 'not so' obvious mistakes.

The Court of Appeals has recently reversed criminal convictions for mistakes made by counsel during jury selection and closing arguments. Although these claims typically garner little notoriety, they provide useful insight to both prosecutors and defense counsel.

In this issue, the imposition of time restrictions during voir dire is discussed. In Part II, a novel ineffective assistance of counsel claim for the failure to object during closing arguments will be examined.

Voir Dire – time limitation on questioning prospective jurors

It is well-established that a trial court has broad discretion in determining the parameters of jury selection. *See People v. Littlejohn*, 92 A.D.3d 898 (2d Dep't 2012). Although there is no litmus test, the trial court may limit the amount of time counsel has to conduct voir dire. The caveat is that defense counsel must be "afford[ed] . . . a fair opportunity to question prospective jurors about relevant matters". *People v. Steward*, 17 N.Y.3d 104 (2011) (internal citation omitted).

Where time restrictions are imposed, the issue is whether counsel was given a "fair opportunity" to inquire of the venire. It appears a "fair opportunity" equates to ample opportunity to pose reasonable preliminary and follow-up questions such that an informed decision regarding the use of challenges, both for cause and peremptory, may be made.

The Criminal Procedure Law provides little clarity on the issue. Section 270.15 merely states that following initial questioning by the trial judge, the parties "[s]hall be afforded a fair opportunity to question the prospective jurors [individually or collectively] as to any unexplored matter affecting their qualifications, but the court shall not permit questioning that is repetitious or irrelevant, or questions as to a juror's knowledge of rules of law."

People v. Steward

The issue for the Court of Appeals in *Steward* was whether the trial court abused its discretion in a multiple felony case by limiting questioning during the

(Continued on page 30)

BENCH BRIEFS

By Elaine Colavito

Suffolk County Supreme Court

Honorable Paul J. Baisley, Jr.

Motion for protective order granted; statements propounded in the notice to admit improperly sought admissions that went to the heart of the parties' dispute.

Elaine Colavito

In *Ashraf Ahmed and Martyna Ahmed v. Michael Stewart and Kelli Stewart, Ashraf Ahmed and Martyna Ahmed v. Whitford Development, Inc.,* Index No.: 9192/09, decided on July 13, 2012, the court granted plaintiff's motion for a protective order vacating the "Requests to Admit" of defendants. In rendering its decision, the court noted that the purpose of a notice to admit is to eliminate from the litigation matters as to which the parties are in general agreement and about which there is not dispute. The court further stated that a notice to admit is not intended to encompass ultimate conclusions, which can only be determined after a trial, or to elicit information in lieu of other available disclosure devices. Here, the court held that the statements propounded in the notice to admit improperly sought admissions that went to the heart of the parties' dispute. Consequently, the motion was granted and the notice to admit was stricken.

Motion on order directing defendant to reproduce witnesses for further deposition to answer questions to which their counsel prohibited inquiry granted; questions were material and relevant to plaintiff's claims, were neither "plainly improper" nor prejudicial, and were not otherwise objectionable, and defendant's counsel improperly directed the witnesses not to answer.

In *Marie Doran, as Administratrix of the Estate of Michael J. Doran, and Marie Doran, individually v. Good Samaritan Hospital Medical Center, Jason A. Winslow, M.D. and Christopher Berard, D.O.,* Index No.: 22793/09, decided on January 12, 2012, the court granted plaintiffs' motion for an order directing the Defendant Good Samaritan Hospital to reproduce Jaime Abad, R.N. and Hazel Traje Aguirre, R.N. for further deposition to answer questions to which their counsel prohibited inquiry. The court reasoned that pursuant to 22 NYCRR §221.2, a witness at a deposition is required to answer all propounded questions except to preserve a privilege or right of confidentiality, to enforce a limitation set forth in an order of the court, or when the question is plainly improper and answering it would cause significant prejudice to any person. The court further stated that an attorney is not permitted to direct a deponent not to answer any question except in accordance with the forgoing rule or as provided in CPLR §3115. In reviewing the transcripts,

(Continued on page 30)

EDUCATION LAW

Celebrating the Bittersweet Anniversary of Title IX

By Candace J. Gomez

This year marks the 40th anniversary of Title IX (20 U.S.C. §1681 et seq.), the pivotal legislation which has become one of the cornerstones of gender equality in education. Although today Title IX is commonly associated with sports, the achievements resulting from this legislation far surpass the realm of athletics. In fact, the original statute made no explicit mention of sports and the legendary Title IX, which was part of the larger Education Amendments Act of 1972, was inconspicuously and briefly worded, simply stating that:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

This wording seemed almost trivial to many who were more concerned with, and distracted by, the key debate erupting from the Education Amendments Act of 1972 – the debate over desegregated school busing.

The provision of Title IX that would eventually serve to become so important to the advancement of women's rights was grouped together in an omnibus bill with the much more controversial issue of school desegregation. The provision regarding busing stated:

> Notwithstanding any other law or provision of law, in the case of any order on the part of any United States district court which requires the transfer or transportation of any student or students from any school attendance area prescribed by competent State or local authority for the purpose of achieving a balance among students with respect to race, sex, religion, or socioeconomic status, the effectiveness of such order shall be postponed until all appeals in connection with such order have been exhausted or, in the event no appeals are taken, until the time for such appeals has expired. This section shall expire at midnight on January 1, 1974.

Candace Gomez

In short, this provision would postpone the effectiveness of any district court order requiring school districts to engage in busing as a means to dismantle racial segregation and achieve racial balance. By adding this provision to the omnibus education bill, Congress was attempting to slow down efforts by the courts to desegregate school districts with the "deliberate speed" required by *Brown v. Board of Education*, 349 U.S. 294 (1955). Through the imperfect lens of history, we can only speculate as to whether these issues – gender equality and school desegregation – were deliberately grouped together in order to provide a political cover for women's rights while the firestorm centered upon racial desegregation. Essentially, a vote *for* gender equality would have simultaneously been a vote *against* racial equality in schools. It must have been a harrowing decision for Congresswomen such as New York's Shirley Chisholm, the first Black woman elected to Congress, and Bella Abzug (D-NY), the first Jewish woman elected to Congress who took on civil rights cases in the South and was a firm supporter of the civil rights movement. It must have also been especially difficult for Patsy Mink (D-HI), the remarkable principal author of Title IX. Ms. Mink was the first woman of color and the first Asian American woman elected to Congress. Three votes, three women, who each overcame extraordinary obstacles based upon not just gender but also their racial or ethnoreligious identities.

At least one Congresswoman, Edith Green (D-OR), who was also chair of the House Committee on Education and Labor, and a drafter of Title IX, spent two years working and fighting for Title IX yet ultimately felt compelled to ask her colleagues to defeat the entire bill because of her opposition to the busing provision. The Congressional Record shows that Representative Chisholm and Representative Abzug also decided to vote "nay" when faced with this very difficult decision. In some respects, the beauty of Title IX is overshadowed by the acknowledgment that many representatives were forced to choose between two very worthy and principled positions. The Education Amendments Act passed by a vote of 218-180 in the House and became law on June 23, 1972.

In the end, supporters of the anti-busing provision enjoyed a short-lived victory because, within months, by September 1, 1972, it was circumvented by *Drummond v. Acree*, 409 U.S. 1228 (1972) in which Justice Powell of the Supreme Court of the United States, held that the Education Amendments Act did not require a stay of all district court desegregation orders. The Court determined that the statute required postponement only if the order required the transfer or transportation of students for the purpose of achieving a racial balance among students, but it did not "purport to block all desegregation orders which required the transportation of students." The Court noted that there was a difference between dismantling dual school systems and seeking to achieve a "perfect racial balance." Thus, those district court orders that were not entered to achieve racial balance were immediately effective.

Despite its somewhat inauspicious implementation process, the triumph of Title IX lives on in every woman who is admitted to college and graduate school; every girl who is given the opportunity to take the field or step onto the court; and in the fact that these equal opportunities are becoming more engrained in our society with each new generation. In my article next month, I will expand upon the achievements of Title IX and the legal challenges regarding this legislation in more recent years.

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

WORKER'S COMP & SS DISABILITY

Supreme Court Unanimously Decides *Astrue v. Capato*

Note: This article is a follow up to the article printed in the June edition of *The Suffolk Lawyer*.

By Sharmine Persaud

The U.S. Supreme Court decided *Astrue v. Capato*, (No. 11-159) on May 21, 2012). The unanimous decision rendered by Justice Ruth Bader Ginsberg, held that only those posthumously conceived children who can inherit under the laws of intestacy of the state where their deceased father was domiciled at the time of death can meet the Social Security Act's definition of "child" under 42 U.S.C. § 416(h)(2)(A), and be eligible to receive survivors benefits. As a result, the court reversed the Third Circuit's holding that the Capato twins could receive benefits if they were found to be dependent on their deceased father. See *Capato v. Commissioner*, 631 F.3d 626 (3rd Cir. 2011).

Sharmine Persaud

Justice Ginsburg, writing for a unanimous court, explained that to understand the definition of "child" entitled to receive survivors benefits, several sections of the Social Security Act must be read together. First, 42 U.S.C. § 416(e) defines a child as the child or legally adopted child of an individual, including, in certain circumstance, a stepchild or a grandchild. 42 U.S.C. § 402(d) provides that every person defined as a child under 42 U.S.C. § 416(e) is entitled to benefits. And, 42U.S.C. § 416(h)(2)(A) states that, "in determining whether an applicant is a child," the commissioner shall apply the intestacy law of the individual's domiciliary state. An applicant who does not meet the intestacy law criteria can be eligible if he meets one of several other criteria found in sections 416(h) (2)(B), 416(h)(3)(C), which are not relevant in this case. The court held that pursuant to § 416(h) of the Social Security Act ("Act"), that a biological child is entitled to Social Security survivors benefits only if the child qualifies for inheritance from the decedent under state intestacy law or satisfies one of the statutory alternatives to that requirement.

The court rejected Ms. Capato's argument that the children are eligible because they are clearly the biological children of a married couple. The flaws in this argument include the fact that a biological connection is not always required for a parent/child relationship to exist (as in the situation involving an adopted child) and the fact that, under Florida law (the state of the father's domicile at his time of death), the parents' marriage ended at the time of death.

Karen and Robert Capato married in May 1999. Shortly thereafter, Robert was diagnosed with esophageal cancer and informed that he would be treated with chemotherapy. Before treatment, Robert deposited his semen in a sperm bank, and he passed away in Florida in March 2002. After Robert's death, Karen began in vitro fertilization using Robert's sperm, and she gave birth to twins in September 2003. Karen claimed Social Security survivor's benefits for the twins, but the Social Security Administration ("SSA") denied her application. The District Court affirmed on the ground that the twins would qualify for benefits only if, pursuant to § 416(h)(2)(A) of the Act, they could inherit from Robert under state intestacy law. Under Florida law, a posthumous child may only inherit through intestate succession if the child was conceived during the decedent's lifetime. The Third Circuit reversed, concluding that, under § 416(e) of the Act, "the undisputed biological children of a deceased wage earner and his widow" qualify for benefits without regard to the state intestacy law.

Granting certiorari to resolve a circuit split, the Supreme Court reversed the Third Circuit. Considering multiple sections of the Act and SSA regulations adopted through notice-and-comment rulemaking, the Supreme Court refused to interpret § 416(e) of the act to mean that biological children or children born of a marriage automatically met the "tautological definition" in § 416(e) ("'child' means ... the child ... of an individual") when the language gave no such indication. The court instead found that the language in § 416(h)(2)(A), "'[i]n determining whether an applicant is the child ... of [an] insured individual for purposes of this subchapter,'" created a "gateway through which all applicants for insurance benefits as a

(Continued on page 27)

Thank you!

Joseph Mauro

SCBA member Joseph Mauro recently sent the Pro Bono Foundation a check in the amount of $19,993.55 as a "cy pres award." The "cy pres" (literally "as near as") check resulted from the case of *Anokhin v. Continental Service Group, Inc.*

Mr. Mauro represented the plaintiff in that class action lawsuit that was prosecuted in the United States District Court for the Eastern District of New York. The plaintiff and the class alleged that the defendant added illegal fees while trying to collect tuition from college students. The parties reach a settlement under which all of the improper fees were returned via checks sent to each of the students. The "cy pres" award to the Foundation represents funds from checks that were sent to students and for various reasons went un-cashed.

The Pro Bono Foundation is very appreciative of Mr. Mauro's generous financial support in helping support pro bono programs.

Bio: Joseph Mauro, a 1988 graduate of Hofstra University received a master's degree in government from Harvard University in 1990 and his law degree from New York Law School in 1993. He is a member of the SCBA's Bankruptcy and Federal Courts Committees and a former member of the Pro Bono Foundation. Joe was a Pro Bono Attorney of the Month in 2007. Joe and his cases have appeared on national and local television including Nightline and 20/20.

~ LaCova

The Honorable Andrew A.Crecca '89, Honored as Distinguished Alumnus

St. John's University School of Law to celebrate in October

By Dennis R. Chase

Dennis R. Chase

In a year readily marred by law school graduates filing suit against their respective law schools for their inability to secure employment following graduation, St. John's is particularly pleased and especially proud to announce the Honorable Andrew A. Crecca '89 as this year's recipient of its Distinguished Alumnus Award. Justice Crecca is a prime example of why the law school finished second overall amongst all the law schools in the country while scoring an A+ rating in *The National Jurist's* Trans-parency Grading Report found in the March 2012 issue (*Volume 21, Number 6*). The rating system's grade is based upon several key factors including the employment status of recent graduates; the percentage of unknown information regarding recent graduates; full vs. part time status of the employment of recent graduates; the availability of the actual list of employers hiring recent graduates; and the availability of salary information for recent graduates. The data collected allows perspective students to accurately evaluate whether a law school is honest and forthright in providing prospective students the knowledge necessary to select a law school that consistently maintains an ability to secure employment post graduation.

As a lifelong resident of Suffolk County, Justice Crecca has made a career of public service. Since January 1, 2005, he has served as a member of the Judiciary in Suffolk County. Prior to becoming a judge, Justice Crecca served as a County Legislator representing the residents of Suffolk County's 12th Legislative District where Crecca was recognized by the *American Heart Association* as well as the *Louis J. Acompora Foundation for* championing legislation providing for the placement of automated external defibrillators (AED's) in all Suffolk County buildings, parks, and golf courses, while also securing the necessary funding for all Suffolk County Police response vehicles to be equipped with these life-saving devices.

In addition to his service as a legislator, Justice Crecca has served as Law Guardian representing abused and neglected children and, in 1999 Crecca was recognized by the Suffolk County Bar Association for his pro-bono work in both the Family and Criminal Courts in Suffolk County.

Crecca also served five years as an Assistant District Attorney in the *New York County District Attorney's* office under Robert Morgenthau in Manhattan where he was personally responsible for prosecuting hundreds of misdemeanor and felony cases, including the prosecution of more than 175 felony cases post-indictment. In January of 2007, Crecca was appointed an Acting Justice of the Supreme Court. At that time, and continuing to the present, Justice Crecca presides over the Integrated Domestic Violence Part of the Supreme Court for Suffolk County. As an active member of the *Suffolk County Bar Association*, Justice Crecca serves on the *Board of Directors* and also co-chairs the *Bench Bar Committee*. In 2011, Justice Crecca was appointed to and, continues to serve as a member of, the Chief Administrative Judge's *Matrimonial Advisory Committee* for New York State.

Hon. Andrew Crecca

In addition to his judicial duties, Justice Crecca continues to contribute to the community through participation in not-for-profit organizations such as the *Cleary School for the Deaf*, as well as other local community and charitable organizations. As a husband, father, judge, and active member of the community, Justice Crecca understands the importance of protecting and preserving the quality of life here in Suffolk County. He looks forward to continuing a long and productive career on the bench.

Please join the Suffolk County Chapter in celebrating the remarkable accomplishments of this truly deserving recipient. The tribute is not limited to St. John's alumni, and all are welcome. We look forward to celebrating with you.

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

Honoring of Justice Crecca By Alumni Association – Suffolk County Chapter

Monday, Oct. 1 at 6 p.m.
The Irish Coffee Pub
131 Carleton Avenue, East Islip
(631) 277 – 0007

For tickets call the law school's Office of Alumni Relations at (718) 990-6006

Renewable Energy Updates

By Robert R. Dooley

Solar

Assembly bill A9149A-2011 is the New York Solar Industry Development and Jobs Act of 2012 providing additional incentives to enable the rapid development of the solar industry. As part of the bill, the Assembly proposes legislation compelling the Department of Environmental Conservation to create an incentive program for the development of qualified solar photovoltaic (PV) generating systems by the beginning of 2013 with a goal of creating 670 megawatts by 2015 and 3000 megawatts by 2021.

The increase in production is ambitious. The DEC's website sets expectations of increase in New York's total on-grid solar electric generation capacity to increase from eight megawatts (from 2009) to 80 megawatts by 2015. In other words, there is a significant gap in what currently is expected to be developed and what is hoped a state incentive program will be able to rapidly close. The Utilities and Authorities ordered to generate this capacity will be authorized to modify the goals if achieving these goals would exceed 1.5 percent of their annual electricity sales revenue over the life of the program. While the cap at 1.5 percent itself is not bothersome, the fixed rate throughout the life of the program is bland and could be more creative facilitating increased budgetary commitment by the Authorities and Utilities. For example, District of Columbia Public Service Commission Renewable Energy Portfolio Standard ensures that the program is scaled over time by increasing the budgetary cap allowing the statutory goals to be modified from .50 percent in 2012 to a high of 2.5 percent in 2023.

Robert R. Dooley

At of July 16, 2012, the Long Island Power Authority (LIPA) commenced its "Clean Solar Initiative" with a goal to acquire and inspire additional solar energy. The program contains New York's first feed-in tariff program. By a Power Purchase Agreement, LIPA will purchase solar energy generated on its customer's property for a period of 20 years at a fixed rate ($0.22 per kWh). The strategic market based initiative likely leads the state's effort to encourage renewable energy development. The program encourages renewable energy in the Long Island community that is densely populated inhibiting the transport of renewable energy sources from the upstate regions and provides a potential long term advancement of the renewable sector.

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SPECIAL EDITION

Wind

The research continues in an effort to manage and advance the potential future development of offshore wind energy projects off the coast of New York State. In March, 2012, the National Oceanic and Atmospheric Administration released a study "A Bio-geographic Assessment of Sea-birds, Deep Sea Corals and Ocean Habitats of the New York Bight" to assist in identifying favorable wind energy development sites in the Atlantic and protect critical offshore bird and fish habitats. The report will have multiple uses. First, it will be used to gain understanding on the ocean environment, human uses and their interactions. The report will also be treated as a planning tool. As a planning tool, the study will be used to develop a framework to coordinate and support decisions that will assist in reducing uncertainty for coastal managers and prospective investors concerning renewable energy development. It is anticipated that the report will also lead to a series of amendments to New York's Coastal Management Program. The full report can be found on the Administration's website: www.noaa.gov.

Note: Robert R. Dooley is the co-chair of the Environmental Law Committee and is an associate with the Law Office of Frederick Eisenbud where his practice is concentrated in environmental and commercial litigation.

SIDNEY SIBEN'S AMONG US

By Jacqueline Siben

On the Move…

Franchina & Giordano, P.C. has relocated to 1050 Franklin Avenue, Suite 302, Garden City, NY 11530.

Mauro Lilling Naparty LLP has moved to 130 Crossways Park Drive, Suite 100, Woodbury, New York 11797. The phone, fax, email and website remain the same. Additionally they have opened an office in NYC at: One Penn Plaza, 49th Floor, New York, New York 10119, 212-631-8617. Please direct all correspondence to the Woodbury office.

Dana Walsh Sivak has joined Genser Dubow Genser & Cona (GDGC), as an associate.

Davidoff Malito & Hutcher LLP announced it has changed its name to **Davidoff Hutcher & Citron LLP.**

Larry R. Martinez, has joined the Melville offices of Littler Mendelson, P.C. as an Associate. Larry can be reached by email at lmartinez@littler.com.

Congratulations…

Richard K. Zuckerman has been selected by his peers for inclusion in the 2013 edition of *The Best Lawyers in America*® in the practice area of Employment Law - Management.

Karen Tenenbaum was named a Top 10 Pitch Winner by Count Me In/American Express OPEN, in a competition for women business owners, for her plans to promote financial literacy for children using her character, Walter the Vault.

To Second Vice President **Donna England** who has assumed the mantle of President of the Suffolk Country Matrimonial Bar Association.

Kudos to SCBA member **Nicole J. Zuvich** who is now the President of the Suffolk County Women's Bar Association.

Jacqueline Siben

Congratulations to the following SCBA members who have been recognized by Long Island Business News' *Who's Who in Professional Women:* **Michelle Feldman, Lamb & Barnosky, LLP; Nicole Marmanillo, Campolo, Middleton & McCormick, LLP; Domenique Camacho Moran, Farrell Fritz, PC; Mary Anne Sadowski, Ingerman Smith LLP; Jessica Satriano, Bond, Schoeneck & King, PLLC; Karen Strom, Schroder & Strom, LLP.**

Frank J. Lombardo, an SCBA member and Partner in the law office of Malapero & Prisco LLP of New York City was the recipient of the Honorable William T. Bellard, Jr. Distinguished Service Award issued by the Brooklyn-Manhattan Trial Lawyers Association.

Announcements, Achievements, & Accolades…

Nancy Burner was named to the Board of the JTM Foundation, which seeks and secures philanthropic support for John T. Mather Memorial Hospital in Port Jefferson.

On June 3, 2012**, Richard K. Zuckerman,** and **Alyson Mathews,** of Lamb & Barnosky, LLP**,** co-presented on "Navigating by the Stars, or Identifying a Clear Route" and **Robert H. Cohen,** co-presented on "Update on Special Education" at the 12th Annual School Attorney Law Conference sponsored by the NYS Association of School Attorneys at The Sagamore Hotel in Bolton Landing, New York. **Richard K. Zuckerman** will participate on a panel with Rachel Bien, Esq., on September 21 on the topic "Who's the Boss? Co-, Joint and Other Complicated Private and Public Sector Employment Relationships" at the NYSBA Labor & Employment Law Section Fall Meeting at the Kaatskill Mountain Club Resort in Hunter, New York. **Alyson Mathews,** as a member of NYS Labor and Employment Law Section's Diversity Challenge Committee, accepted a first place award on its behalf.

John J. Roe III ("Pete"), a partner at Roe Taroff Taitz & Portman in Bohemia, was named president of the Patchogue Business Improvement District.

Sharon N. Berlin, and Richard K. Zuckerman, of Lamb & Barnosky, LLP, co-authored an article entitled "Court of Appeals Update: Contractual No-Layoff Provisions" for the NYS Bar Association Labor and Employment Law Journal, Winter 2012, Vol. 26, No. 1.

On September 20, 2012, **Scott M. Karson,** of Lamb & Barnosky, LLP, will be hosting a program featuring a discussion by United States District Court Judge Frederic Block about his new book, "Disrobed: An Inside Look at the Life and Work of a Federal Trial Judge." The program is sponsored by the SCBA and by Lamb & Barnosky, LLP. and will be held at the SCBA.

SCBA member **Lance R. Pomerantz** attended the spring meeting of the American Land Title Association's Title Counsel Committee in Washington, DC. He presented a case alert concerning *pro forma* allegations that triggered a title insurer's duty to defend." **Mr. Pomerantz** served as guest lecturer on adverse possession and littoral rights in the "Law of Property" class at Briarcliffe College's Paralegal Studies Program."

Eugene R. Barnosky, of Lamb & Barnosky, LLP, will moderate a panel on October 25 on "When Medical Conditions Affect Job Performance" at the 16th annual Pre-Convention School Law Seminar co-sponsored by the NYS School Boards Association and NYS Association of School Attorneys.

The Law Office of **Tully & Winkelman, P.C.** will host "The Home Environment Matters!", an Autism workshop for parents and caregivers of children with Autism Spectrum Disorder (ASD) on September 22, starting at 10:30 a.m. In this free workshop, those in attendance will learn how they can regain some control in helping their child on the autism spectrum. The law firm is located at 150 Broadhollow Road, Suite 120 in Melville.

Alyson Mathews, of Lamb & Barnosky, LLP, wrote "Recent PERB Decisions Clarifying the Scope of Bargaining for Interest Arbitration Involving Deputy Sheriffs" for the NYS Bar Association Labor and Employment Law Journal, Spring 2012, Vol. 37, No. 1.

The first meeting of the Long Island chapter of the **National Lawyers Guild** is on Wednesday, October 17, at 6pm. The meeting will be held at the Public Advocacy Center Conference Room, 2nd floor, Touro

(Continued on page 11)

Environmental Review in Condemnation Proceedings

By Lilia Factor

It is well known that a governmental authority seeking to acquire property by condemnation must establish that it is doing so for some public purpose, use or benefit. Eminent Domain Procedure Law ("EDPL") § 204. Indeed, condemnation proceeding are frequently challenged on these grounds.

However, it is just as effective to challenge a proposed taking on the grounds that the condemnor did not comply with the corollary requirement of conducting proper environmental review of the proposed action in accordance with the State Environmental Quality Review Action ("SEQRA"). See EDPL § 204(C)(3). As shown in a recent decision of the Appellate Division, Second Department, failure to follow SEQRA's mandate to "identify the relevant areas of environmental concern, take a hard look at them, and make a reasoned elaboration"[1] with respect to the proposed taking can lead to the rescission of the condemnation determination.

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In the Matter of Raphael Riverso v. Rockland County Solid Waste Management Authority, 946 N.Y.S.2d 175; 2012 N.Y. N.Y. App.Div. LEXIS 4271 (June 6, 2012), petitioner challenged a decision to condemn his seven acre parcel, which is adjacent to a closed Town of Clarkston landfill. Respondent, which owns and uses the landfill and other adjacent property for its solid waste recycling facilities, sought to acquire the parcel to "expand and reconfigure its operations" and to allow the town to cap the 1.5 acre portion of petitioner's land on which it had previously dumped landfill waste. Petitioner pointed out the numerous adverse environmental impacts that could result and demanded a positive declaration of environmental significance and a Draft Environmental Impact Statement to study these. However, respondent took the position that any environmental impacts are speculative, that it has no concrete engineering plans for its future actions, and that the only "action" that is being considered is the condemnation itself, i.e. the transfer of title to the Authority.


Lilia Factor

Petitioner challenged the taking in an action pursuant to EDPL § 207 as being in violation of SEQRA. The Court agreed that respondent's approach of deferring review is a classic case of segmentation, which is expressly disfavored under SEQRA. See §§6 NYCRR 617.1(c) and 617.3(g). "[T]he fact that it [the Authority] had no 'concrete' plans for the expansion of its operations on the property did not relieve it of the requirement to conduct an environmental review of the entirety of Riverso's land."[2] The determination and negative declaration of environmental significance were annulled and the matter was remitted to the respondent to undertake the appropriate review.

This case highlights the importance of taking seriously the condemnor's responsibility to strictly comply with SEQRA in considering a taking. No shortcuts will do, which the New York State Department of Transportation learned the hard way in the *Matter of William A. Zutt v. State of New York*, 2012 N.Y.App. Div. LEXIS 5581 (July 18, 2012). There, to avoid the necessity of holding public hearings, the state invoked a statutory exemption for an acquisition that is *de minimus* in nature (EDPL § 206(D)). It also classified the proposed drainage easement as a Type II action without significant impact on the environment, thus not requiring review. The Court, citing prior litigation in the matter, held that this was an abuse of discretion. In fact, it found the state's conduct to be so egregious and in bad faith, that instead of the usual relief of remitting the matter to the condemning authority, it granted the property owner's request for an injunction prohibiting the state from further pursuing the proposed condemnation.

As seen above, potential condemnors and condemnees should all keep in mind the importance of proper environmental review early in the decision making process[3].

Note: Lilia Factor practices civil litigation and environmental law at the Law Office of Frederick Eisenbud in Commack, NY. She is the Chair of the Environmental Law Committee of the Nassau County Bar Association.

1 *Matter of Chemical Specialties Mfrs. Assn. v. Jorling*, 85 NY2d 382, 397 (1995).
2 *Matter of Save the Pine Bush v. City of Albany*, 70 NY2d 193, 200; *Matter of Concerned Citizens for Envt. v. Zagata*, 243 AD2d 20, 22 (2d Dept. 1998); *Matter of Long Is. Pine Barrens Socy. V. Planning Bd. of Town of Brookhaven*, 204 AD2d 548, 550-551 (2d Dept. 1994).
3 *See, e.g., Matter of Gyrodyne Co. of Am., Inc. v. State Univ. of N.Y. at Stony Brook*, 17 AD3d 675 (2d Dept. 2005).

The Suffolk Lawyer wishes to thank Environmental Law Special Section Editor Robert R Dooley for contributing his time, effort and expertise to our September issue.


Robert R. Dooley

Navigation Law, Environmental Conservation Law and the Relationship with Municipal Codes

By Robert R. Dooley

The Appellate Division reviewed the relationship of the state's interest in navigable waterways and the statutory interplay with local codes in *North Elba v. Grimditch*, 2012 NY Slip Op 5215, (3d Dept. June 28, 2012),

The state's sovereign ownership of underwater land originates in the English common law. Tidal waters were considered navigable and, thus, the land under these waters were deemed owned by the crown. *Id*. at **4. Non-tidal waters were considered not to be navigable with the underwater land being owned by the adjacent riparian owner. Because of the abundance of lakes, streams and rivers, this distinction was abandoned in New York. The state's ownership extends to a line three miles from the coast along with many inland lakes. The test to determine whether an inland lake is owned by the state in its sovereign capacity is a practical one set forth in *Granger v. City of Canandaigua*, 257 N.Y. 126 (1931).

As a general principle, local zoning codes do not apply to the lands of the state, including navigable waters when used in the common law sense. See *Erbsland v. Vecchiolla*, 35 A.D.2d 564, 313 N.Y.S.2d 576 (2d Dept. 1970) (zoning power of city of Rye did not extend into a Long Island harbor). The Appellate Division held that in order for this preemptive principle to apply, the state must own the underwater land in its sovereign capacity – as opposed to a proprietary ownership as a riparian owner.

Robert R. Dooley

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Despite rejecting North Elba's argument that the state transferred its ownership in its sovereign capacity under the Macomb patent of 1972, the Appellate Division still held that the state did not own the land under the water in its sovereign capacity. at **7.

In not owning the lake in its sovereign capacity, the state would also not have exclusive jurisdiction over every form of regulation in the public interest. *Id*. While the Supreme Court determined that Navigation Law §§ 30 and 32 regulated the construction of the boathouses and excluded the land use code basing its conclusion on the determination that the lake was a navigable water as defined by Navigation Law § 2(4), the Appellate Division disagreed. The Appellate Division pointed out that Navigation Law §§ 30 and 32 provide that the DEC would have jurisdiction over the waters as related to navigation yet does not authorize the infringement of local laws or regulations. Further, Navigation Law § 46-a provides examples where the state delegates authority over its underwater land held in its sovereign capacity authorizing the regulation of construction and location of boathouses, moorings and docks. The state's delegation granted authority to the local municipalities that would otherwise not exist. There would be no limitation on regulating waters *not* owned by the state in its sovereign capacity by the referenced statutes. Thus, the Navigation Law would not preempt the local zoning.

From a local perspective, the interesting portion of *North Elba* is the citation to the *Erbsland* decision. For context, Navigation Law § 2(4) defines navigable waterways as specifically excluding tidewaters of Nassau and Suffolk counties. The Honorable Justice Leon Lazer in *Islip v. Powell*, 358 N.Y.S.2d 985 (Suffolk Cnty, Supr. Crt. 1974) clarified that the rationale from *Erbsland* involved moorings attached to the underwater land of the Long Island Sound rather than docks which float but are physically attached to the shore directly or indirectly. Judge Lazer's interpretation further shows the interrelationship between the Navigation Law and the Environmental Conservation Law. The relationship is set forth in ECL § 15-1503(1)(b), requiring that a permit be obtained from the DEC where "a lease or other appropriate conveyance of an interest authorizing the use and occupancy of state-owned lands underwater" has not been obtained.

The relationship between the state's interest in navigation and the riparian owners' right to access navigable water ways is a relationship that is not short of conflict. An understanding of the goals and purpose behind the conflicts of past will inevitably lead to a more constructive dialogue between riparian owners, local municipalities and the state when work modifying the land adjoining the water ways is desired.

Note: Robert R. Dooley is the co-chair of the Environmental Law Committee and is an associate with the Law Office of Frederick Eisenbud where his practice is concentrated in environmental and commercial litigation.

SEQRA vs. the Environment

By Michael Lewyn

New York's State Environmental Quality Review Act (SEQRA) requires state and local officials to draft an Environmental Impact Statement (EIS) whenever a project has a significant impact upon the environment. This statute applies not only to government actions such as highway construction, but also to private sector projects requiring government permits, such as most rezoning applications. Either a decision not to issue an EIS or the EIS itself is judicially reviewable.

Unlike the comparable federal statute (the National Environmental Policy Act) SEQRA defines "environmental impact" to include not only physical harm such as air pollution, but socio-economic impacts.

This broad definition suggests that any major infill development will usually require an EIS. For example, in the 1986 case of *Chinese Staff and Workers Association v. City of New York* (Chinese Staff I), a developer proposed to build a high-rise condominium on a vacant lot in New York's Chinatown. Neighborhood activists challenged the city's refusal to require an EIS, alleging that the city erred in failing to consider the possibility that new housing would increase property values and thus displace neighborhood residents.

The court agreed, holding that because SEQRA's definition of "environment" refers to "existing patterns of population …and existing community or neighborhood character," any effect that a project might cause on population patterns or neighborhood character is an "environmental" impact under the statute.

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It follows that any development that significantly increases the housing supply may require an EIS, because new housing by definition affects population and thus population patterns and neighborhood character.

This rule is more likely to affect urban "infill" development than exurban "greenfield" development, for two reasons. First, if proposed development is not near an existing neighborhood, it is unlikely to affect the character of a neighborhood. Second, as a practical matter, infill development is more likely to attract neighborhood resistance than greenfield development because the more neighbors a development has, the more likely it is that one neighbor might object. And if that neighbor seeks to use the law to delay the project, SEQRA is a handy tool.

Admittedly, SEQRA litigants are rarely able to persuade courts to stop a project completely (as opposed to delaying the project by requiring an EIS). But for a developer, "time is money" because it will often be paying interest on loans while it is going through the EIS process, but will be unable to receive money from buyers or renters until the project is actually built. Thus, SEQRA does impose costs on developers by making development slower and more costly, especially infill developers.

SEQRA's anti-infill bias may actually increase air pollution. If SEQRA makes infill development more difficult, development will shift to the newest suburbs, suburbs that tend to be more car dominated than cities and older suburbs. So SEQRA's anti-infill bias means that more people will be more dependent on cars, causing more pollution. For example, New York's suburban households emitted over 3800 more pounds of transportation-related carbon dioxide per household than did city residents.

SEQRA can be made less anti-environmental in a variety of ways. For example, the New York State Legislature could target the most environmentally-friendly projects for SEQRA relief by limiting environmental review for compact developments near public transit. Alternatively, the legislature could encourage all development by exempting all zoning permits from SEQRA. The latter policy would no doubt make some environmentally unfriendly development easier, but would on balance favor environmentally friendly development by eliminating SEQRA's bias against urban infill development. Or the state legislature could amend SEQRA by limiting the term "environmental impact" to the physical environment. However, this amendment might do less for developers, since neighborhood activists could claim that development creates traffic, which in turn affects the physical environment.

Note: Michael Lewyn is an associate professor at Touro Law Center in Central Islip.

A Primer About Fracking the Marcellus Shale

By Brian Duggan

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The oil and gas industry has been promoting the extraction of natural gas found in the Marcellus Shale, a thick layer of rock which extends under New York, Pennsylvania, Ohio, West Virginia, and other states. The extraction requires hydraulic fracturing ("fracking") of the rock, where the gas is tightly held in place. Fracking has been employed in other states for many decades. Fluids under high pressure are pumped into a well to create small fractures in the rock, allowing gas (or oil) to flow more readily through the more open fractures, and increasing the amount of gas extracted. Once the fracture zones have been opened, the waste fluids are pumped out and either pumped back in the ground elsewhere, or delivered to a wastewater treatment facility. By the late 20th Century, this technique was greatly refined for better extraction, including adding chemicals to the fluids, and the application of directional drilling to extend wells horizontally.[1]

Although originally thought to not have enough natural gas to be economically developed, new estimates hold that the Marcellus Shale contains approximately 489 trillion cubic feet of natural gas, and the NYS Department of Environmental Conservation (NYSDEC) reports that NYS currently consumes 1.1 trillion cubic feet of natural gas per year.[1] However, the gas industry also contends that not all of this gas is readily recoverable, and there are about 14 years of viable production available. States like Pennsylvania and Ohio are now actively being drilled. NYS is under a moratorium on drilling, while considering the matter, with a DGEIS recently completed.[2] There are many issues associated with fracking the Marcellus Shale to be considered:

Brian Duggan

- The volume of water supply to support an active gas extraction industry will additionally strain already greatly taxed water resources for communities throughout the region.

- The volume of waste waters generated by this process is estimated to be about 1,000,000 gallons per well, per day, and requiring treatment at wastewater discharge facilities, which are not designed to eliminate the chemicals contained in the fluids introduced by the drilling company.[3] This is further complicated by the fact that much of the chemicals used are unreported by the industry as being proprietary on nature.[4]

• The Marcellus Shale itself is distinctive from other formations elsewhere where natural gas is being extracted, in that it contains heavy metals, such as arsenic and chromium, as well as radioactive minerals which produce radon gas. These naturally-occurring contaminants are generally not treated by the existing wastewater treatment systems. The treated wastewaters are also typically discharged in sensitive watersheds and groundwater recharge areas, ending up in municipal drinking water systems.

- The stray fracking fluids left behind within the formation impacts groundwater aquifer systems relied upon for drinking water. One Ohio town has already settled with a company for about 4.1 million dollars for adversely impacting its local groundwater supply. Insurance companies are already concerned about liability coverage for all aspects of the fracking operation.[5]

- There are also concerns about radon gas in the natural gas supply, which may be delivered to consumers at levels which may pose a health risk, since the radon gas is not combustible.[2]
- The fracking process may result in local earthquakes.[5]

Note: Brian Duggan is employed as General Counsel with Cashin Associates, P.C. in Hauppauge, N.Y. He also has a Masters in Science in Geology, and has been working for more than 27 years in the environmental consulting field.

1 New York State Department of environmental Conservation, NYSDEC Marcellus Shale, *Marcellus Shale.* (http://www.dec.ny.gov/energy/46288.html) accessed July 23, 2012.
2 New York State Department of Environmental Conservation, NYSDEC Marcellus Shale, *Marcellus Shale*. (http://www.dec.ny.gov/energy/46288.html) accessed July 23, 2012.
3 Geology.com, *Water Resources and Natural Gas Production from the Marcellus Shale*, by Daniel J. Soeder and William M. Kappel, USGS - - Republished from USGS Fact Sheet 2009-3032. (http://geology.com/usgs/marcellus-shale/) accessed July 23, 2012.
4 The Huffington Post; *Nationwide Insurance: Fracking Damage Won't Be Covered*, July 12, 2012.(http://www.huffingtonpost.com/2012/07/13/nationwide-insurancefracking_n_1669775.html) accessed July 23, 2012.
5 United States Geological Society (USGS), *USGS Fracking, FAQs-Earthquakes Induced by Fluid Injection*. (http://earthquake.usgs.gov/learn/faq/?categoryID=46&faqID=357) accessed July 23, 2012.

Among Us *(continued from page 7)*

Law Center, 225 Eastview Drive, Central Islip, NY 11722. The National Lawyers Guild is a 75-year old non-profit federation of lawyers, legal workers, and law students using the law to advance social justice and support progressive social movements. More information about NLG can be found at http://www.nlg.org. Some agenda items for the first meeting of the NLG-LI LI chapter are to organize the chapter and recruit legal observers. Please bring your ideas for organizing and projects. For more information call organizer **Ian Wilder's** cell at (631) 671-9019 or email him at ianswilder@yahoo.com.

On October 26, 2012, **Richard K. Zuckerman,** of Lamb & Barnosky, LLP, will be co-presenting with Florence T. Frazer, Esq. on the topic "Employee Discipline - What is New? What is the same?" at the 93rd Annual Convention & Education Expo co-sponsored by the NYS School Boards Association and NYS Association of School Attorneys.

Touro College Jacob D. Fuchsberg Law Center is hosting an Academic Convocation to celebrate the installation of **Dean Patricia E. Salkin** on Thursday, October 11, at the Alfonse D'Amato Courthouse in Central Islip, across from the law school. Convocation at 6:00 pm will be followed by a reception in the Courthouse atrium. The convocation will be preceded by an Open House at Touro Law Center, offering tours of the law school building, clinical suite, Gould Law Library, William Randolph Hearst Public Advocacy Center as well as an opportunity to meet Dean Salkin.

The HIA-LI Sports Committee will honor **Fred Eisenbud** of the Law Office of Frederick Eisenbud, The Environmental Law Firm, for his commitment to the LI Business community at the HIA-LI 33rd Annual Golf Outing on **October 2, 2012** at the Hamlet Wind Watch Golf and Country Club in Hauppauge.

On September 20, 2012, **Lawrence Kushnick** and Vincent Pallaci will present a lecture on Mitigation of Damage to Structures Adjacent to Construction Sites in Urban Environments in New York. More information at www.lorman.com/ID389308 or contact Mr. Kushnick at (631) 752-7100.

A. Thomas Levin, Chair of the Municipal Law, Land Use and Environmental Compliance practice and the Professional Responsibility practice at Meyer, Suozzi, English & Klein P.C. has been named to the Nassau County Bar Association's task force to review the proposed new Caretaker Attorney rules.

SCBA member **Barbara Prignano** has published *.Angelo: The Underappreciated Ant,* a wonderful children's book that shows even when the odds are against you, perseverance and determination can win the day.

Melissa Negrin-Wiener, partner at Genser Dubow Genser & Cona (GDGC), has been appointed to the Board of Suffolk County Women's Bar Association.

Ruskin Moscou Faltischek, P.C. announced that senior partner, **Douglas J. Good,** has been appointed the Chair of the Judiciary Committee of the Nassau County Bar Association.

Safe Harbor Title of Port Jefferson recently presented Friends of Karen with a check for $1,000 as part of their ongoing commitment to the organization that provides emotional, financial and advocacy support to families with a child diagnosed with cancer or life-threatening illness.

Brian Andrew Tully, of the elder law firm of Tully & Winkelman, P.C. announced that he has been featured in Newsweek's "Nationwide Leading Elder Care & Estate Planning Attorneys Showcase" for the year 2012.

Karen Tenenbaum recently appeared on the cable television show "Something to Talk About" where she discussed New York State tax audit pitfalls and financial literacy for children. "Something to Talk About" is produced and hosted by Bonnie D. Graham.

Condolences….

To Mrs. Judith Goldstein, son SCBA member **Ronald Goldstein** and their family upon the passing of longtime devoted member **Arthur Goldstein** of Goldstein, Rubinton, Goldstein & DiFazio, P.C. Arthur Goldstein was an honored, respected and revered member of our noble profession.

To former Supreme Court Justice **Mary M. Werner** and her family on the passing of Doctor Lawrence Werner.

The SCBA extends its deepest sympathy to **Joseph LaCapra** upon the passing of his mother Lucille.

President Arthur E. Shulman, the Officers, Directors, members and staff acknowledges with sympathy the passing of Supreme Court Justice **Thomas F. Whelan's** mother, Margaret Whelan, who passed away on June 27.

Condolences to **Marion Tinari** and her family on the passing of her father, John Cadden.

New Members…

The Suffolk County Bar Association extends a warm welcome to its newest members: **Rita L. Bonicelli, Janice, J. Scott Colesanti, Michael J. Dyer, Timothy F. Flanagan, Joyce Glass, Gary F. Glenn, George F. Harkin, Carl Andrew Irace, Geoffrey R. Kaiser, Michael C. Lamendola, Jessica A. Leis, John J. Leo, Zachary C. Lyon, Michael P. Malone, Charles A. Martin, Joseph Matza, Mary C. Merz, Cathleen Quinn Nolan, Daniel P. Rause, Emily G. Rothenberg, Patricia J. Russell, Jose G. Santiago, Jessica C. Satriano, David Savetz, Craig L. Smith, Kathryn E. Stein, Paul B. Sudentas , Elaine Tinsley-Colbert and Teresa A. White.**

The SCBA also welcomes its newest student member and wishes them success in their progress towards a career in the Law: **Diosalma Melgar, Pepito Santos, Daniel Van Vorst.**

REAL ESTATE

Does Refused Search Equal Probable Cause to Search Incident to Rental Permit Application?

By Andrew M. Lieb

What do you have to do to make a buck these days? You have a vacant residential property that you aren't using and you are willing to rent it. Can you make a buck? Well, you need to get a tenant. So you hired a real estate broker and you got a prospective tenant. Can you make a buck? Well, you may need a rental permit from your local municipality, but what municipality is your property located within? So you check your tax bill to ascertain the town, city or village that your property is located within? Did you know that there are 13 incorporated towns, two cities, and 97 incorporated villages within Nassau and Suffolk Counties of Long Island and each has its own individual rental permit rules? That means that there are 112 possible local municipality's rules that cover renting on Long Island. Did you know that 33 of these 112 or approximately 29 percent require a rental permit? Assuming that yours does, what's next before you can earn a buck?

Did you know that you may find out that you are already too late with getting the permit at this point? Did you know that 31 of these 112 or approximately 28 percent also hold a real estate broker responsible to get a permit before listing the property?

For the purposes of this article, let's assume that you realized that your local municipality does require a permit and that you are attempting to obtain the permit with your real estate broker before you attempt to solicit a tenant. How do you get the permit? Well, many municipalities seek an inspection of the premises incident to issuing a permit. In fact, a typical code will authorize the municipality's building inspector to inspect for safety, on consent of the owner, incident to the issuance of a permit. Yet, what happens when the owner denies such consent?

Andrew M. Lieb

In 1981, the Court of Appeals dealt with this issue in *Sokolov v. Village of Freeport*[1] and held that "the imposition of a penalty upon a landlord for renting his premises without first consenting to a warrantless search violates the property owner's Fourth Amendment rights." Thereafter, many codes were modified to authorize the municipality's attorney to make application for a search warrant in order to conduct the inspection if consent was denied. So, today, is there any getting around a search of your premises by the municipality if you want to make a buck? Meaning, can you apply for a permit, deny consent to an inspection and avoid a search warrant?

Sokolov appears to say yes in the court's rationale for its holding; that "A property owner cannot be regarded as having voluntarily given his consent to a search where the price he must pay to enjoy his rights under the Constitution is the effective deprivation of any economic benefit from his rental property." Yet, the court also made a point to state "the strict standards attending to the issuance of a warrant in criminal cases are not applicable to the issuance of a warrant in administrative inspections." So, what is the standard?

To understand the standard for an administrative inspection's search warrant we look first to the United States Supreme Court decision in *Camara v. Municipal Court of City and County of San Francisco*[2] for guidance wherein the court distinguished between a criminal search warrant and an administrative warrant and stated that probable cause for an administrative warrant "will not necessarily depend upon specific knowledge of the condition of the particular dwelling." Thereafter, we look to In re City of Rochester where the issue before the court was precisely whether probable cause existed solely as a result of the "landlord's refusal to permit the City" to inspect his rental property. First, the City Court[3] heard the issue and held that probable cause existed based solely upon the refusal. Yet, the County Court[4] later held that the decision was moot and constituted a prohibited advisory opinion. So, where are we left now?

As the City Court suggests in its moot and prohibited opinion, "if a property owner believes that an administrative search warrant has been issued illegally, he or she may seek to have it quashed upon proper motion." When seeking to quash the motion remember the words of the Court of Appeals in *Sokolov*. If the sole basis for the issuance of a search warrant of a rental property is the property owner's refusal to consent to a search warrant, than what was the point of *Sokolov's* rationale that a property owner should not have to give up his constitutional rights in order to reap the economic benefits of his property. It seems that municipalities have learned to comply with the letter of the precedent in *Sokolov,* but our legislature needs to step in to enforce *Sokolov's* stated rationale.

In this economy where homeowners are required to rent in order to avoid foreclosure and young Long Islanders are fleeing the Island because they cannot find affordable housing, your author submits that legislative changes are necessary to let a landlord earn a buck. The county and / or state legislature should step in and create uniformity in the rental permit laws within our 112 divergent municipalities and define whether probable cause exists for a search warrant solely as a result of a property owner's refusal to consent to a search[5]. Then, at least, property owners will know if they can earn a buck.

Note: Andrew M. Lieb is the Managing Attorney at Lieb at Law, P.C., a law firm with offices in Center Moriches and Manhasset. Mr. Lieb is also the founder and lead instructor of the firm's New York State licensed Real Estate School, which serves as the Pro Bono arm of Lieb at Law offering continuing education courses to Real Estate Agents and Brokers. Additionally, Mr. Lieb serves as a co-chair of the Real Property Committee of the Suffolk Bar Association.

1 52 NY2d 341 (1981)
2 387 US 523 (1967)
3 4 Misc.3d 310 (Cy. Ct., Rochester, 2003)
4 6 Misc.3d 1013(A) (Monroe Cty. Ct., 2004)
5 Matter of City of Rochester (449 Cedarwood Terrace), 90 AD3d 1480 (4d Dept., 2011)(Held Criminal Procedure Law Article 690 does not preempt the law of search and seizures and preclude a municipality from enacting inspection warrant procedures)

LAND TITLE

Dual Agent or Double Agent

By Lance R. Pomerantz

A recent Federal Court case highlights the risks inherent in using a title agent that is also a "settlement agent."

What is a "settlement agent?"

Settlement agents (sometimes referred to as "escrow agents") act on behalf of the lender leading up to, and at, the closing. Following instructions from the lender, they prepare documentation, calculate various fees and costs, receive and disburse funds, etc. In short, they fill a large portion of the role traditionally assumed by the "bank attorney" in a downstate transaction. In theory, at least, they do not provide "legal services."

Many companies that provide settlement services are also authorized to write title insurance policies by licensed title insurance companies. Title insurance agency agreements typically prohibit the agent from providing settlement services on behalf of the insurer. Some agency operators, but not all, form a separate entity to provide settlement services, apart from the title insurance business. Even if corporate formality is observed, both businesses are usually operated by the same individuals, out of the same location.

Widely used in other jurisdictions, as well as upstate New York, settlement agents have been an increasing presence on Long Island in recent years. Probably the most well-known local example was TitleServ, Inc., and various subsidiaries thereof, all of which ceased operations in 2011 amid allegations of embezzlement and misappropriation in connection with "settlement" activities.

Lance R. Pomerantz

The federal case

In *Fidelity National Title Insurance v. Cole Taylor Bank,* No. 11 Civ. 4497 (MGC) (U.S. Dist. Ct., S.D.N.Y., July 10, 2012), the court held that a title insurer was not liable for the defalcation and malfeasance of one of its policy-writing agents. The agent had been contacted by Illinois-based Cole Taylor Bank to perform settlement services in connection with loan refinancings in the Albany area. The case revolved around two specific instances in which the agent prepared title insurance commitments and proceeded to close each loan. The closings were carried out in accordance with detailed instructions provided by the bank and previously accepted, in writing, by the agent. At each closing, the commitments were "marked up." Post-closing, the bank discovered that prior loans had not been paid off and that the monies earmarked for that purpose had been stolen by the agent. The bank made claims against Fidelity only to learn that the agent had not remitted the policy premiums to Fidelity, the mortgages had not been recorded and the policies had never been issued.

The bank sought to hold Fidelity liable based on apparent authority in the agent to act on behalf of Fidelity. Fidelity pointed out that its agreement with the agent explicitly prohibited the agent from providing settlement services on Fidelity's behalf. More importantly, the bank was unable to show that Fidelity had made any representations to the bank that established apparent authority. In addition, testimony by the bank's own expert witness established that customary upstate closing practice did not establish apparent authority. Indeed, the expert testified that the "closing instructions from the lender to the settlement agent have nothing to do with the title agent." And, that "when [the agent] stole the loan proceeds, it did so as a settlement agent."

The *coup de grâce* came in the court's finding that the agent was legally the bank's agent, whose conduct could be imputed to the bank. As a result, any liability that might have arisen under the marked up commitments was barred by Exclusion 3(a) of the ALTA policy, which excludes coverage for "[d]efects, liens, [and] encumbrances" that are "created, suffered, assumed, or agreed to by the Insured claimant."

Due Diligence is indispensable

All the reported New York case law on this issue appears to emanate from the First and Second Departments (*see, e.g., HSA Residential Mortgage Services Of Texas, Inc. v. Stewart Title Guaranty Co., et al.,* 7 A.D.3d 426 (1st Dept., 2004); *Forest Park Cooperative, Inc., Section 2 v. Commonwealth Land Title Insurance Company*, 2011 NY Slip Op 31352(U) (Sup. Ct., Queens County, 2011)). Because dual-agency practice is primarily an upstate phenomenon, it will be interesting to see where the Third or Fourth Departments come down on similar fact patterns in the future.

In other states, parties can protect themselves against settlement agent malfeasance by obtaining a "closing protection letter" from the insurer, but CPL's are not available in New York for this purpose (*see* N. Y. S. Ins. Dept. Circular Letter No. 18 (Dec. 14, 1992) and N. Y. S. Ins. Dept. Office of General Counsel Opinion issued Dec. 28, 2005)). Therefore, prudence dictates that any settlement agent be carefully vetted prior to being retained.

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

PRACTICE MANAGEMENT

Client Service and Expectations

By Allison C. Shields

Without clients, your law practice can't survive, regardless of your technical excellence. The better the experience your clients have with your firm, the more loyal and satisfied they'll feel. To get the most satisfied clients, you have to identify, manage and exceed clients' expectations. Ultimately, that translates into more work and more referrals for your firm.

Good communication and setting expectations with the client at the beginning of the engagement are essential to creating the proper tone for the engagement and establishing your role as guide and leader. Your client's expectations will control the engagement and their perception of the value that you provide. Don't leave it to chance that you'll meet them naturally; find out what they are.

All clients have expectations about outcome (results) and services, but seemingly identical clients do not have identical wants and needs. Two clients with different objectives or goals may require different legal services, a different approach, and a different fee structure *even if the clients appear to have the same problem or issue to be resolved*. They may even want or need a different outcome. To ascertain the client's expectations, ask questions and be sure to LISTEN to the client's response. Resist jumping in with your solution or interrupting. Ask questions about the substance of the client's matter and their desired outcome, but do not forget to ask the client what their expectations are about things like frequency and mode of communication, availability and accessibility, budget and fees. Since prior experience often colors expectations, make sure to learn about the client's prior experience with the legal industry or with this particular issue.

Allison C. Shields

Are the client's expectations realistic? As the professional, you must play a role in defining and reshaping what some of those needs, wants and expectations are and should be, based upon your own expertise and experience. Once the client has defined their expectations, discuss the potential pitfalls of the client's desired course of action and the risks in taking or failing to take an alternate course of action. Explore the likelihood that the client's objectives and expectations can realistically be met. Provide the client with options.

Outline the process. What better way to build trust than to outline the process for the client at the beginning of your work together? The client's trust in your abilities and your advice will be reinforced at each stage of the engagement. Create a basic document that outlines each step in the process that the client's matter will go through.

Define the scope of work. Difficulties arise between lawyers and clients when there is a misunderstanding or lack of agreement about the scope of the work to be performed and the manner in which that work is performed. These items should be spelled out in detail in your representation agreement.

Develop 'FAQs'. You probably get asked the same questions over and over from different clients (or even from the same client at different points in the process). Start creating a list of those "Frequently Asked Questions" along with appropriate answers to those questions so that you aren't caught off guard.

Meeting expectations may satisfy your client, but will it 'wow" them enough to return in the future or refer other clients. Instead of simply meeting clients' expectations, strive to exceed them. Under-promise and over-deliver; it creates increased profits by increasing client loyalty. Exceeding clients' expectations does not have to require additional expenditures of money or time, and can be accomplished simply and effectively. Seemingly small changes can make a big impact. Some good examples include: anticipating clients' wants and needs; providing easy access to firm staff and answers when needed, including extranets or client portals; making clients feel as if the firm cares about the client and her business; delivering before a deadline and providing extra resources or introductions to others that can help the client in areas where you can't.

Some define good client service as determining the client's wants, and then delivering exactly that and nothing more. That is short-sighted and a disservice to clients. Clients hire lawyers for their expertise, advice and experience. Sometimes what the client 'thinks' they want is, upon further reflection or exploration, not in the client's best interests. When a lawyer is able to suggest different alternatives that would better meet the client's needs, or more effectively accomplish the client's goals, it is incumbent upon the lawyer to do so. It is good business and your clients will appreciate it.

Creativity and innovation in the approach to a client's problems may be the best value a firm delivers. A mindset that places a premium on the client's stated wants and disregards the firm's ability to assess the situation and suggest alternatives, is a huge loss for clients and de-values the importance of hiring an attorney. It's this kind of thinking that leads people to the conclusion that legal services are a mere commodity.

In short, exceeding clients' expectations is an excellent strategy. It is the essence of good client service.

Note: Allison C. Shields is the President of Legal Ease Consulting, Inc., which offers management, productivity, client service, business development and marketing consulting services to law firms. Contact her at Allison@LegalEaseConsulting.com, visit her website at www.LawyerMeltdown.com or her blog, www.LegalEaseConsulting.com. A version of this article originally appeared on the Lawyerist blog.

Visiting Parenthood

By Edward J. Nitkewicz

Recently, I had an opportunity to spend my annual summer vacation with my wife's family in Cape May, New Jersey. It was, for different reasons, the most difficult week of my life.

My 14 year old son suffers from autism. Many in the community rail against using the phrase "suffers from." I however militantly and liberally employ it when my mood dictates. Though I try, I cannot always embrace my son's disability cheerily with the earthy Lola Granola attitude that his disabilities make him so unique that we are the luckiest family on the planet. His inability to easily express his feelings, to socialize with any other children or to tell me when he feels disappointment, sadness or sheer joy is something he and his parents endure and "suffer."

I have spent the entirety of the past 14 years developing a different perspective on what "fatherhood" could be for me. It is certainly not what I planned on or prepared for. As I have offered many in my circumstances, "people plan and God laughs." Sometimes however, I don't feel like I am in on his joke. Other times, I just don't have the emotional strength or desire to celebrate my "unique parenthood." Sometimes, I just feel badly that my son suffers the significant limitations that come with having autism.

Over the past week, I have visited (albeit as a surrogate) the parenthood I always thought I would have. At the shore

Photo courtesy of the Nitkewicz family

Ed Nitkewicz and his son Edward.

house in Cape May, New Jersey, I am the "awesomist uncle in the universe." That does not represent a baseless boast. It is the title on the portrait of me drawn by one of my niece in laws. It is the term used when I take any of three teams rotating throughout the week for the daily $50 "candy run." It is the battle cry yelled when the "pool fight" to drown and defeat the evil (yet still awesome) Uncle Ed ensues each day at 2pm after the last hot dog is consumed.

Watching seven children burying each other up to their heads in the white sand is unforgettable. Having them teach me how to boogie board "tasty waves" (as Jeff Spicoli once taught us) is priceless. And seeing them narrowly avoid a sugar coma from literally eating a grocery bag of candy every night is hilarious. It is heartbreaking that my son is not right in the middle of the daily blizzard of activity.

It is watching Edward's cousins grow from babies to tweeners, witnessing them develop personalities and the accompanying "attitudes," and seeing them move swiftly towards adulthood in a "typical" way, that cause me to experience a complex combination of joy, admiration, envy and pain. Professionals often push parents of impaired children to celebrate their unique qualities. I get that. However, grief requires that we allow for those moments in our life when we just feel sad for what our children aren't. It is acceptable to feel badly for our child, for our family, and for ourselves. The key is not letting it consume and define you.

This week, as I spent a week in a beach house in New Jersey with seven children related to me only through marriage, I was at once as happy and as sad as I have been in a very long time. I visualized what the world would look like if my son, the first and thus oldest cousin, were "typical."

I am grateful that Edward has so many terrific cousins on both sides of his family. But as I enjoy their company, I can't help but wonder in my heart which one among them will take the lead in looking out for my son when I am gone. After this week, I am confident the answer is "all of them." And, I am eternally grateful to them for allowing me to visit the parenthood I once planned to have.

Note: Edward J. Nitkewicz is Senior Counsel to Sanders, Sanders, Block, Woycik, Viener & Grossman, where he concentrates in the representation of personal injury plaintiffs. Since 1999, when his son Edward was diagnosed with autism, Ed has become a leading education law attorney representing families in CPSE and CSE meetings, impartial hearings and special education litigation as a Parent Advocate and/or attorney.

Save the date!

Please join SCBA member Ed Nitkewicz and his family at the Long Island Walk Now for Autism Speaks on Sunday, October 7, 2012 at 9am at Jones Beach State Park, Field 5, in Wantagh, NY. There will be live entertainment throughout the day, a large resource fair, refreshments, bounce houses, arts and crafts and more. To register with Edward's Army for the Walk or to make a donation please visit: www.walknowforautismspeaks.org/longisland/edwardsarmy.

ESTATE PLANNING

To Gift or Not to Gift

By Alison Arden Besunder

To gift or not to gift; in 2012, that has become more than a rhetorical question. Under current tax law, an individual may transfer $5.12 million during his or her lifetime or at death without incurring any federal transfer tax. The tax rate on transfers above the exemption amount is at a historic low of 35 percent. A married couple can transfer a combined $10.24 million because of a newly introduced concept of "portability" allowing a surviving spouse to "carry over" the unused exemption of the first spouse to die.

This historically high exemption amount expires on December 31, 2012, when the federal exemption drops to $1 million at a 55 percent tax rate unless Congress acts before then. This state of affairs has prompted a flurry of discussion in the estate and financial planning communities on the benefits and drawbacks of transferring assets in 2012.

It has become popular for estate attorneys and financial advisors to urge clients to "act now" to take advantage of the opportunity to make tax-free transfers in excess of the $13,000 annual exclusion. Some of the reasons cited are: the unique opportunity to transfer this large amount, the current low interest rates, and the current depressed asset values.

There is no "one size fits all" answer to the question. Gifting is not right for everyone, and in fact may be appropriate for only a limited percentage of the population (even less than the 1 percent, or those with assets in excess of $10 million, although the ultimate number is open to debate). Many clients do not have a primary objective of shielding their children's inheritance from estate taxes, feeling that they should be content with the net result of their hard earned wealth. For others with very lucrative family businesses, on the other hand, it may be an opportune time to use a $5 million gift to transfer $7 million in business-related assets. Considering whether to gift depends on many factors, including: the nature and extent of the client's assets, the cost basis at which they required those assets, whether they are ready to give up control, the family dynamic and the personalities of the children or other individuals whom they would entrust with their assets. The assessment should address whether a gift makes sense, which assets should be gifted, whether conditions should be placed on transfer of assets, whether a trust should be used to hold the gifted assets, and the terms and structure of that trust.

Alison Besunder

Some of these issues are contemplated in greater detail:

- *Will the Estate Tax Exemption Be Lowered?* The answer to this question depends, in part, on the election. President Obama has proposed a $3.5 million estate tax exemption at a rate of 45 percent, with a lifetime gift tax exemption of $1 million (historically, lifetime gifts have a lower exemption amount than the estate tax exemption at death). If he wins in November, he will still need to convince Congress to enact his proposal. If the Republicans take control of Congress, it is anyone's guess as to whether they will insist on keeping the exemption at $5 million at a 35 percent rate or whether they will compromise to President Obama's proposal.

- *What is Your Cost Basis?* If you transfer an asset during your lifetime for no consideration, the "donee" (the recipient of the gift) takes the gift at the donor's basis. For example, if you purchased a loft in SoHo in 1965 for $20,000 and it is now worth $3 million, that loft is subject to capital gains tax when sold. If you transfer the loft during your lifetime, you have removed it from your estate but have lost the opportunity to take a "step up" in basis at your death, and the donee will still owe a significant capital gains tax on the asset at sale which could exceed any potential estate tax that would have been due.

- *Are you concerned about the New York State estate tax?* Oft forgotten in discussions about estate tax is New York State's estate tax, which kicks in for assets exceeding $1 million. For married couples, the surviving spouse can defer state estate taxes until the death of the second spouse. For single individuals, however, their estate will owe a large chunk of taxes to New York. Since New York State does not impose a lifetime transfer tax, but the federal government does, the available window to transfer $5.12 million tax free is attractive to reduce your taxable estate for New York State estate tax purposes.

- *Are you ready to give up control?* In general, enjoying estate tax savings techniques requires that the donor give up some semblance of control over the assets. Giving a substantial portion of your wealth to another individual leaves you without any legal guarantee that they will use the money to pay for your care or return the money at your request. Not everyone is ready to put themselves at someone else's mercy, even their own children.

If, having contemplated the benefits and drawbacks, you or a client decides to make substantial gifts, some of the available strategies include:

- *Outright gifts*. This is appropriate only in certain situations as it is not always appropriate to give significant gifts to minor children or grandchildren without putting asset protection in place against potential creditors or future ex-spouses. There may also be generation-skipping tax consequences to making outright gifts to a younger generation. Keep in mind that anyone can gift $13,000 per year to any individual ($26,000 from a married couple) and can pay unlimited medical and educational expenses. Annual exclusion gifts remain an effective way to decrease your estate without using up any of your lifetime exemption, wherever it winds up. As noted above, New York State does not impose a transfer tax but has a very low estate tax exemption of $1 million. Thus, making annual exclusion gifts can help to reduce the size of your taxable estate for New York State estate tax purposes.

- *Gifts in Trust*: When structured properly, trusts can offer an ideal solution for gifting assets instead of transferring them outright to beneficiaries. A living trust can be drafted for the benefit of intended beneficiaries or a class of beneficiaries (i.e., descendants, grandchildren,

(Continued on page 25)

COURT NOTES

Appellate Division-Second Department

By Ilene Sherwyn Cooper

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:

Alan Harrison Brent
John Fedden Hockenberry
Alise M. Kellman
Jonathan Mack
Brian M. Madden
Gilman T. Miller
Garrett Stackam
Robin Cory Thorner
Erin Tollini
Michael John Vosilla
Sheila Walsh

Attorney Resignations Granted/Disciplinary Proceeding Pending:

Akintayo Abimbola Ayorinde: By affidavit, respondent tendered his resignation, based upon his plea of guilty in the United States District Court for the Eastern District to one count of conspiracy to commit wire fraud and bank fraud, a class B felony. He stated that his resignation was freely and voluntary rendered, and affirmed that it was subject to an order directing that he make restitution and reimburse the Lawyers' Fund for Client Protection. In view of the foregoing, the respondent's resignation was accepted and he was disbarred from the practice of law in the State of New York.

Swindley Anderson Edwards: By affidavit, respondent tendered his resignation, indicating that he was aware that he is the subject of an ongoing investigation by the Grievance Committee concerning allegations that he neglected legal matters, and presented two checks from his attorney's escrow account to the Kings County Clerk's Office that were dishonored. He acknowledged that he would be unable to defend himself against such charges on the merits. He stated that his resignation was freely and voluntary rendered, and affirmed that it was subject to an order directing that he make restitution and reimburse the Lawyers' Fund for Client Protection. In view of the foregoing, the respondent's resignation was accepted and he was disbarred from the practice of law in the State of New York.

Ilene S. Cooper

Brian M. Rattner: By affidavit, respondent tendered his resignation, indicating that he was aware that he is the subject of an ongoing investigation by the Grievance Committee concerning allegations that he presented checks from his attorney's escrow account that were dishonored, and checks were issued from his escrow account payable to cash. He acknowledged that he would be unable to defend himself against such charges on the merits. He stated that his resignation was freely and voluntary rendered, and affirmed that it was subject to an order directing that he make restitution and reimburse the Lawyers' Fund for Client Protection. In view of the foregoing, the respondent's resignation was accepted and he was disbarred from the practice of law in the State of New York.

Attorneys Censured

Thomas Joseph Perkowsi: Motion by the Grievance Committee to impose discipline on the respondent based upon a final order of the United States Patent and Trademark Office and an Order of the Connecticut Superior Court suspending the respondent for a period of 24 months and staying said suspension for a 24 month probationary period based upon facts that disclosed that the respondent was found guilty of signing and submitting 18 checks to the USPTO drawn in insufficient funds. The respondent averred that the foregoing was the product of poor recordkeeping and that no such lapses had previously or subsequently occurred. Inasmuch as the respondent asserted none of the enumerated defenses to the imposition of reciprocal discipline, the application by the Grievance Committee was granted and respondent was publicly censured in New York.

Attorneys Suspended

Jasleen Anand: Motion by the Grievance Committee to suspend the respondent from the practice of law granted and the committee was authorized to institute a disciplinary proceeding against him, based upon findings, prima facie, that the respondent failed to cooperate with the lawful demands of the Grievance Committee in its investigation and other uncontroverted evidence of professional misconduct, including the failure to account for estate funds that came into her possession. Following service of the motion, the respondent's counsel submitted a response in which he stated that the respondent had voluntarily removed herself from the practice of law and did not oppose the motion. Accordingly, the respondent was suspended from the practice of law pending further order of the court.

Robert A. Bertsch: By letter, dated November 22, 2011, the Grievance Committee informed the court that the respondent pled guilty to Misprison of a Felony, based upon knowledge of the actual commission of a felony; to wit, securities fraud and wire fraud. As a consequence, the respondent was immediately suspended from the practice of law as a result of his being found guilty of a serious crime, and the Grievance Committee was authorized to institute a disciplinary proceeding against him.

Attorneys Disbarred

George R. Alderdice: By decision and order dated September 7, 2011, the respondent was suspended from the practice of law, and the Grievance Committee was authorized to institute a disciplinary proceeding against him. The petition against the respondent contained 14 charges of professional misconduct against the respondent alleging, *inter alia,* that he had failed to maintain sufficient funds in his attorney escrow account, and failed to timely or completely cooperate with the Grievance Committee. The respondent failed to answer the petition and the Grievance Committee moved for an order deeming the charges in the petition established. The respondent failed to answer the motion or request an extension of time to do so. Accordingly, based upon the circumstances, the charges in the petition were deemed established, and the respondent was disbarred from the practice of law in the State of New York.

Raymond E. Kerno: By decision and order dated August 16, 2011, the respondent was suspended from the practice of law, and the Grievance Committee was authorized to institute a disciplinary proceeding against him. The petition against the respondent contained 24 charges of professional misconduct against the respondent alleging, *inter alia,* that he neglected matters entrusted to him, engaged in conduct prejudicial to the administration of justice by failing to promptly turn over a client's file in an appellate matter, and failed to keep clients reasonably informed about the status of their legal matters. The respondent failed to answer the petition and the Grievance Committee moved for an order deeming the charges in the petition established. The respondent failed to answer the motion or request an extension of time to do so. Accordingly, based upon the circumstances, the charges in the petition were deemed established, and the respondent was disbarred from the practice of law in the State of New York.

Ethan Jordan Serlin: On October 26, 2011, the respondent pled guilty to two counts of grand larceny in the second degree, a class C felony, and conspiracy in the fourth degree, a class E felony. Accordingly, by virtue of his felony conviction, the respondent ceased to be an attorney and was automatically disbarred from the practice of law in the State of New York.

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

SCBA's Annual Outing

By Sarah Jane LaCova

Monday, August 13th daybreak - at the first appearance of light in the sky, we all knew it was going to be a perfect day for fishing aboard the Osprey V sailing out of Port Jefferson Harbor and for members and guests who were planning to play 18 holes of golf at Rock Hill Country Club in Manorville.

Kudos to Barry Smolowitz, who with skipper Amanda Cash and other fishing devotees, set out at 8 a.m. for a wonderful day of camaraderie, fishing and for some, sunning on the upper deck. Todd Houslanger hooked the biggest bluefish and the most fish for the day (definitely not a fish story). Todd, his wife Victoria, and son Alexander accepted both prizes at the annual awards dinner that evening at Rock Hill. The sign that was posted on the Osprey V thanked Will Puvogel, Associate Director of Investments at Oppenheimer & Co., Inc. for sponsoring the fishing part of the annual outing.

Our golf tournament welcomed golfers and duffers and some were still on the course when the sumptuous feast of lobsters, clams, mussels marinara and chicken (to name but a few special dishes and delicacies), that were served; our compliments to Jim Murphy for giving us once again superb service.

Suffolk County Bar President Art Shulman arrived early and greeted the players and also acted as the photographer to record the day's event. Art presented the prizes to the winners of the tournament: Longest Drive went to Kevin Loyst and closest to the pin winners went to Judge Gigi Spelman and Tony Salva. Men's low gross first and second prizes went to Denny Brown and John Mann and women's low gross first prize went to Lynne Kramer and Judge Gigi Spelman. Men's low net first and second prize winners were Tom Stock, Jr. and Tony Soscia. Women's low net prizes were awarded to Sue Pierini and Dawn Hargraves. Raffle winners for the evening were: Sue Pierini who won first prize of a golf bag and irons donated by the golf pro Bob Becker; second and third prizes were marine photographs donated by Chris Paparo and won by past presidents Barry Warren and George Roach respectively.

Photo by Art Shulman

Several SCBA members enjoyed a day of golfing at the annual outing at the Rock Hill Country Club including from left: Rich Bronstein, Bob Clemente, Joel Ziegler and Joe Fritz. (See more photos on page 16.)

A final word of appreciation goes to the many supporters whose generosity contributed to the outing's success:

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St. James Financial Services
VIP Vacations, Kim Smolowitz

SCBA Annual Golf Outing and Fishing Trip

Photos by Art Shulman and Barry Smolowitz

FREEZE FRAME

Swearing in of Academy Officers

SCBA members Maianne Rantala, Robert Harper, Jennifer Mendelsohn and Brette Haefeli were sworn in by President Art Shulman as Academy officers.

Surrogate Dinner

Photos by Arthur Shulman

SCBA members enjoyed the annual Surrogate's Court Dinner.

Charity Play at Engeman– 42nd Street

SCBA members and guests attended a Tony Awards best musical performance of 42nd Street (a fairy tale of a small town girl who becomes a Broadway star) in June at the John W. Engeman Theater. The funds raised by the SCBA Charitable Foundation were used to assist underprivileged and at-risk children living in shelters, foster care or on public assistance by offering tutoring services, school supplies, computer access and teachers.

IMMIGRATION LAW

Opportunity for our Immigrant Youth

USCIS to give deferred action for childhood arrivals

By Victoria Campos

President Obama announced an Immigration Administrative decision called "Deferred Action" on June 15, 2012 that will benefit many of our young immigrants. Applicants who qualify will be given Deferred Action and will be able to obtain an employment document valid for two years. This employment authorization card will be renewable. It is estimated that approximately 800,000 young immigrants are eligible to apply for Deferred Action.

The Department of Homeland Security announced the criteria for applicants under this new initiative. Applicants must be under the age of 31 as of June 15, 2012, have entered the United States before their 16th birthday, continuously resided in the United States for at least five years preceding June 15, 2012 (or in other words since at least June 15, 2007, up to the present time), were present in the US when the President made the announcement, currently in school, have a high school diploma, GED certificate or be an honorably discharged veteran of the Coast Guard or Armed Forces of the US, and have not been convicted of a Felony, significant or multiple misdemeanor offenses. The applicant of any country may apply as it does not matter if the applicant had come to the US illegally (through the Mexican border) or with a Tourist visa and overstayed or if the person has an order of Deportation or Removal in his record.

Victoria Campos

It is important to understand "Deferred Action." As cited in the USCIS website: "Deferred action is a discretionary determination to defer removal action of an individual as an act of prosecutorial discretion. Deferred action does not confer lawful status upon an individual. In addition, although an alien granted deferred action will not be considered to be accruing unlawful presence in the United States during the period deferred action is in effect, deferred action does not absolve individuals of any previous or subsequent periods of unlawful presence."

In another words, this is not an Immigration Benefit like legal Permanent Residence or Citizenship. Deferred Action does not give the applicant a Legal Status, but it certifies the applicant to be a low priority for Removal purposes.

Although I applaud President Obama efforts to give our immigrant youth the opportunity to keep studying, to obtain a social security to be able to work, and be able to obtain a driver's license, I am especially concerned for those who apply and don't qualify. Many immigrants unfortunately go to "Notarios" or people who do not have a license to practice law in NY and exploit immigrants. We do not know yet if the unqualified applicants will end up facing Removal proceedings instead of obtaining Deferred Action. The requirements are fairly easy, yet, we must advise the community to seek for legal advice with an attorney or with a non-for-profit organization who can help them with this application.

One of the requirements is that the person did not commit a felony or does not have a significant misdemeanor. This is a grey area, since Deferred Action is discretionary, it will be up to the officer reviewing the case to make this determination. For example, USCIS position as stated in their website is that a felony is a federal, state or local criminal offense punishable by imprisonment for a term exceeding one year. A Significant Misdemeanor, regardless of the sentence imposed, is an offense of domestic violence, sexual abuse, burglary, unlawful possession or use of a firearm, drug distribution or trafficking, or Driving under the Influence. If not an offense just mentioned, the individual was sentenced to time in custody of more than 90 days. A DWI conviction, if it is the first one, will not normally make an applicant ineligible for an Immigration relief; however, for purposes of Prosecutorial Discretion, a DWI conviction, will be grounds for denial. A minor traffic offense, like driving with no license, will not be considered a misdemeanor. However, USCIS will look at your entire record to determine if the applicant warrants an exercise of prosecutorial discretion.

Each application for Deferred Action will be reviewed individually and each presents a different case scenario. Immigration is not taking the applications for Deferred Actions as of yet. On August 3, they announced that on August 15, they will make all forms and additional information available; that same day, they will start taking the applications. The costs for the applications will be $465 ($380 for employment authorization and $85 biometrics or fingerprint fee).

Note: Victoria Campos has offices in Huntington Station, (1677 New York Avenue), Bay Shore (1805 Fifth Avenue) and in Hempstead. She is currently the chair of the SCBA Immigration Committee.

Ending Life in a Humane and Dignified Manner

The Oregon "Death with Dignity Act"

By Marvin Waxner

Consider the following scenario: You are a competent, adult person with a terminal illness who has come to the realization that the treatment intended to cure or slow your disease is no longer working. All you can look forward to are increasing debilitating symptoms, infections, chronic fatigue, significant ongoing digestive problems and generalized pain and discomfort. These symptoms are expected to increase in intensity as the treatment loses its effectiveness. It is apparent to you that the burdens associated with continued treatment are far greater than the benefits. Self-determination is important to you, and you have decided to terminate your life at a time of your own choosing. If you happen to live in Montana[1], Oregon[2] or the state of Washington[3] you may seek the assistance of a physician to accomplish your purpose.

In 2009, the Montana Supreme Court, in *Baxter v. Montana,* ruled that physicians may assist patients in ending their lives by prescribing lethal medications (to be self-administered by the patient), citing the state's Rights of the Terminally Ill Act. The court held that while the State Constitution did not guarantee a right to the assistance of a physician to terminate one's life, there was nothing in Montana Supreme Court precedent or Montana statutes indicating that physician aid in dying is against public policy.

On November 4, 2008, the State of Washington passed Initiative 1000, the state's Death with Dignity Act, which became law on March 5, 2009. The statute is set forth in the Revised Code of Washington (RCW) as Chapter 70.245.

If you live in New York State you have no such remedy. New York Law criminalizes assisted suicide. *Penal Law § 120.30* provides that "A person is guilty of promoting a suicide attempt when he intentionally causes or aids another person to attempt suicide. Promoting a suicide attempt is a class E felony." *Penal Law § 125.15* states that "A person is guilty of manslaughter in the second degree when: . . .3. He intentionally causes or aids another to commit suicide. Manslaughter in the second degree is a class C felony." In *Vacco v. Quill*, it was held that the prohibition against assisted suicide in New York statute did not violate the Equal Protection Clause of the U.S. Constitution. The court drew a distinction between letting a person die and making a person die. In *Cruzan v. Director, Missouri Department of Health*, the U.S. Supreme Court held that a competent person has the right to *refuse* unwanted lifesaving medical treatment. Thus, in New York, while a competent person may refuse lifesaving medical treatment, there is no right to seek assistance to hasten the process of dying [4]

Marvin Waxner

Should the citizens of the State of New York have the same option as the citizens of Oregon, Washington State and Montana? The answer to that question involves more than merely passing a statute. It is not, however, the purpose of this article to deal with the moral, religious or philosophical aspects of voluntarily ending one's life. That is best left for another article. The sole purpose of this article is to describe the procedure available to a person who chooses to terminate his life with the aid of a physician in the State of Oregon. The Oregon statute was chosen because it has been in place longer than the other two jurisdictions offering this remedy. No opinion for or against the Oregon Death with Dignity Act (DWDA) is offered. Access to the procedures set forth in the statute is voluntary. Thus, the likelihood of entering the science-fiction world of *Logan's Run* (1976 film), where mandatory termination of life occurred upon reaching the age of 30, seems unlikely.

Procedure Pursuant to the Death with Dignity Act (DWDA)

The statute is officially known as "The Oregon Death with Dignity Act" (DWDA) and is set forth in Chapter 127 of the Oregon Revised Statutes (ORS) 127.800 to 127.897. It was enacted in 1997. The act allows terminally-ill individuals to end their lives through the voluntary self-administration of lethal medications, prescribed expressly for that purpose by a physician. Participation by doctors in the program is voluntary, and physicians are not required to provide prescriptions. Since the law was passed in 1997, a total of 935 people have had DWDA prescriptions written and 596 patients have died from ingesting a lethal dose of medication.[5]

A capable Oregon resident, who is 18 years of age or older, and has been determined by an attending physician and a consulting physician to be suffering from a terminal disease and who has voluntarily expressed a wish to die may request medication for the purpose of ending his or her life in a humane and dignified manner in accordance with the statute. *ORS 127.805 §2.01*. "Capable" is defined as ". . .a patient [who] has the ability to make and communicate health care decisions to health care providers, including communications through persons familiar with the patient's manner of communicating if those person are available." *ORS 127.800 §1.01(3)*.

"Terminal disease" is defined as "an incurable and irreversible disease that has been medically confirmed and will, within reasonable medical judgment, produce death within six months." *ORS 127.800 §1.01(12)*.

People who wish to participate in the DWDA do not apply to the state or to any arm of the state. In order to receive a prescription for the medication, the patient must make an oral request and a written request to the attending physician, and then repeat the oral request to the attending physician no less than 15 days after the initial oral request. *ORS 127.840 §3.06*. The written request to the attending physician must be signed in the presence of two witnesses. At the time of the second oral request, which is the end of the 15 day waiting period, the attending physician is required to offer the patient the opportunity to rescind his or her request. A patient may, at any time, rescind the request for a prescription. Also, the attending physician must request, but cannot require (*i.e.*, make it a condition of providing the prescription), the patient to notify his or her next-of-kin of the prescription request.

The attending physician also must ensure that the patient is making an "informed decision" regarding his or her request for a prescription for the medication. An "informed decision" is defined as the patient having an appreciation of the relevant facts after having been fully informed by the attending physician of (1) his or her medical diagnosis,(2) prognosis, (3) potential risks associated with taking the medication, (4) the probable result of taking the medication, (5) such other feasible alternatives as hospice care and pain control. *ORS 127.800 §1.01(7), 127.815*

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Pro Bono Foreclosure Project

By Rory Alarcon

NOTE: The following article is written, in part, as a 'tongue-in-cheek' discourse on the author's own observations. If you cannot tolerate such an article, please skip ahead. If you enjoy attempts at humor, then proceed.

The foreclosure crisis (so often discussed in this paper) is far from over, and the need for attorneys to assist in pro bono efforts to help struggling homeowners has never diminished.

I myself was fortunate enough to have attended the Empire Justice Center's CLE program in late 2010. During the course of the lengthy seminar, our own Barry Smolowitz requested that attendees enroll in the Bar Association's Pro Bono Foreclosure Project ("the Project"). I did join the Project, continue to act as a volunteer, and have received the many benefits of participation: I have discovered a new field of practice, achieved what I consider to be good 'karma points,' and have been privileged enough to work with outstanding attorneys of a caliber much higher than my own: Barry Smolowitz is the straight-talking glue that holds the Project together, Barry Lites' advice is fantastic, and Ray Lang's ability to calm anxious homeowners is incredible (many other outstanding attorneys participate as well).

Nevertheless, despite the benefits mentioned above, there are certain times when I question my participation. Originally, it was due to my jealousy, as in "If I want to modify my mortgage payment, I must pay $20,000 in fees because I am not behind. That's not fair, aren't we rewarding irresponsibility? Blah blah blah, Bill O' Reilly said blah blah blah" and the like. In an effort to reach transcendence, I have put such thoughts behind.

My doubts now only come from my own disbelief. At times, I cannot help but look for hidden cameras in Riverhead Supreme's 128A. While many homeowners are making serious efforts to stave off foreclosure, other homeowner's actions border the insane.

Please indulge a few examples. If nothing else, perhaps you will get a laugh.

Client: This is not fair, bank CEOs are making tons of money and won't help anyone…
Me: Yes it is terrible. Many people have nowhere to go. So, how long have you lived at the property?
Client: I don't live there, it's an investment property and I live in ____....

Client: This modification is no good.
Me: The numbers seem fine according to your income. What is wrong?
Client: I paid my dues! I want 2 percent!
Me: Sir, it doesn't work that way. Are you a veteran?
Client: No, but I paid taxes all my life!

Client: I received a trial modification offer but it's unaffordable.
Me: Let's see…the numbers fit HAMP guidelines…why is it unaffordable?
Client: We would be short $100 per month for the payment according to our budget.
Me: That is unfortunate. By the way what have you been doing with the mortgage payments you haven't made?
Client: Oh, they're in a separate bank account. There is $25,000.00 in that account.
Me: Sigh….

Client: I received a trial modification offer on my $450,000 mortgage from 2010.
Me: OK, let's look, this looks good, this looks good…holy ___, they are going to drop $200,000 off the principal balance and reduce your rate to 2.5 percent fixed!
Client: But that's not fair, they added on $35,000 in penalties.
Me: Sigh…

Finally, my all time best:

Client: These banks are terrible, they are no help, and I have to deal with my ex-husband to try to get this done.
Me: Oh, sorry. Um, I'm sorry, but can I ask? If you are divorced, why are you still wearing that (big) diamond ring?
Client: I'm getting married again in two months.
Me: OK, is your fiancé living in the home as well.
Client: No, he has his own house free and clear and we are living there.
Me: So why do you want to modify this loan?
Client: Well, I just want to sell the house in two years.

Fortunately, when volunteers file reports online we are able to recommend whether clients should continue to receive pro bono services through the Project. Can you guess what I recommended for this client?

Note: Rory Alarcon practices foreclosure defense, consumer defense and matrimonial law at Alarcon Law Firm, P.C. in Hauppauge, New York. His website is http://www.nylawsource.com/

TRUSTS AND ESTATES UPDATE

Retainer Agreement Held Binding on Fee Request

By Ilene Sherwyn Cooper

Ilene S. Cooper

In a proceeding for the judicial settlement of the account of the institutional co-executor of the estate, objections were filed by the two of the decedent's sons, as co-executors, to, *inter alia,* the legal fees claimed by the three firms retained by petitioner during the course of its administration. The issue was submitted to the court for decision.

The decedent's estate at death was valued at approximately $1.25 million. The principal asset thereof was his cooperative apartment in New York.

Pursuant to the terms of the retainer between petitioner and the firm of Windels Marx, counsel agreed to a flat fee of $50,000 for services in (1) probating the decedent's will and obtaining the issuance of letters testamentary to the named executors; (2) preparing and filing estate tax returns and representing the estate at any audit thereof; and (3) attending to the general administration of the estate. The retainer excluded services performed in connection with any litigation or in connection with the projected sale of the decedent's apartment. The retainer also contemplated additional fees incurred for outside experts, including a lawyer in France relative to the decedent's apartment in Paris.

Despite the foregoing, the petitioner requested that the firm be allowed fees of $200,000 for services performed, plus disbursements. In support of the application, the petitioner argued that the firm was not bound by the terms of its retainer, and that fees should be awarded to it on a quantum meruit basis. More specifically, petitioner maintained that the additional fees incurred by counsel were attributable to the recalcitrance of the individual co-executors, who interfered with and complicated the administration of the estate.

The court opined that notwithstanding the existence of a retainer, the Surrogate has the inherent authority to fix and determine legal fees payable from an estate. Thus, while an estate must pay the fees of fiduciary's counsel, it will only be charged with the reasonable value of the legal services rendered. As such, retainer agreements between an estate fiduciary and counsel will not always be enforceable to the same extent as a commercial contract. Indeed, when a legal fee has been prescribed by a retainer, the attorney bears the burden of proving that the agreed-upon fee is reasonable.

When, however, counsel seeks a fee in excess of the fee contained in a retainer, the attorney will be bound by the terms of its agreement, regardless of the complexity involved in the handling of the estate. The court noted that while such a result would invariably be disappointing to a firm that is caused to incur more time and effort than otherwise expected, "the practitioner who agrees to a flat fee for specified legal services is chargeable with the knowledge that a client may make the lawyer's professional objectives harder or easier to reach than is typical. Thus, where clients add to the lawyer's work burden, the lawyers …cannot seek relief from [a] bargain's terms by claiming unfair surprise."

Accordingly, the court denied the request of petitioner's counsel for fees in excess of its retainer. As to fees for services performed outside the scope of the agreement, upon

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REAL ESTATE

The Mortgage Modification Myth

By Charles Wallshein

Talk to anyone who has tried to obtain a modification of their mortgage and you will immediately hear the frustration in their voice. Their stories involve hours of time on hold, lost paperwork by the servicer, repeat requests for the same paperwork, not having a single point of contact, denials without explanation, unexplained ejection from the program and a myriad of other complaints.

It is estimated that approximately 30 percent of the mortgaged homes in America carry mortgage debt that exceed their value. Many of these homeowners have sought modification of their loan's terms only to be inexplicably delayed or denied altogether. Most common is the scenario where delinquent borrowers are given trial mods, pay for a period and are then inexplicably thrown out of the program. To the layman it seems completely counterintuitive that lenders would refuse to accept payments from borrowers when the lenders' only alternative is foreclosure.

Conventional wisdom and logic dictate that under present economic circumstances, lenders would want to keep people in their homes and receive payment even if it meant taking less than what was contractually owed on the note. If homes are sold at foreclosure sale, lenders will certainly realize a large net loss from the mortgage principal, mortgage arrears and tax and insurance escrow advances. It is here that logic and conventional wisdom depart the conversation. The reason for lenders' unwillingness to permanently modify mortgages for borrowers requires an understanding of who actually makes the decision to modify (or not) and their contractual and economic incentives to do so.

The common conception that there is a "bank" that owns a mortgage is to a large degree an arcane idea. Most home mortgages are securitized. This means that loans were pooled into bundles of hundreds or even thousands of mortgages. The securitization "sponsor" turns the right to receive cash flow from the pool of loans into a stock/trust certificate that pays a steady rate of return just like a bond. This is called an RMBS (residential mortgage backed security) transaction. The RMBS pool's cash flow is separated into different classes. Each class has different rights to collect cash flow from different parts of the pool's income stream. Some classes are safer than others. The safest classes of the trust certificates (shares) will pay the least interest to the investor. Conversely, the higher risk will pay higher interest. For example; If the average rate of return from all the loans in a mortgage pool is 6.5 percent, the safest class may offer a return of only 3 percent and the riskiest class may provide a return of 15 percent.

A group of investors buying trust certificates in a RMBS pool will calculate the likelihood of performance of their certificate against the relative yield of that derivative portion of the market's performance. The investor that buys the certificates that have the highest likelihood of performance will get the lowest yield. This means that if a portion of the pool of loans had to be liquidated (through foreclosure for instance) due to some breach by the borrowers (nonpayment) the top rated class of investors would get their money out first.

Example: if the pool had to foreclose on a $500,000 loan the investor that held the first-out principal piece that guaranteed payment of the first 20 percent of the loans principal would be in a very good spot. Even if the foreclosure sale only netted $400,000, the first 20 percent is still $100,000. However, the investor who held the last-out 20 percent of principal would be completely wiped out.

Who controls the trust assets?

The mortgage pool is set up as a REMIC trust.[1] The trust is controlled by a trustee. The trustee's responsibilities are created by a contract called a PSA (pooling and servicing agreement). The trustee is supposedly a neutral party that oversees the distribution of trust income and assets in accordance with the terms of the PSA. The trust via the trustee hires a servicing agent to manage and administer the contractual duties of the trust. The servicing agent is called the Master Servicer. Likewise, the PSA governs the duties and authority of the Master Servicer as to what acts the Master Servicer is responsible for and what acts the Master Servicer has authority to perform on behalf of the trust.

The trust has several classes of investors. The different rights of investors create different priorities when there is a default in payment of loans held by the trust. For example, the investors who get paid first would favor a liquidation of the asset (foreclosure) as they would get all their money back as soon as possible. The investors that hold the certificates that get paid back last (if at all) would favor a loan modification or a restructuring of the borrower's debt. In this scenario the riskiest or "last out" investment retains at least some chance of recovery, whereas foreclosure leaves them nothing. Therefore there are internal conflicts between and among different classes of investors in every RMBS. This is especially relevant as to how defaulted and delinquent loans are handled.

The entity that receives the most secure cash flow from a loan pool is usually never the same entity that controls the loan's management and administration. Master Servicers administer and manage the mortgage pool's performing loans. Sub-Servicers (short for sub-contracted servicers) are usually hired by Master Servicers to handle defaulted and delinquent loans. In nearly all Pooling and Servicing Agreements the most junior loan class is the one that gets to choose the Master Servicer.[2] Therefore, the entity that

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CORPORATE LAW

Entering into a Joint Venture

By Joseph V. Cuomo and Anthony V. Curto

Joseph V. Cuomo

Anthony V. Curto

In today's competitive marketplace, entities often pursue business opportunities through collaborative efforts generally referred to as joint ventures. A joint venture - so known as a strategic partnership - an undertaking, usually for a specific or limited purpose, in which two or more entities pool their assets and resources, and share in the risks and rewards of the enterprise. While such an endeavor can undoubtedly lead to various problems, many of them are foreseeable. Consequently, parties contemplating a joint venture can take precautionary measures to proactively address such issues.

This article outlines some of the major considerations that parties should think through before entering into a joint venture. As with most business ventures, preliminary considerations should include: a confidentiality agreement, a letter of intent, and due diligence. Here, subsequent considerations should be given to the structure of the venture, and the agreement that will govern its operation.

Confidentiality Agreement

Parties to a joint venture usually exchange confidential information and should, therefore, protect that information by executing a confidentiality agreement. Confidentiality agreements -so known as nondisclosure agreements - are one of the most common agreements entered into by business entities. These agreements have many characteristics to consider; three of the key considerations are mutuality, explicit identification of the information that the parties seek to protect, and the term of the agreement. Mutuality is desired because mutual agreements typically provide each party with equal protection for their proprietary information. Explicit identification of what information is protected reduces the risk that the agreement will contain loopholes. The term of the agreement sets the parties' expectations regarding the length of time each will be subject to the agreement's restrictions.

Letter of Intent

Parties contemplating a joint venture should also prepare either a letter of intent or a term sheet. These two documents are distinct from one another, however the difference is slight. Both are preliminary, typically non-binding, documents used to record the material terms of the joint venture. The documents are ordinarily used to guide in the preparation of the definitive agreement that will govern the venture's operation. Also, the letter of intent and term sheet serve the additional functions of: vetting key issues upfront, centralizing pertinent discussions into a single document for convenient review, and clarifying the rights and responsibilities of each party.

Due Diligence

Parties should exercise due diligence by researching their potential joint venture partner. Public databases such as Westlaw and LexisNexis, and Internet searches via Google are just a few of the many resources available for this task. Additionally, rather than limit due diligence efforts to public searches, parties should always consider supplementing their investigations with a reference check and, in some circumstances, a private investigation.

Structure of the Joint Venture

With regard to the structure of a joint venture, primary considerations include: business objectives, limitation of liability concerns, contributions of the parties to the venture, tax treatment, and ease of termination. Joint venture structures range from a simple handshake to the creation of a new business entity. However, undocumented verbal agreements, memorialized in nothing more than a handshake, can easily lead to a disastrous outcome. The more prudent approach is to, instead, have a contractual agreement govern the arrangement.

Common elements of a Joint Venture Agreement

Fundamental to any joint venture is its governing agreement, which - depending on the structure of the venture - can take many forms, including: a contractual agreement, a shareholders' agreement, an LLC operating agreement, a partnership agreement, a development agreement, a licensing agreement, or a marketing agreement, to name a few. Although distinguishable, these joint venture agreements address many of the same issues. The most significant of these common issues are: scope or purpose of the venture, geographic area or markets to be covered, type of product or service to be provided, identification of the parties and point person for each side, responsibilities of each party, contributions of or commitments regarding future contributions of each party, assignment or license of technology or intellectual property, ownership of jointly developed products or intellectual property, compensation or sharing of profits and losses for each party, sharing of the costs and risks of the venture, management of the venture, restrictions on transfers of interest in the venture, right of first refusal for future ventures, reversion rights, dispute resolution method (arbitration or mediation), term and termination of the relationship, non-competition or exclusivity conditions, and non-disclosure requirements.

Legal Representation

In joint venture situations in which the parties' relative bargaining strengths are approximately equal, the parties often retain one law firm to serve as legal counsel to the venture itself. The duties of a law firm under this scenario run to the venture and not to any joint venture party on an individual basis. Alternatively, where one party has a more dominant position, it is common for that party to use its own counsel to perform the legal work needed to create and structure the joint venture. Under this latter scenario, the less dominant partner would typically have its own counsel to look out for such party's specific interests.

"Top 10" Joint Venture Issues

While contemplating the considerations

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COMMERCIAL LITIGATION

Task Force Report & Recommendations for the Commercial Division

By Leo K. Barnes Jr.

In late June 2012, Chief Judge Jonathan Lippman's Task Force on Commercial Litigation released its Report and Recommendations for the Commercial Division,[1] the culmination of the Task Force's six-month exploration of how to better manage judicial resources of the Commercial Division by improving the court's operations for both the bench and the bar. The report contains widespread suggestions including procedural reforms, revising the Commercial Division's docket, proposals to facilitate early case resolution and suggestions to provide more support to Commercial Division Justices.

Procedural reforms

Many of the recommendations in the report involve procedural reforms to the Commercial Division Rules, the most notable being an amendment of the expert disclosure process to mirror expert disclosure in the federal courts. For example, the proposed rule would require depositions of all testifying expert witnesses and require that all expert disclosure (including identification of expert witnesses and written reports) be made no later than four months after completion of fact discovery. In addition, the Task Force recommended a modification to Rule 8 of the Commercial Division Rules requiring the parties to discuss the scope and timing of expert disclosure both prior to and at the Preliminary Conference.

Reforms to enhance efficiency were recommended which included a modification to the Commercial Division Rules to restrict the number and scope of document demands, interrogatories and the number and length of depositions (again, akin to the existing limitations in federal court). Additionally, the report proposed that an amendment be made to the Commercial Division Rules to offer an accelerated adjudication procedure available on consent of both parties, which would have highly truncated written discovery, narrowly tailored electronic discovery, limited depositions, and other accelerated procedures.

Other proposed procedural reforms in the report include:

- Imposing limitations to privilege logs, with recommendations of four different rubrics under which privilege logs can be limited as examples of the possible ways in which parties can stipulate to appropriate means of limiting privilege logs.

- The creation of standard forms and procedures for optional use in Commercial Division litigation to promote greater efficiency.

- Endorsement of two reforms proposed by the E-Discovery Working Group of the New York State Court System: (i) The recently adopted Rule 1(b) which requires parties to appear at the preliminary conference with counsel who have sufficient knowledge of the party's computer systems to have a meaningful discussion of e-discovery issues, and (ii) The consideration of the use of internal experts to assist the court, lawyers, and parties with the newest opportunities and challenges presented by e-discovery.

- Improvements to courtroom efficiency by: (i) urging justices to schedule staggered court appearances (instead of asking all lawyers on all cases to appear on a given day at the same time); (ii) utilizing letter submissions for discovery motions, (iii) conducting discovery conferences via telephone, instead of requiring the attorneys to travel to court, and (iv) encouraging judges to preside over discovery conferences.

Leo K. Barnes Jr.

- Encouraging an open dialogue between the Commercial Division and the Appellate Divisions, and providing appellate judges with additional exposure to commercial issues.

- The use of recent technological advancements and tools to promote greater efficiency in the Commercial Division, including the continued expansion of mandatory Electronic Filing to other counties.

- The recommendation that Commercial Division Justices be encouraged to consider monetary and non-monetary sanctions more often where parties fail to comply with case management orders and other deadlines.

Revisions to the Docket

Several recommendations were made to revise the Commercial Division docket in order to alleviate the growing number of cases and motions that the Commercial Division currently confronts. The first is the revision of the Court of Claims Act to enable the Governor to designated qualified individuals as judges assigned to the Commercial Division (with a suggestion that six new judges be appointed to the Commercial Division). The second recommendation was an increase in the monetary threshold. For example, the Task Force urged that New York County's threshold be increased from $150,000 to $500,000 and that proportionate increases should likewise be implemented on a county-by-county basis. In addition to the foregoing recommendations, the Task Force calls for periodic review of the cases eligible for Commercial Division designation (and adjustments as necessary).

Early Case Resolution Initiatives

Two initiatives were proposed which the Task Force believes will aid in the early resolution of cases. The first initiative is the implementation of a Pilot Mandatory Mediation Program, which the Task Force proposed be first implemented in New York County. The rule as proposed would require that every fifth newly assigned case to the New York County Commercial Division be required to be mediated within 180 days of assignment to the Commercial Division unless (a) all parties stipulate that

(Continued on page 25)

TRUSTS AND ESTATES

Exoneration Clauses

By Robert M. Harper

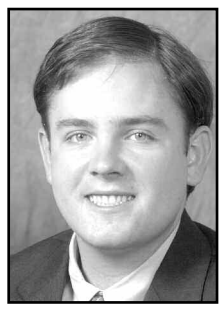
As trusts and estates practitioners, we bear witness to the fact that fiduciary relationships regularly involve a level of tension. On the one hand, executors and trustees wish to minimize any exposure to liability that they may face due to their conduct as fiduciaries; on the other hand, beneficiaries rightfully expect that they will be compensated when an executor or trustee breaches his or her fiduciary duties. Given that tension, testators and grantors oftentimes seek to limit the potential liability of their respective fiduciaries by including exoneration clauses, which purport to absolve executors and trustees from liability for the failure to exercise a certain standard of care, in the instruments that govern. This article discusses the extent to which exoneration clauses contained in testamentary and inter vivos trust instruments are enforceable.

EPTL § 11-1.7

Under Estates, Powers and Trusts Law ("EPTL") § 11-1.7, "a testator is prohibited from exculpating the executor or testamentary trustee nominated in a will from liability for failing to 'exercise reasonable care, diligence and prudence.'"[1] Testamentary provisions that endeavor to do so are void as against public policy. Indeed, they have been described by former Nassau County Surrogate C. Raymond Radigan as "nugatory provision[s] amounting to nothing more than a waste of good white paper."[2]

For an illustration of this, practitioners need not look any farther than Bronx County Surrogate Lee L. Holzman's decision in *Matter of Lubin*.[3] In *Lubin*, the decedent's will contained a broad exoneration clause, providing that the executor would be absolved of liability "for any loss or injury to the property . . . except . . . as may result from fraud, misconduct or gross negligence." Surrogate Holzman found that the provision was unenforceable, describing it as a "toothless tiger."

While EPTL § 11-1.7 resolves the extent to which exoneration provisions contained in testamentary instruments are void as against public policy, it does not address whether similar provisions in inter vivos trust instruments are enforceable. As discussed more fully below, given that statutory silence, courts have reached sometimes conflicting conclusions as to the enforceability of exoneration clauses contained in inter vivos trust instruments.



Robert M. Harper

Inter Vivos trusts

In the absence of statutory guidance concerning the validity of exoneration clauses in inter vivos trust instruments, most courts have, historically speaking, applied a "more liberal rule" to exculpatory provisions in inter vivos trusts than to similar clauses in testamentary instruments. Consequently, most courts have enforced exoneration provisions absolving fiduciaries from liability for the failure to exercise reasonable care in connection with inter vivos trusts[4] The underlying rationale is "said to be the nature of an *inter vivos* transaction and the contracting freedom of the [grantor] and trustee to define the scope of the latter's powers and liabilities."

What is more, while there are several cases in which courts have found that EPTL § 11-1.7 applies to inter vivos trusts,[5] those cases stand in stark contrast to the Appellate Division's recent decision in *Matter of Knox*.[6] In *Knox*, the Fourth Department acknowledged that certain Surrogates have "begun to apply EPTL [§] 11-1.7 to inter vivos trusts," but declined "to extend the statute beyond its clear and unambiguous terms" addressing only exoneration provisions in testamentary instruments.

Nonetheless, whether applying EPTL § 11-1.7 to inter vivos trusts or declining to do so, all courts appear to agree that there are "limitations to the enforceability of [exoneration] clauses."[7] At the very least, it is undisputed that a "trustee of a lifetime trust who is guilty of wrongful negligence, impermissible self-dealing, bad faith or reckless indifference to the interests of beneficiaries will not be shielded from liability by an exoneration clause."[8] Exoneration clauses that purport to absolve the trustee of an inter vivos trust of the duty to account or an attorney-fiduciary who drafted the inter vivos trust from liability for all conduct other than bad faith are similarly unenforceable.[9]

Given the foregoing, it logically follows that most courts will enforce exoneration clauses contained in inter vivos trusts, to the extent that the clauses seek to exculpate trustees from liability for the failure to exercise reasonable care. Inasmuch as the exoneration clauses contained in inter vivos trusts purport to absolve the fiduciary from the duty to account or from liability for gross negligence, reckless indifference, bad faith or self-dealing, those provisions are void and unenforceable as against public policy.

In counseling clients, whether they be testators, grantors, or fiduciaries, practitioners should be mindful of the extent to which the exoneration clauses that their clients may wish to include in testamentary and inter vivos trust instruments are enforceable. The failure to adequately consider the enforceability of such exculpatory provisions may cause testators, grantors, and fiduciaries to rely upon them, without justification and to their detriment.

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

1 Ilene S. Cooper & Robert M. Harper, "Incomplete Protection: Exoneration Clauses in New York Trusts and Powers of Attorney," 28 *Touro L. Rev.* 379 (2012).
2 *Matter of Stralem*, 181 Misc.2d 715 (Sur. Ct., Nassau County 1999).
3 *Matter of Lubin*, 143 Misc.2d 121 (Sur. Ct., Bronx County 1989).
4 *Matter of Mankin*, No. 330328, 2010 WL 2801614 (Sur. Ct., Nassau County 2010), *aff'd*, 88 A.D.3d 717 (2d Dep't 2011).
5 *Matter of Goldblatt*, 162 Misc.2d 888 (Sur. Ct., Nassau County 1994); *Matter of Shore*, 19 Misc.3d 663 (Sur. Ct., Westchester County 2008).
6 *Matter of Knox*, 947 N.Y.S.2d 292 (4th Dep't 2012).
7 *Matter of Tydings*, No. 2008-2623, 2011 WL 2556955 (Sur. Ct., Bronx County 2011).
8 *See id.*
9 *See Shore*, *supra*; *Tydings*, *supra.*

LANDLORD TENANT

Amendment to Conform to Proof

Sufficiency of Rent Demand & Proof of Damages

By Patrick McCormick

As summer winds down, I thought the best way to ease into autumn would be to examine certain jurisdictional and proof issues that pop up over and over again in summary proceedings. Thankfully, the courts have provided relevant decisions worthy of discussion. The first is from Nassau County District Court Judge Scott Fairgrieve which discusses whether a commercial landlord waived the right to commence a summary proceeding seeking to collect significant additional rent when the landlord accepted base rent payments.[1] The second case is from the New York City Civil Court and involves an amendment of a petition to conform to trial proof and whether additional rent demands are needed before the motion will be granted.[2] The last case is a brief decision from the Appellate Division, Second Department, which discusses the adequacy of proof adduced at the trial of an unlawful eviction claim.[3]

In *Ambrogio & Caterina Giannone Family Ltd. Partnership*, petitioner commenced a commercial non-payment proceeding seeking $1,205.10, in base rent and $79,396.72 in additional rent for construction costs. Respondent moved to dismiss, alleging that petitioner accepted 13 base rent payments since the construction was completed, seven base rent payments since the additional rent was billed and three base rent payments since the rent demand was served. Petitioner alleged "[f]rom the time the construction work began through to when the costs were billed to the tenants in August 2011, when a formal rent demand was served in December 2011, and when a nonpayment proceeding commenced in March 2012, I have actively and continuous (sic) discussed, with respondent, its obligation to pay for these costs under the lease."

Patrick McCormick

After initially confirming that laches is not a viable defense in commercial cases, the court framed the issue presented as whether "petitioner waived its right to commence this summary proceeding" by accepting base rent payments. The court noted that respondent did not dispute that petitioner "continuously attempted to collect the additional rent owed . . . "The court noted that the lease at issue contained a "no waiver clause" providing that "no waiver of any provision of this lease shall be effective unless in writing, signed by the waiving party." The court denied the motion to dismiss holding that these facts combined with the "no waiver provision clause" led to the conclusion that "[t]here is no basis to find that petitioner waived its right to recover additional rent in a summary proceeding by its acceptance of basic rent. To hold otherwise would frustrate the reasonable expectations of the parties embodied in their lease."

In *JDM Washington Street, LLC*, after the conclusion of petitioner's case, petitioner moved to conform its pleading to the proof presented at trial and rested its case. Respondent opposed the motion arguing that "petitioner must make an updated demand for any rent and additional rent that has accrued since the predicate notice before it can seek to amend the petition at trial." Respondent argued that "petitioner is limited to a claim for the rent sought in the predicate notice because petitioner never demanded any additional rent while this proceeding was pending."

In granting the motion to amend the petition to conform to the proof adduced at trial, the court relied on the specific language of RPAPL §711(2) and CPLR §103(b). The court noted that "RPAPL §711(2) provide for '*a* demand of rent'—not plural demands for rent. . . The RPAPL makes no provision for an updated demand for rent in a nonpayment proceeding." In discussing the CPLR, the court reminds us that "[u]nder the CPLR a motion to amend a pleading at trial must be freely granted absent surprise or prejudice resulting from the delay." The court thus found that a tenant could not be surprised that a landlord in a nonpayment proceeding would seek all rent owed up to trial. The court refused to read into the RPAPL "a requirement that rent demands must be updated before a petitioner may seek to amend its petition to reflect rent allegedly accrued at the time of trial. Such a requirement would graft another element onto a petitioner's prima facie case."

Finally, in a case brought by a commercial tenant against its landlord for damages resulting from an unlawful eviction, the Appellate Division, Second Department, reversed a judgment after a nonjury trial in favor of the tenant. The Appellate Division found that the hearsay testimony offered by tenant to establish its damages was insufficient. In awarding judgment in favor of the tenant for $120,000 ($30,000 loss plus treble damages of $90,000), as compensation for equipment lost as the result of a wrongful eviction, the lower court relied on "the hearsay testimony of the plaintiff, as well as the hearsay testimony of another witness that a third party in Georgia offered to purchase the equipment for the sum of $30,000 after the witness described the equipment to that third party during a telephone conversation." The Appellate Division noted that "Neither the plaintiff nor his witness testified from his own knowledge as to the actual value of the equipment." In reversing the judgment

(Continued on page 27)

2012 New York Statewide High School Mock Trial Tournament

By Joy Ferrari

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

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

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

The Suffolk County Attorney Coordinator is Alan Todd Costell. This year 25 Suffolk County schools and approximately 375 students and 58 SCBA member volunteer attorneys and judges participated in the Mock Trial Program.

The participating high schools this year were: Bay Shore, Central Islip, Commack, Comsewogue, Connetquot, East Islip, Elwood, Half Hollow Hills East, Half Hollow Hills West, Hampton Bays, Harborfields, Islip, Kings Park, Mattituck, Newfield, Northport, Our Savior New American Lutheran, Patchogue-Medford, Rocky Point, St. Anthony's, St. John the Baptist, Smithtown West, West Babylon, William Floyd and Wyandanch.

The members of team were Adam Henn, Jessica Furia, Mallory Nargi. Jonathan Nelson, Erin Engelmann, Chelsea Smart, Michael Gross, Emily Vigliotta, Kelsey Barnett, and Vincent Kappel.

After eight weeks of competitions and 66 trials at the school and court levels, William Floyd High School prevailed over East Islip High School at the Suffolk County Final held on March 28th at Suffolk County Federal Court in Central Islip presided by the Hon. Madeleine A. Fitzgibbon.

The Honorable Arthur D. Spatt presided at the Regional Final held April 18 at the Nassau County Supreme Court in Mineola between William Floyd HS and the Nassau County winner, Massapequa HS. The victor of that competition, William Floyd, will continue on to the State Finals in Albany on May.

Appreciation for insuring the success of this tournament is extended to the following SCBA member attorneys and judges who participated as either team attorney advisors or judges:

Hon. Salvatore A. Alamia (ret)
Hon. Armand Araujo (ret)
Peter J. Ausili
Brian Bass
Hon. Toni A. Bean
Eric J. Bressler
Peter E. Brill
Bryan E. Cameron
Robert W. Dapelo
Richard P. DeBragga
William A. DeVore
Gerard Donnelly
Wayne J. Donovan
Robert W. Doyle, Jr.
Hon. Patricia M. Filiberto
John P. Finnerty
Hon. Madeleine A. Fitzgibbon
Hon. James P. Flanagan
Christopher Gatto
Howard E. Gilbert
Hon. Philip Goglas
Melissa B. Greenberger
Leonard M. Grenci
Joseph A. Hanshe
Elizabeth Harrington
Hon. Richard Hoffmann
Hon. Richard I. Horowitz
David M. Kaufman
Michael C. Kennedy
Mark C. Kujawski
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Matthew K. Mady
Louis E. Mazzola
Michael M. McClellan
Vincent J. Messina, Jr.
Scott D. Middleton
Michael J. Miller
Hon. Michael F. Mullen (ret)
Thelma Neira
John T. Powers
Hon. James F. Quinn
Cornelius S. Rogers
Jamie Rosner
Frank S. Russell
Steven L. Sarisohn
Robert J. Savage
Ronald C. Schule
Kenneth M. Seidell
Arthur E. Shulman
Thomas Sica
Phil Siegel
Joel Sikowitz
David J. Sobel
Joseph K. Strang
Francesco P. Tini
Hon. Stephen Ukeiley
Richard D. Winkler

This program could not exist without the continuing support of the Supervising Judge of the District Court, Hon. Madeleine A. Fitzgibbon. The SCBA extends appreciation to Judge Fitzgibbon, her staff and the court security personnel for their assistance in the use of the District Court facilities.

If you are interested in becoming a judge or attorney coach for the 2013 tournament or know of a school who would like to become involved, please contact Joy Ferrari, SCBA Administrator for the Suffolk County tournament, at (631)234-5511 ext. 224, or email joy@scba.org.

PRO BONO

Pro Bono Attorney of the Month - William Motherway

By Nancy Zukowski

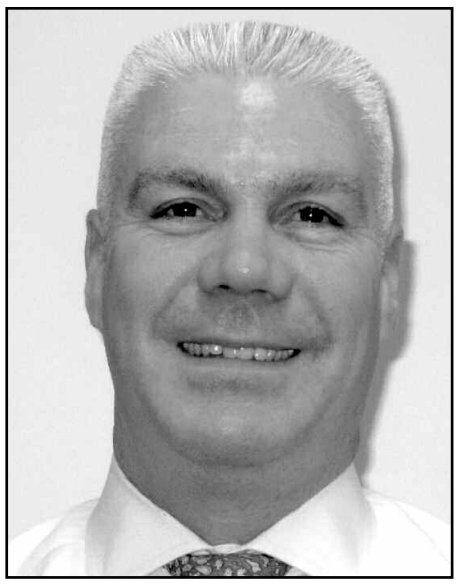
We are pleased to honor an attorney who has generously stepped out of his regular role to help needy families navigate their way through the most difficult cases. As Executive Vice President of Tishman Construction Corporation, which was acquired by AECOM Technology Services in July 2010, William Motherway is normally engaged with building structures such as 1 World Trade Center. However, in his work handling matrimonial cases for the Suffolk County Pro Bono Project, he has become involved in the lives of low income families that are breaking apart. Many attorneys consider matrimonial cases to be among the most difficult, yet William Motherway has found the 3-4 hours he devotes weekly to handling such cases to be highly rewarding.

Explaining what attracted him to this calling Mr. Motherway said, "I was a litigator in Florida and I wanted to get back into the courtroom and help people in need." He observed that, "you get [to work with] people who are at a very low point. Often children are involved, lives are caving in, and you are there for them telling them how long each step will take and what to expect." Contrasting his pro bono service with his corporate work he explains, "The pro bono work is very personal and you can put people's minds at ease. You would think that divorce cases are always about the money, but what has opened my eyes is that emotions can have more influence on these cases than the money. You can always make more money, but there are no formulas to control people's emotions."

William Motherway holds a B.S. from Manhattan College in Biology and taught High School Chemistry and Biology before earning his J.D. from the University Of Miami School Of Law. His desire to enter the legal field grew out of his experiences working in the litigation group of the Marriot Corporation. Explaining his decision to become a corporate executive he explained, "I love the practice of law if not the business of law." After surviving the effects of Hurricane Andrew in August 1992 he returned to Long Island so he and his family could avoid future hurricanes.

Prior to coming to Tishman Construction in 1994, he served as Risk Manager for the City of New York. Even though he left the field of education for law, his interest in educating people never ended. He served on the Kings Park School Board for six years and he continues to be a valuable source of knowledge for his pro bono clients.

He is also eager to explain that Tishman Construction has been very supportive, and even encourages the time that he devotes to his work with the Pro Bono Project. His volunteer experience has also helped him to demonstrate the importance of community service to his own children.



William Motherway

"Many attorneys are lucky to make a decent living," he said. "A lot of people haven't had the opportunities we have. This has helped me to explain to my children that there are less fortunate people living within our community and to appreciate the opportunities they are given and the value of helping out others in need."

William has been married for 25 years to his wife Victoria. Together they have raised three daughters, Jamie (24), Tory (23), Erin (19) and one son, Billy (21). In addition to his achievements in the corporate and legal arenas, William has also competed in triathlons for the past 20 years, although he says he has become more serious about this over the last two years.

He encourages other attorneys to become involved with pro bono stating, "So many people out there need our help. It doesn't take much time and it is well worth the time you spend on it." For devoting his time over the past years using his valuable legal knowledge and courtroom experience to those who otherwise would not be able to afford legal counsel, it is our privilege to honor William Motherway as Pro Bono Attorney of the Month.

The Suffolk County Pro Bono Project is a joint venture of the Suffolk County Bar Association and Nassau Suffolk Law Services. Pro bono attorneys are greatly needed, especially in the areas of: matrimonial and family law, bankruptcy, guardianships (17A), foreclosure, and consumer cases. To volunteer, please call (631) 232-2400 x 3369.

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

CONSUMER BANKRUPTCY

When Debtors Forget to Schedule P.I. Suits

A debtor can lose standing to litigate

By Craig D. Robins

There is one question that Chapter 7 trustees like to ask debtors twice at the meeting of creditors: "Are you currently suing anyone or do you have the right to sue anyone?"

The reason trustees like to ask this question twice is because many debtors forget to tell their attorneys that they have a cause of action, which can be a valuable asset worth administering.

Causes of action are considered assets that must be disclosed in the bankruptcy petition. Because of their unusual nature (they're intangible, unliquidated and contingent), many consumer debtors just don't think about them like they would a more typical asset like a car or bank account. Consequently, many debtors don't tell their bankruptcy attorneys about them even when asked.

A debtor who neglects to list such an asset can end up in a heap of trouble – sometimes losing the possibility of exempting the asset or seeking recovery, or in extreme cases, losing the ability to obtain a discharge.

Judge Alan S. Trust, sitting in the Central Islip Bankruptcy Court, issued a decision a few years ago in which he denied a debtor's application to re-open a case to pursue a P.I. cause of action. In this month's column I will discuss non-disclosed causes of action which can be a P.I. case or any other right to sue.

Bankruptcy Code provides for Duty of Disclosure

The debtor's obligation to disclose a cause of action is based on Code Section 521(a) which requires a debtor to schedule "contingent and unliquidated claims of every nature" and provide an estimated value of each one.

The trustee has the ability to step into the debtor's shoes and pursue any litigation claims the debtor has. It is therefore essential that the debtor disclose all contingent and unliquidated claims so that the trustee can make a determination of whether to pursue those claims for the benefit of the debtor's estate. *In re: Costello*, 255 B.R. 110 (Bankr. E.D.N.Y. 2000).

When a debtor inadvertently omits a cause of action or pending suit from the schedules, and the trustee catches this at the meeting of creditors, the resolution is usually simple. The trustee directs debtor's counsel to amend the schedules and the trustee investigates the viability of pursuing the cause of action.

Craig D. Robins

However, resolving a non-disclosed cause of action becomes much trickier once the case is closed, and that has a lot to do with the concept of standing.

Issues with Re-Opening a Case

Here's the typical scenario: Debtor had a cause of action stemming from injuries suffered in an accident. However, the debtor neglected to tell his or her bankruptcy attorney about it. Then, for whatever reason, when questioned by the trustee about the right to sue anyone, the debtor testified that he or she did not have the right to sue anyone. The case then was routinely closed and the debtor received a discharge.

Then, a year or two passes during which time the debtor's personal injury attorney brings suit and is about to settle the case. However, defense counsel advises P.I. counsel that they did a bankruptcy search and discovered that the plaintiff filed for bankruptcy relief but failed to schedule the cause of action for the accident. They tell the surprised P.I. attorney, "Sorry, there's no longer any settlement money on the table because your client lacks standing as a plaintiff in the P.I. case!"

That's because even after a bankruptcy case is closed, non-disclosed causes of action and litigation remain the property of the bankruptcy estate, unless abandoned by the trustee. Case law provides that if the trustee never knew about the potential estate property, the trustee could not have abandoned it.

Thus, even though the bankruptcy case was closed, the cause of action is still the sole property of the trustee, and the debtor lacks standing to commence or continue the suit. Upon learning of this, P.I. counsel will invariably make a frantic call to debtor's former bankruptcy counsel.

So what can bankruptcy counsel do in this situation after getting the frantic call? Nationally, there are two schools of thought – estopping the trustee and estopping the debtor. In the Fifth, Seventh, Tenth, and Eleventh Circuits, the Courts have found that the trustee should not be estopped from commencing or continuing a suit, as the trustee is the real party in interest.

These courts, however, punish the debtor, who they say should be estopped so that any excess proceeds, instead of going to the debtor, instead go back to the defendant. The reasoning here is to protect the integrity of the bankruptcy process while preserving assets of the estate for distribution to creditors. Doing so deters dishonest debtors who fail to disclose assets, while at the same time, protecting the rights of creditors.

However, there does not seem to be any appellate authority in the Second Circuit. My personal experience with these situations is that the court will permit trustees to reopen a case to administer a non-disclosed asset in most situations, provided that there is no egregious evidence of bad faith on the part of the debtor.

Keep in mind that if the asset was not disclosed, then the debtor did not avail him or herself of any applicable exemption, such as the personal injury exemption, now a minimum of $7,500. If debtor's counsel were to try to re-open the case and amend the schedule of exemptions, the trustee would likely object. The best case scenario may be to negotiate a disposition with the trustee in which the debtor gets half the exemption.

In one case before Judge Trust, the debtor sought to re-open the case to amend schedules to include a non-disclosed P.I suit against the Long Island Rail Road. Even though the debtor had already retained separate P.I. counsel prior to the bankruptcy, the debtor did not tell his bankruptcy attorney about it and did not truthfully answer the trustee's questions about pending lawsuits.

The District Court, where the P.I. case was pending, permitted the suit to be dismissed upon learning of the prior bankruptcy filing, stating that the debtor lacked standing. When the debtor sought to re-open the bankruptcy case to get standing, Judge Trust refused to permit the debtor to do so, citing the debtor's lack of good faith.

In the March 2010 opinion, Judge Trust, using colorful football terminology, stated that debtor's motion to re-open appeared to be "an effort to make an end run around the District Court's dismissal order." *In re: Carlos Meneses* (05-86811-ast, Bankr.E.D.N.Y.).

The practical tip here is to question your client and question again about possible causes of action or potential claims. Also, if you later discover an omitted asset, amend your schedules immediately.

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

SCBA Past President Roach Keynote Speaker at SCCC Paralegal Symposium

By Leonard Badia

I attended Suffolk County Community College's 12th annual Paralegal Symposium held at the Babylon Student Center at the Ammerman Campus in Selden on May 4. At this event, I was reminded of an article by SCBA Immediate Past President Matt Pachman written while he was our president discussing his belief that the law is not practiced in a vacuum. For those of us that have worked with paralegals, the work that they perform is often the difference between our success and failure.

Outstanding training of these legal professionals is accomplished with great skill by the Paralegal Studies department at Suffolk County Community College.

Dr. Ronald Feinberg, assisted by Professor Scott Giaccone and Professor John Ammerman coordinate the Annual Paralegal Symposium for attorneys and the 1700 Paralegal alumni in the legal community to network. Speakers and participants discuss jobs, firms, areas of law, internships, salaries, benefits, legal practice and news in general concerning the legal field.

This year the keynote speaker was SCBA Past President (01-02) George Roach. SCBA members know that Mr. Roach worked for the Legal Aid Society of Suffolk County for 30 years, dealing exclusively with the problems of the elderly and the elderly poor. He was the attorney-in-charge of the Legal Aid Society of Suffolk County's Senior Citizen's Division. George is the former Dean of the Suffolk Academy of Law as well as serving as an Associate Dean of the Academy. He was the first chairperson of the SCBA's Elder Law Committee, a committee that he helped launch. George has also served as the Chair of the Federal Court Committee and has received the SCBA's highest award, the President's Award.

At the symposium George spoke of his past work with the elderly and how he has developed a view about life which includes a willingness to accept the fact that aging is inevitable and often comes with unexpected difficulties. To this end, he explained, individuals are urged to make sure that they have consulted with an elder care attorney so they will be prepared for the unexpected. He explained further that he, upon turning 60, has enrolled in a long term disability insurance plan, giving the audience a quick mathematical lesson on the practicality of participation. He kept the 150 attendees enthralled with his friendly and engaging speech and was rewarded with a rousing applause.

Program alumni and immigration attorney Serge Pierre also spoke discussing the rewarding aspects of admission to the bar and the need for students to keep focused in their quest for their Juris Doctor degree. Other speakers were alumni Caroline Rau from the Suffolk County District Attorney's Office, William Russell from Brookhaven Lab's Intellectual Property Division, Denise Spezio from Dayton T. Brown and Denise Sciortino, a real estate Paralegal.

The evening provided a wonderful venue for discussions and networking for Suffolk County students, attorneys and faculty to share a meal and listen to inspiring speakers that represented the true diversity of vocations available within our legal community.

Note: Major Len Badia is the Commanding Officer of the Cohalan West and Security Operations Commands of the New York State Court System's Tenth Judicial District. He has served as the Captain of the training unit of the Tenth Judicial District, speaks as the "Ethics in Law Enforcement" lecturer as well as a frequent lecturer on legal topics for the New York State Court System's Academies in New York City and Albany. He is a member of the Executive Board of the Suffolk County Bar Association's Charitable Foundation.

Congratulations!

The Suffolk County Bar Association and The Chase Sensale Law Group, L.L.P. are proud to announce, Senior Partner and current President – Elect of the SCBA, Dennis R. Chase, was named President of the St. John's University School of Law Alumni Association, Suffolk County Chapter. As President, Dennis quickly organized this year's Distinguished Alumni Dinner honoring fellow SCBA Board member, the very Honorable Andrew A. Crecca '89 taking place on Monday, October 1, 2012 at The Irish Coffee Pub, 131 Carleton Avenue, East Islip, New York 11730. 6:00 p.m. Cocktails; 7:00 p.m. Dinner; $85.00 per person. RSVP by September 20, 2012 by calling (718) 990-6066 for more information.

VEHICLE AND TRAFFIC LAW

Suffolk DMV TVB Closed in September 2012

By David A. Mansfield

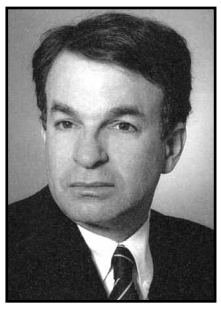
State legislation has been passed to replace the New York State Department of Motor Vehicles Suffolk County Traffic Violations Bureau with the enabling legislation of Vehicle and Traffic Law §225 with a Nassau County/ District Court Traffic & Parking Violations Agency (The Agency) system under legislation similar to §1690. The Legislature has amended General Municipal Law §370 by adding a new subdivision 3 and General Municipal Law §370-a. The Senate bill was sponsored by State Senator Lee Zeldin is S. 5634.

The current status is that the legislation is, as of this writing ((7/25/12) awaiting the Governor's signature. It was passed by overwhelming margins in both houses, so a veto seems unlikely. The legislation's effective date is 4/1/13. There are, as of this writing, many unanswered questions. The location has yet to be chosen. Will there be a transfer of cases pending at the Traffic Violations Bureau on the effective date. There is an open question as to whether the effective date will be delayed.

Defense counsel's ability to postpone their client's cases is limited by the TVB adjournment policy under 15 NYCRR Part §124.10. It might be prudent for newer matters to seek a permissible number of postponements until a clearer picture of the startup date emerges. Some cases involving very high speeding offenses, serious multiple summons issued in a single incident or extremely poor driving records might be best heard before the transition to avoid the possibility of subjecting your client to a possible sentence of incarceration.

This is a useful opportunity to review the different issues that arise representing clients in the two jurisdictions. This article will compare and contrast the two venues.

The Suffolk Traffic Violations Bureau (TVB) has jurisdiction over the five western towns in Suffolk County for most traffic infractions which are not returnable in a local village or town court. The authority of the Nassau County District Court Hearing Officer is preferred by Vehicle & Traffic Law §1690.



David A. Mansfield

The Nassau Agency grants the right to timely request supporting depositions, CPL §100.25 make timely motions to dismiss in the event that supporting depositions are not served. Motions can be made to test the sufficiency of the supporting deposition. Plea bargaining is permitted by the agency and all dispositions are, of course, subject to the approval of the judicial hearing officer. The agency prosecutor generally will not offer a plea bargain for passing stopped school buses §1174(a) and railroad crossing cases §1170(a) (b)-§1171. Extremely high speeding violations will usually be subject to some limitations on plea offers.

Extremely high speeds and a poor driving record could limit your ability to negotiate an acceptable disposition and your client may be subject to a period of incarceration as an authorized sentence handed down by the agency's judicial hearing officer. A sentence of incarceration can result in serious collateral consequences for non-citizens. The administrative law judge at the Traffic Violations Bureau is not empowered to impose a sentence of incarceration under §227(4) (a).

The Nassau Agency jurisdiction is limited generally to traffic infractions not returnable in a city, town or village court but does not include certain numerated violations of §1192(1), and speeding cases such as a violation of §1180(g) which involving speeding by drivers of commercial vehicles using a radar detector and Transportation Law Violations.

It is important to note that the judicial hearing officers are required to be village justices or retired district or criminal court judges with at least two years of experience in conducted trials of parking and traffic violations cases. The judicial hearing officer is charged to determine all questions of law. He or she is the exclusive trier of all factual issues and will render a verdict or dispose of the case provided by law. The judicial hearing officer is authorized to impose sentence and dispose of the case in any manner provided by law §1690(1) (d) (e).

You should carefully consult your Magill's Vehicle & Traffic Law Manual for Local Courts to review sentences for many ordinary speeding and other traffic violations convictions that have a period of incarceration as an authorized sentence. The 2012 edition can be ordered by logging onto downloading the order form at http://dutchmagill.com.

The rules of evidence at the Nassau County District Court Traffic and Parking Violations Agency requires the case be proved beyond a reasonable doubt under §1690 (2)

Defense counsel should also be aware that when points are assessed under 15 NYCRR Part §131.3 as a result of a conviction had outside the Department of Motor Vehicles Administrative Adjudication or Traffic Violations Bureau system, and no action is taken by a court against the driver's license, in certain circumstances your client will be subject to a separate Department of Motor Vehicles administrative hearing under 15 NYCRR Part§131. Your client will receive a letter advising of a proposed 31 day suspension with a waiver of hearing for accumulating more than 11 points in an eighteen month period 15 NYCRR Part §131.4. The waiver is usually in your client's best interest unless they have a commercial driver's license or only barely met the 11 point threshold and could be reduced the points with a safety course.

Your client will, be sent a hearing notice for a speeding conviction for more than 40 miles per hour over the limit §131.4(e). The hearing must be held and not is not subject to a waiver of hearing.

The Traffic Violations Bureau system is within the administrative adjudication system of the Department of Motor Vehicles. When the Administrative Law Judge imposes a sentence on a high speed or persistent violation and issues a warning or imposes a suspension, the administrative action is deemed final. This does not apply to default convictions.

Your client will not be subject to a separate administrative hearing to determine discretionary action to suspend or revoke their driver's license.

Once a case has been set down for *trial* in the Nassau Agency, it may be more difficult to adjourn.

A Suffolk TVB case may be adjourned once without a problem. A second adjournment may require a bond as security. A third or subsequent adjournment request could result in a license suspension pending the next trial date. Please refer to 15 NYCRR Part§124.10.

An appeal of a Traffic Violations Bureau conviction is governed by §228 and is fairly straightforward. The Appeals Board is very strict on the 30 day rule from the date of conviction to file an appeal. The other 30 day rules involve the payment of the $50 transcript deposit from the date of the cover letter and 30 days from date of the transcript cover letter to submit final argument.

An appeal of a conviction had at the Nassau County District Court Traffic Parking Violations Agency must be filed within 30 days of the date of conviction with the Supreme Court, Appellate Term. *People v. Jones*, 178 Misc. 2d 681,682 N.Y.S. 2d 789 (1998).

Long time DMV administrative law judge David A. Berkowitz has retired.

This article seeks only to highlight some of the significant considerations in representing clients in each jurisdiction.

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

Trusts and Estates Update (Continued from page 19)

review of counsel's affidavit of services and contemporaneous time records, the court awarded an additional sum for work performed in connection with the sale of the decedent's New York apartment.

Similarly, the court awarded fees to the two other firms retained by petitioner, however reduced the fees of one such firm, finding that the amount sought was somewhat excessive, as it included instances of double-billing.

***In re Estate of Jacoby,* NYLJ, Dec. 19, 2011, at 17 (Sur. Ct. New York County)(Sur. Glen).**

Collateral Estoppel

In *In re Salvati,* the Appellate Division, First Department, unanimously reversed an Order of the Supreme Court, New York County (Wilkins, J.) which held that the nonparty executor of the decedent's estate was collaterally estopped from objecting to that portion of the respondent-guardian's final account that was based on annual accounts filed for the years 2003-2006, and denied the executor's motion for discovery as to those accounts.

The respondent was appointed guardian in 2003 for the decedent, who was then alive and in a coma. Thereafter, the guardian filed annual accounts for the years 2003-2007. The reports for the period 2003-2006 were reviewed by a court-appointed examiner and approved by the court.

Following the IP's death, the guardian prepared a final report and account and commenced a proceeding for the judicial approval of same, serving the executor of the incapacitated person's (IP) estate as a party. The executor filed preliminary objections to the account and sought review of the guardian's books and record, and discovery with respect to disbursements and property transactions. The court denied the executor's request for relief, except as to the accounts for 2007 and 2008, finding that the executor was collaterally estopped from objecting to the prior accountings, and therefore not entitled to discovery for the years 2003 to 2006.

The Appellate Division reversed, concluding that the guardian had failed to establish any basis for the defense of collateral estoppel. The court held that to invoke the doctrine of collateral estoppel the guardian had to demonstrate that the executor, the IP, or any other person on her behalf, received notice and had an opportunity to be heard, or that the guardian sought permission to render an intermediate report upon notice under the Mental Hygiene Law. The court opined that without this proof, the annual accounts were merely ex parte proceedings, which were not binding on the executor in the accounting proceeding.

***In re Salvati,* 2011 NY Slip Op 08666 (App. Div. 1st Dept.)**

Testamentary Capacity and Undue Influence

The Surrogate's Court decision in *In re Moles,* which granted summary judgment in favor of the proponent of the will, was addressed in the undersigned's column this past June. Recently, the decree issued by the court was reversed by the Appellate Division, First Department, on the grounds that questions of fact existed as to the issues of testamentary capacity and undue influence.

The court found that there was considerable circumstantial evidence of undue influence, including the facts and circumstances surrounding the will signing, the nature of the will, in which the decedent had disinherited all of the beneficiaries of her long-standing earlier will in order to leave her entire estate to her long-time companion and caregiver, the decedent's family relations, the condition of her health and mind, her dependency upon and subjection to the control of the petitioner, the petitioner's opportunity to wield undue influence on the decedent, and the petitioner's acts and declarations.

Specifically, the court relied upon a report issued by Adult Protective Services several months before the execution of the propounded will, finding that the decedent's judgment was impaired and recommending an Article 81 guardianship proceeding to safeguard her. Moreover, the court found it significant that the attesting witnesses were the petitioner's friend, who had recommended the draftsman of the will, and one of his former employees. Further, the court noted that the draftsman of the will was not the same attorney who had prepared the decedent's prior will citing *Matter of Elmore,* 42 AD2d 240, 241, the court opined that "[w]here a will has been prepared by an attorney associated with a beneficiary, an explanation is called for, and it is a question of fact for the jury as to whether the proffered explanation is adequate."

In addition, the court observed that the decedent, both before and after signing the propounded will, expressed her intent to maintain her nephew, the objectant, as the beneficiary of the bulk of her estate. To that extent, she confirmed her prior will in a discussion with her prior attorney at the time she signed a durable general power of attorney in favor of her financial advisor.

***In re Moles*, 2011 NY Slip Op 08966 (App. Div. 1st Dept.)**

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

Commercial Division (Continued from page 21)

they do not want the case mediated or (b) a party makes a showing of "good cause" as to why mediation would be ineffective or otherwise unjust. The second initiative proposes that Rules 7 and 8 of the Uniform Rules be amended to require the parties and the Court to address, at the Preliminary Conference, whether any particular limited disclosure would help facilitate settlement discussions or mediation.

Additional Judicial Support

The Task Force endorsed providing additional law clerks for all Commercial Division Justices, similar to the law clerks provided to federal judges. The report noted that New York County Justices currently have at least one long-term law clerk and have additional law clerks recruited and hired directly out of law school which serve for a shorter period of time. It is suggested that this program, which is akin to the federal program, be expanded to other counties that have demanding caseloads.

Creation of a panel of "Special Masters" whom the Justices of the Commercial Division can appoint on consent of all parties to "hear and report" on discovery and other matters was also recommended. It is proposed that the panel be drawn from seasoned New York commercial litigators. It was also recommended that the court system rehire Judicial Hearing Officers (JHOs) specifically assigned to the Commercial Division to assist the justices with the Commercial Division's growing docket.

In order to guide the implementation of the recommendations and to periodically review the long-term strategic goals of the Commercial Division, the Task Force proposes that the Chief Judge appoint a formal statewide Advisory Council on the Commercial Division. It is anticipated that many of the recommendations will be adopted in the near future.

Note: Leo K. Barnes Jr. is a member of Barnes & Barnes, P.C. in Melville, and can be reached at LKB@BARNESPC.COM.

1 The Task Force's 30+ page Report can be found on the New York Commercial Division website at http://www.nycourts.gov/courts/comdiv

To Gift or Not to Gift (Continued from page 14)

nieces and nephews, etc.). The grantor can appoint trustees to have the authority to make specified distributions to or for beneficiaries under standards set out by the grantor. Some trusts can be structured as "Grantor Trusts" for income tax purposes so that any trust income is picked up on the grantor's individual return. This allows the grantor to further reduce his or her estate by paying the income tax on the appreciation without the income tax itself becoming a "gift." Devising a trust and the appropriate trust terms (such as when and under what conditions assets would be distributed to heirs) requires time, attention, and careful planning. Additional considerations are securing appropriate valuations, permission of corporate partners, and achieving a new capital structure, all of which takes time and cannot be accomplished in days or even weeks.

- *Family Limited Partnerships*: Although an entire article can be devoted to this topic, FLP's can work if it is formed for a legitimate business purpose (i.e., not set up on one's deathbed just to avoid estate taxes) and a reasonable transfer discount is applied. A FLP is not appropriate, for example, to maintain one's primary residence while continuing to live there rent free.

Whether to take advantage of certain estate planning techniques requires an individual assessment of your own situation (available assets, cost basis, tolerance for gifts, etc.). Before undertaking a drastic restructuring of your assets, you should fully understand the mechanisms and consequences of doing so, and feel comfortable with the transfers and structures you are implementing. Although saving taxes and maximizing your heirs' inheritance is a worthy goal, even more important is that the transferor be comfortable in the planning. It is essential that you consult with your accountant, tax planner, financial advisor and attorney before undertaking any change in your estate plan.

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

Joint Venture (Continued from page 20)

discussed above, parties entering into a joint venture should bear in mind that:

- A good agreement cannot fix a bad relationship so it is essential to consider the parties' compatibilities.
- The motivation and commitment of each party will have a direct impact on the venture's success or failure.
- The contributions of each partner should be defined in a straightforward and clear manner because convoluted responsibilities will prove problematic.
- "Breaking up is hard to do," but prenuptial-type provisions can serve to relax the difficulties of dissolution.
- It is crucial for each partner to have a long-term perspective because one-night stands rarely work.
- Clear and realistic objectives backed by a detailed business plan are a recipe for success. Remember, "He who fails to plan, plans to fail."
- Impasse resolution procedures should be implemented to avoid deadlocks, which can be fatal to business ventures.
- Due to the issue prone nature of intellectual property, it should be handled more judiciously than tangible property.
- Conflicts-of-interest should be considered and protected against beforehand.
- Parties always need a channel or mechanism for communication.

Joint ventures provide businesses with a wide array of opportunities, but their variations and complexities can be intimidating. By giving careful thought to all of the considerations highlighted above, parties can safeguard against many of the issues that may arise.

Note: Anthony V. Curto, of Forchelli, Curto, Deegan, Schwartz, Mineo & Terrana LLP. counsels public and private corporations in major transactional matters, including mergers and acquisitions, joint ventures, partnering arrangements and the reorganization of business enterprises and assets, across a variety of industries. His work centers on structuring, negotiating and documenting a variety of complex transactions on behalf of regionally and nationally known clients.

Note: Joseph V. Cuomo, of Forchelli, Curto, Deegan, Schwartz, Mineo & Terrana LLP. concentrates his practice on the representation of private and public companies and emerging businesses with respect to business law and transactional matters. He also serves as "outside" general counsel to numerous middle market private companies.

President's Message (Continued from page 1)

greater use of electronic methods for the dissemination to our members of notices and previously printed materials. And Jane along with your Board of Directors is continuing to seek out other ways to reduce costs. It is also with great pride that I can report that the mortgage on our bar association facility is now paid off and the Suffolk County Bar Association now own its beautiful building free and clear.

Recently 1st Vice President Bill Ferris, 2nd Vice President Donna England and I met with C. Randall Hinrichs, the Administrative Judge of the Suffolk County Courts, to discuss some of those issues that affect our members while practicing at the courthouses throughout our county. That meeting was undertaken to bring our concerns and needs to the appropriate people with the hope of solving some of the problems. I am happy to report that at that meeting, Judge Hinrichs confirmed to us that the long standing threat to take away the attorney's room on the second floor of the Central Islip courthouse by using that space for a new courtroom has been scrapped by the court administration. Our attorneys' lounge which is used by many of our attorneys throughout the day will be available to us in the coming years. The lounge was originally furnished by your bar association shortly after the courthouse first opened in December, 1992, almost 20 years ago. Due to the extensive usage since it was furnished, the furniture is now in disrepair, uncomfortable and needs to be replaced. I have taken the first steps to remedy this situation by appointing members of the Executive Committee to ascertain the cost of a complete refurbishing of the attorneys' lounge. The Executive Committee has agreed to propose to our Board of Directors that we accomplish this refurbishing of the attorneys' lounge as soon as possible.

Another item discussed with Judge Hinrichs was the lack of adequate space in the courthouses for attorneys to have private settlement discussions between themselves and with their clients while at the courthouses. Meeting in the crowded hallways with members of the public surrounding us is not conducive to or professional for dealing with sensitive and private issues. Judge Hinrichs fully understood this problem and the need to resolve it. We proposed numerous possible locations at the courthouse to Judge Hinrichs which could be utilized at little or no cost to the court budget and he has assured us that he will work with us to the best of his ability and give serious consideration to our requests. I will keep you informed of our progress in this area.

One of the ongoing issues faced by my predecessor Matt Pachman was the funding for and processing of claims for work done by 18B attorneys in representing clients in various criminal and Family Court proceedings. I am continuing to give my attention to this problem and have asked Bill Ferris to continue his leadership of a task force working to permanently solve the funding crisis and lack of prompt payment problem that our 18B attorneys still face. After many meetings by the appointed task force with the various necessary parties, the task force has proposed new procedures to the administration and I will hopefully have significant information to give you in my future president's columns. In view of the deficits Suffolk County is anticipating in its current budget, your Executive Committee and I will again do everything we can to encourage Suffolk County to provide additional funding so sorely needed in this important function performed by our 18B attorneys.

In June, my Wife Ruth and I attended an event sponsored by the SCBA Charitable Foundation at the John Engeman Theater in Northport to raise money for the Charitable Foundation's noble charitable pursuits. Thank you to all the members of the SCBA Charitable Foundation who coordinated this event, which was very successful. Everyone who attended the performance of *42nd Street* thoroughly enjoyed themselves.

Congratulations and thanks to Jane LaCova once again for making the SCBA's annual golf and fishing outing a smashing success. With the economy constantly affecting our legal community, I am amazed each year how Jane does what she does in coordinating and getting our membership to participate in all of the many events held at our bar association.

Special thanks to Joseph Mauro, Esq., a member of our organization and former member of the Pro Bono Foundation for arranging for almost $20,000.00 in Cy Pres money left over from a successful class action law suit he won to be awarded by the court to the Suffolk County Bar Association Pro Bono Foundation for its use in representing those who cannot afford an attorney.

In conclusion, I again encourage all of our members to participate in our upcoming bar association events as it is only with your participation and input that we can fully represent your needs and interests in the future. If you have any suggestions, please do not hesitate to make them known to the leadership. I assure you that your Executive Committee and Board of Directors value your input and when possible will try to use your suggestions for the good of the entire Suffolk County Bar Association.

Advice from the Experts (Continued from page 1)

detail as well as settlement strategies. The program concludes with insights into the client's perspective of business litigation.

This program will use an exciting, interactive format. The speakers will focus on strategies and practical advice for maximizing the effectiveness of each stage of the litigation. In particular, they will discuss techniques for advancing a client's interests as well as potential pitfalls or traps for the unwary.

The program chairs are Robert L. Haig of Kelley Drye & Warren LLP in New York City and Linda U. Margolin of Bracken Margolin Besunder LLP in Islandia. The speakers include Commercial Division Justices Elizabeth H. Emerson, Emily Pines, and Thomas F. Whelan, and Appellate Division Justice (and former Commercial Division Justice) Leonard B. Austin. Other speakers are the following leading litigators: Leslie R. Bennett, Leslie R. Bennett LLC; John P. Bracken, Bracken Margolin Besunder LLP; Richard C. Hamburger, Hamburger, Maxson, Yaffe, Knauer & McNally, LLP; Frank A. Isler, Smith, Finkelstein, Lundberg, Isler & Yakaboski, LLP; David Lazer, Lazer, Aptheker, Rosella & Yedid, P.C.; Peter J. Mastaglio, Cullen and Dykman LLP; Mark S. Mulholland, Ruskin Moscou Faltischek, P.C.; Joseph J. Ortego, Nixon Peabody LLP; William M. Savino, Rivkin Radler LLP; Kevin Schlosser, Meyer, Suozzi, English & Klein, P.C.; Jeffrey G. Stark, Forchelli, Curto, Deegan, Schwartz, Mineo & Terrana, LLP; Paul B. Sweeney, Certilman Balin Adler & Hyman, LLP; and James M. Wicks, Farrell Fritz, P.C. Also speaking will be the following prominent in-house counsel for a major corporation: Walter Siegel, General Counsel, Standard Microsystems, Inc.

This program is designed for both newly admitted attorneys seeking an overview of commercial litigation in New York State courts and experienced attorneys seeking to refine and update their litigation skills. It will take place from 1:30 to 5:00 p.m. on October 11, 2012 at the Suffolk County Bar Association, 560 Wheeler Road, in Hauppauge. Attendees will receive four CLE credits (.5 Ethics; 2.5 Skills; 1.0 Professional Practice). The program fee is $250 for Suffolk County Bar Association members and $300 for non-members. For reservations, call (631) 234-5588 or go to www.scba.org.

As noted above, all registrants at the program will receive the critically acclaimed six-volume treatise *Commercial Litigation in New York State Courts*. This publication was written by 144 outstanding attorneys and judges throughout New York State and gives you everything you need to handle commercial cases from initial assessment, through pleadings, discovery, motions, trial, appeal, and enforcement of judgment. Great emphasis is placed on strategic considerations specific to commercial cases. Sample forms are provided as well as procedural checklists. In addition, there is comprehensive coverage of 38 areas of substantive law, including strategy, checklists, forms and jury charges. Compensatory and punitive damages and other remedies will also be covered.

The book review of this treatise found in the January 2012 issue of *The Suffolk Lawyer,* written by Scott M. Karson of Lamb & Barnosky, LLP in Melville, concludes: "It is the opinion of this reviewer that the Third Edition of *Commercial Litigation in New York State Courts* is an indispensable resource which should be a part of every commercial litigator's library. Bob Haig and the many judges and lawyers who contributed to this great work are truly deserving of the thanks of the commercial litigation bar for providing us with a comprehensive, authoritative and eminently readable source of pertinent information and invaluable practical and strategic advice."

The six-volume, 7,769-page set comes with a CD-ROM containing hundreds of forms and jury instructions. All royalties from sales of this publication go to the New York County Lawyers' Association.

Ending Life (Continued from page 18)

§3.01. The attending physician is required to refer the patient to a "consulting physician" for a medical confirmation of the diagnosis. The "consulting physician" is one who is qualified either by specialty or experience to make a professional diagnosis and prognosis regarding the patient's disease. See also *ORS 127.820 §3.02*. If either the attending or consulting physician believes that the patient's judgment is impaired by a "psychiatric or psychological disorder or depression" the patient must be referred for counseling. No medication may be prescribed until the person performing the counseling determines that the patient is not suffering "from a psychiatric or psychological disorder or depression causing impaired judgment." *ORS 127.825 §3.03*.

Once all of the appropriate steps have been carried out pursuant to the statute, the prescription for the medication is ready to be written. If the attending physician is registered as a dispensing physician with the Board of Medical Examiners, and has a current Drug Enforcement Administration certificate and complies with any administrative rules, the physician may dispense the medications directly. This includes any ancillary medications intended to facilitate the desired effect to minimize the patient's discomfort. Alternatively, with the patient's written consent, the attending physician may contact a pharmacist and inform the pharmacist of the prescription. The physician then delivers the written prescription to the pharmacist either personally or by mail, who will then dispense the medication to the patient, the attending physician or an expressly identified agent of the patient. See *ORS 127.815 §3.01(1)(L).*

The law does not require a physician to be present at the time the medications are taken. A physician may be present, however the patient, not the doctor, administers the medication. The statute specifically states that nothing in the DWDA "shall be construed to authorize a physician or any other person to end a patient's life by lethal injection, mercy killing or active euthanasia." However, actions taken in accordance with the act "shall not, for any purpose, constitute suicide, assisted suicide, mercy killing or homicide, under the law." In other words, doctors who act in accordance with the Oregon statute are immune from prosecution (*ORS) 127.880 §3.14).*

The Oregon statute appears to provide safeguards only up through the time the doctor writes the prescription for the lethal drugs. There is no follow-up as to what happens with the medication once it is in the hands of the patient. A question may arise as to the status of the patient's judgment after receipt of the medication. The statute requires that the patient's judgment not be impaired between the first request for the lethal drugs and the doctor's writing the prescription. There appears to be no provision in the statute requiring the patient to be competent at the time of ingesting the lethal dose.

End of Life Concerns

Statistics published by the Oregon Public Health Division indicate that the most frequently mentioned end of life concerns of those persons who ingested the lethal medication were (1) loss of autonomy, (2) decreasing ability to participate in activities that made life enjoyable and (3) loss of dignity.[6]

Note: Marvin Waxner is of counsel to Sarisohn Law Partners, LLP, a member of the Suffolk County Bar Association, and a member the Committee of Professional Ethics and Civility.

1 *Baxter v. Montana*, 354 Mont. 234, 224 P.2d 1211(2009).
2 On October 27, 1997 Oregon enacted the Death with Dignity Act (DWDA).
3 Information about the Washington Death with Dignity Act can be found at http://www.doh.wa.gov/dwda.
4 *Vacco v. Quill*, 521 U.S. 793, 117 S. Ct. 2293, 138 L.Ed2d 834 (1997). See also *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 110 S. Ct. 2841 111 .L. Ed.2d 224 (1990).
5 See http://public.health.oregon.gov/ProviderPartnerResources/EvaluationResearch/DeathwithDignityAct/Documents/yr14-tbl-1.pdf.
6 See http://oregon.gov/dhs/ph/cdsummary.

Mortgage Modification (Continued from page 20)

holds the weakest and riskiest part of the cash flow gets to determine how the defaulted and delinquent loans are handled.

Triggers in the PSA

Pooling and Servicing Agreements govern how trust assets are handled. The PSA also governs what duties the trustee has in relation to the investor-certificate holders. RMBS trustees are not bound by fiduciary duties like common law trustees. RMBS trustees are bound by the contractual provisions of the PSA. They do not have to act in the investor's best interests.[3] With this in mind note that the various investor classes have their own definitions of what their "best interests" are.

When the securitized pool (RMBS) is set up the pool retains reserve capital. Reserve capital is funds that are not yet disbursed to the investors and are kept in a special account or accounts as reserves.[4] This is "rainy day" money. In the event of defaults or other drops in cash flow these reserve accounts are used to maintain payments to the investors as per terms set out in the PSA as to what class gets what income and when. These "to who," "how much" and "when" questions are defined in the PSA and other trust documents[5] and are commonly referred to as "trigger events." There are triggers for release of funds from over-collateralization. This means that the senior (less risky) classes get money released to them as of the occurrence of a specified event, usually a set time ("step down date", e.g. 36 months). Triggers also apply to allowing releases of credit-risk collateral (reserves) to the riskier classes

Other, less senior classes have money released to them upon the evaluation of a performance ratio based on actual dollar losses or a percentage of the loan balances. If the performance ratios are not met there is what is referred to as either a "Cumulative Loss Trigger" or a "Delinquency Trigger" event. These triggers impact the lower classes of loans most severely as it stops the disbursement of over-collateralization (reserve) funds to those classes. The lower classes continue to receive no principal payments for the duration of the failed trigger.

In plain English, the above says that if performance is good enough for long enough, the reserves set aside to cover losses are no longer as necessary, so investors in lower classes receive extra money. If performance is bad enough, however, this distribution doesn't take place and the over-collateralization is maintained in order to protect senior note holders.[6]

The servicer's conflict of interest

Borrowers feel that the "banks" should be modifying loans. They believe that for the "banks" receiving something is better than nothing or at least better than selling their loan at pennies on the dollar, going to foreclosure, abandoned homes, a downward spiral of real estate values etc. If this were a logical process, where preserving cash flow from loans was the investor's priority I would agree. However, the investor pool has inherent internal conflicts of interest where the entity that makes the decisions on defaulted and delinquent administration of loans is biased.

The sub-servicer is contracted by the master servicer and the master servicer is hired by and controlled by the lowest class of the investor pool. The lowest class of the investor pool knows it is virtually wiped out because there is no equity in the underlying collateral (the homes) to recapture in the event of a foreclosure. Likewise, the likelihood of a loan modification re-defaulting is very high.

The lowest classes in the investor pool can still get paid if the servicer reports the loans as performing rather than delinquent. The servicer is also the entity that has complete control over the statistical reporting of pool performance. Compounding the servicer's inherent predisposition to report a delinquent loan as performing, the industry had no clear legal contractual definition of what a "performing" loan actually is.

Servicers that take delinquent loans and modify them are often allowed to re-classify that loan as performing. If the delinquency trigger or cumulative loss trigger are reversed then the lower classes will receive distributions of principal from the collateral (credit enhancement) account. If the loans remain delinquent there are no distributions. Therefore there is a strong incentive for servicers to grant mortgage modifications just long enough to un-trigger the triggers - hence, the reason for the popularity of "temporary" or "trial" modifications with servicers.

In reality these "modified" loans are anything but. For a modification to be considered enforceable by the borrower the mod must be in recordable form with the county clerk as a modified mortgage with a corresponding re-made note. Likewise, the classification of non-permanent modifications that lack a pay history, as performing loans is a distortion of their expected future cash flow, the duration of that cash flow and their fair value for accounting purposes.[7].

Servicers have figured out how to manipulate the modification process to alter the delinquency triggers. Once a loan is modified it is typically considered current for purposes of delinquency triggers. Classifying modifications as "current" may allow delinquency triggers to pass. This would release cash flow to lower-rated tranches and possibly disadvantage senior cash flows which lose some over-collateralization reserves (credit enhancement) if cash is released to the junior tranches. Servicers try to time modifications of bundles of loans so that they can artificially manipulate the statistical performance of the pool to cross trigger thresholds.

Servicer manipulation of the modification process therefore has nothing to do with preserving assets and maximizing return for the benefit of the pool. Rather, temporary mortgage modification has become more about delaying or accelerating the occurrence of "trigger events" that maximize return for the class of investors that control the pool. This almost always happens at the expense of the majority of the balance of the pool's investors even if they represent a vast majority of the invested capital and certificate-holders.

Until there are standardized accounting methodologies and standardized legal definitions for contractual terms (in PSA's and other trust documents) such as modification, performing asset, current, delinquent, defaulted etc., we can expect servicer manipulation of mortgage modifications to continue in earnest. Perhaps it is time that state legislatures standardize Pooling and Servicing Agreements and requires that protections be built in to protect not only consumer-borrowers but investors as well.

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

1 REMIC, Real Estate Mortgage Investment Conduit, is an entity created by the Internal Revenue Code §860 that allows the REMIC to act as a tax free pass through entity for cash flow from mortgage trust pools.

2 The investor in the most subordinate bond classes is commonly referred to as the *"B-Piece Buyer."* B-Piece Buyers generally purchase the B-Rated and BB/Ba-rated bond classes along with the unrated class. The most subordinate bond class outstanding at any given point is considered to be the Directing Certificate-Holder, also referred to as the Controlling Class. Given that losses come out of the lowest rated bonds, the PSA provides the Directing Certificate-Holder the opportunity to play an active role in monitoring the performance of each loan, make decisions on key asset issues and appoint and/or terminate the Special Servicer.

3 Business Trusts v. Fiduciary Trusts. The difference is the definition of the duties of the trustee. A fiduciary owes uncompromised loyalty to the trust. A trustee of a business trust is bound by the trust agreement and cannot act outside the parameters of the trust document regardless of whether those acts are in the trust beneficiaries' best interests.

4 Reserve funds are referred to as "collateralization". As the pool matures the principal balances on the loans get smaller. Theoretically, as the principal is reduced there is less need to maintain as much of a reserve. The excess reserves of principal are released to the lower (riskier) classes in the pool. A release of principal from the reserve accounts occur when the pool is deemed "overcapitalized". In other words the pool has more cash in reserve than it theoretically needs.

5 The term sheet, offering circular or prospectus supplement, and pooling and servicing agreement or indenture should describe the Trigger Events consistently and fully. Specifically, the trigger language should be disclosed in: (1) preliminary marketing materials such a term sheet, (2) prospectus supplement and (3) pooling and servicing agreement in sufficient detail using substantially similar (if not identical), defined terms. *ASF Recommended Market Standards and Practices: Disclosure and Periodic Reporting for Home Equity Loan ABS with Collateral-Based Performance Triggers,* March, 2006.

6 http://www.housingwire.com/news/more-bailout-tripping-trigger , Paul Jackson, Dec. 5, 2007

7 FASB (Financial Accounting Standards Board) sets the accounting methodology for accounting for valuation and accounting of impaired assets. See FASB Section 140.

Amendment to Conform to Proof (Continued from page 22)

of the lower court and dismissing the complaint, the Appellate Division found that the testimony regarding damages was "based completely on hearsay, and unsupported by competent proof . . ." This ruling is harsh, but it serves to remind us that care must be taken when preparing all aspects of our cases and that damages will not be awarded unless competent proof is presented, regardless of the culpable conduct of the opposition.

Note: Patrick McCormick litigates all types of complex commercial and real estate matters. These matters include business disputes including contract claims; disputes over employment agreements and restrictive and non- compete covenants; corporate and partnership dissolutions; mechanics liens; trade secrets; insurance claims; real estate title claims; complex mortgage foreclosure cases; lease disputes; and, commercial landlord/tenant matters in which Mr. McCormick represents both landlords and tenants.

1 Ambrogio & Caterina Giannone Family Ltd. Partnership v. 7th Heaven USA Inc., 2012 WL 2476682; 2012 N.Y. Slip Op. 51193(U)' decided June 28, 2012

2 JDM Washington Street, LLC v. Washington Rest. Associates, LLC., 084318/10, NYLJ 1202562358784, at *1 (Civ., NY, Decided June 11, 2012)

3 Pernell v. 287 Albany Avenue, LLC, 95 A.D.3d 1094, 944 N.Y.S.2d 614 (2d Dep't 2012)

Astrue v. Caputo (Continued from page 5)

'child' must pass." And pursuant to that section, the "Commissioner shall apply state intestacy law" to determine who is a qualifying child.

The court also noted that the SSA's construction better suited the act's purpose and was entitled to deference under *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U. S. 837 (1984). The court held that the SSA's interpretation of the relevant provisions adhered to without deviation for many decades, is at least reasonable; the agency's reading is therefore entitled to the Supreme Court's deference under Chevron, 467 U. S. 837. Under Chevron, deference is appropriate "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp*., 533 U. S. 218, 226–227 (2001). In the Capato matter, the Supreme Court noted, the SSA's longstanding interpretation is set forth in regulations published after notice-and-comment rule making. Congress gave the commissioner authority to promulgate rules "necessary or appropriate to carry out" the commissioner's functions and the relevant statutory provisions. See 42 U. S. C. §§405(a), 902(a)(5). The commissioner's regulations are neither "arbitrary or capricious in substance, [n]or manifestly contrary to the statute." *Mayo Foundation for Medical Ed. and Research v. United States*, 562 U. S. ___, ___ (2011) (slip op., at 7) (internal quotation marks omitted). They thus warrant the court's approbation. See Barnhart v. Walton, 535 U.S. 212, 217–222, 225 (2002) (deferring to the commissioner's "considerable authority" to interpret the Social Security Act).

Finally, the court concluded that the SSA's construction of the Act with regard to posthumous children satisfied rational basis review. Justice Ginsburg delivered the opinion for a unanimous Court.

Note: Sharmine Persaud is a sole practitioner in Farmingdale, NY. Her practice areas are Social Security Disability Benefits, NYS Workers' Compensation and Disabled Veteran's Benefits. She is past co-chair of the SCBA SSDB/WC Committee.

SUFFOLK ACADEMY OF LAW

OF THE SUFFOLK COUNTY BAR ASSOCIATION

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

Early Fall CLE

The Suffolk Academy of Law, the educational arm of the Suffolk County Bar Association, provides a comprehensive curriculum of continuing legal education courses. Programs listed in this issue will be presented during September and October 2012.

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. The Suffolk Academy of Law is not liable for errors or omissions in this publicity information.

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

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

INQUIRIES: 631-234-5588.

UPDATES

ANNUAL NEW YORK CIVIL PRACTICE UPDATE

Wednesday, October 3, 2012

An incisive examination of all that is new and significant for civil practitioners
Presenter: **Professor Patrick Connors** (Albany Law School)
Time: 6:30 – 9:30 p.m. (Sign-in from 6:00 p.m.)**Location:** Hyatt Regency Wind Watch Hotel **Refreshments:** Deli supper
MCLE: 3 Hours (2.5 professional practice; 0.5 ethics

Presented with Nassau Academy of Law

ANNUAL CRIMINAL PRACTICE UPDATE

Friday, October 26, 2012

Significant statutory and decisional developments – including game-changing U.S. Supreme Court decisions – for criminal defense attorneys.
Presenters: **Hon. Mark Cohen; Kent Moston**
Time: 1:30–4:30 p.m. (Sign-in from 1:00 p.m.)
Location: Nassau Supreme Court–Mineola
MCLE: 3 hours (2.5 professional practice; 0.5 ethics)

ANNUAL DMV UPDATE

Wednesday, November 7, 2012 – on the East End
Wednesday, November 14, 2012 – at SCBA Center

A must-attend for all attorneys who represent motorists on issues related to license revocations and suspensions and similar matters.
Presenter: **David Mansfield**
East End
Time: 5:00–7:30 p.m. (Sign-in from 4:30 p.m.)
Location: Seasons of Southampton
Refreshments: Light supper
SCBA Center
Time: 6:00–8:30 p.m. (Sign-in from 5:30 p.m.)
Location: SCBA Center **Refreshments:** Light supper
MCLE: 2.5 hours (professional practice)

FALL SEMINARS

Late Afternoon Seminar

LINKED IN FOR LAWYERS

Friday, September 14, 2012

Learn why "Linkedin" is considered the "professional network" and how to use it to boost your visibility and grow your business . . . while staying within ethical bounds. All will receive the presenter's book written on the topic for the American Bar Association. This kick-off-the-fall-semester presentation will be followed by a complimentary happy hour.
Faculty: **Allison Shields, Esq.** (Legal Ease Consulting // SCBA Director)
Time: 3:00–5:00 p.m. (Sign-in from 2:45)
Location: SCBA Center
Refreshments: Happy Hour after Program
MCLE: 2 credits (1 law practice management; 1 ethics)

Full-Day Conference

CHALLENGES OF WILL DRAFTING

Friday, September 21, 2012

In this thorough program, an experienced faculty delves into key aspects of effective will drafting, with an eye toward challenges that can arise even in situations that, on the surface, seem devoid of complications. Topics include:

- Ethical Issues
- Drafting to Avoid a Contest
- Trusts in Wills
- Drafting for a Special Needs Beneficiary
- Elective Share Issues
- Estate Tax Considerations
- 1404 Exams
- Common Errors to Avoid
- Attestation Clauses and Witness Affidavits
- Cautionary Case Law

Faculty:: **Eileen Coen Cacioppo, Esq.; Ilene S. Cooper, Esq.; Robert M. Harper, Esq.; Eric M. Kramer, Esq.; Marilyn Lord-James, Esq.; Scott P. McBride, Esq.; George R. Tilschner, Esq.; Richard A. Weinblatt, Esq.; Ernest R. Wruck, Jr., Esq.**
Program Coordinator: Eileen Coen Cacioppo, Esq. (Curriculum Co-Chair)
Time: 9:00 a.m.–5:00 p.m. (Sign-in 8:30)
Location: SCBA Center
Refreshments: Continental Breakfast and Lunch
MCLE: 8 credits (4 professional practice; 3 skills; 1 ethics)

Lunch 'n Learn

GET MORE OUT OF YOUR COMPUTER!

Monday, September 24, 2012

Research is an important aspect of most legal advocacy. But it can be expensive! In this succinct lunch program, you will learn about FREE websites and how to use them to find the information you need.
Faculty: **Adam Michaelson, Esq.** (Lamb & Barnosky)
Program Coordinator: Sheryl Randazzo (Past SCBA President)
Time: 12:30–2:10 p.m. (Sign-in from noon)
Location: SCBA Center **Refreshments: Lunch**
MCLE: 2 credits (1 legal practice management; 1 skills)

Evening Seminar

FIDUCIARY DUTIES OF THE NOT-FOR-PROFIT BOARD

Thursday, September 27, 2012

Many lawyers sit on non-profit boards. And while such service is an honor, it can also be a liability. This program provides pointers for avoiding pitfalls and making board service the rewarding experience it is meant to be. Topics include:

- New York Not-for-Profit Law
- Duties and Responsibilities of the Board
- Individual Members versus Board as a Whole
- Directors versus Advisors
- Delegation of Authority
- Handling Conflicts
- Inattentive Directors
- Liability Insurance

Faculty: **Thomas J. Killeen, Esq.** (Farrell Fritz); **Chris d. Krimitsos, Esq.** (Farrell Fritz); Representatives of TIAA-CREF
Time: 6:00–8:30 p.m. (Sign-in from 5:30)
Location: SCBA Center **Refreshments:** Light supper
MCLE: 2 credits (1.5 professional practice; 0.5 ethics)

Evening Seminar

PERSUASIVE WRITING & ORAL ADVOCACY

Tuesday, October 2, 2012

Convincing others – verbally or in writing – is an important aspect of any advocacy. This entertaining and enlightening program provides tips and techniques for making the most out of the language you employ.
Faculty: **Hon. Gerard Lebovits**
Program Coordinator: Diane Farrell (SCBA Director)
Time: 6:00–8:30 p.m. (Sign-in from 5:30)
Location: SCBA Center **Refreshments:** Light supper
MCLE: 2.5 credits (2 skills; 0.5 ethics)

Morning Seminar in Riverhead

ELECTRONIC FILING IN SURROGATE'S COURT

Friday, October 5, 2012

Electronic filing is becoming commonplace throughout New York State and will soon be mandatory virtually everywhere. This program will show you how to file electronically in Surrogate's Court. If you handle wills and estates, you will not want to miss it.
Faculty: **Jeffrey Carucci** (Statewide Coordinator for Electronic Filing); **Karen Mackin** (Associate Court Clerk–NYS E-Filing Resource Center)
Program Coordinator: Scott P. McBride (Surrogate's Court Law Department // Academy Advisory Committee)
Time: 9:30–11:30 a.m. (Sign-in from 9:00)
Location: Surrogate's Court–Riverhead
Refreshments: Donuts & Coffee
MCLE: 2 credits (1 professional practice; 1 law practice management)

Evening Seminar

THE DOMESTIC VIOLENCE COURT

Wednesday, October 10, 2012

Advocacy in the Domestic Violence Court requires a special skill set and insight into the court's goals. This intensive program featuring the court's presiding judges will explore the court's mission – immediacy, safety, accountability, supervision, and coordination (District Court, Family Court, law enforcement, social services, criminal justice agencies) – and provide tips for representing both victims and alleged batterers.
Faculty: **Hon. Toni Bean; Hon. Chris Ann Kelley**
Program Coordinator : Hon. James Flanagan (Academy Officer)
Time: 6:00–9:00 p.m. (Sign-in from 5:30)
Location: SCBA Center **Refreshments:** Light supper
MCLE: 3 credits (2.5 professional practice; 0.5 ethics)
18B - 3 hours

(Continued on next page)

SUFFOLK ACADEMY OF LAW

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Afternoon Seminar

SUCCESSFUL STRATEGIES FOR WINNING COMMERCIAL CASES IN NEW YORK STATE COURTS

Thursday, October 11, 2012

In this fast-paced, four-credit seminar, an all-star faculty of commercial-part judges and skilled litigators provides practical advice and strategies for handling commercial cases. As a bonus, all registrants will receive – at no extra cost — the acclaimed six-volume publication, *Commercial Litigation in New York State Courts, Third Edition* (Thomson Reuters)–a $680 retail value. Topics include:

- Case Investigation and Evaluation
- Motions and Provisional Remedies
- Deposition Techniques
- Ethics for Business Litigators
- Trial Advocacy
- Appellate Advocacy
- Settlement Strategies
- More....

Chairs: **Robert L. Haig, Esq.** (Kelley, Drye & Warren, LLP–NYC); **Linda U. Margolin, Esq.** (Bracken, Margolin, Besunder, LLP)

Faculty: **Hon. Elizabeth H. Emerson; Hon. Emily Pines; Hon. Thomas F. Whelan; Hon. Leonard B. Austin; Leslie R. Bennett, Esq; John P. Bracken, Esq.; Richard C. Hamburger, Esq.; Frank A. Isler, Esq.; David Lazer, Esq.; Peter J. Mataglio, Esq.; Mark S. Mulholland, Esq.; Joseph J. Ortega, Esq.; William M. Savino, Esq.; Kevin Schlosser, Esq.; Walter Siegel, Esq.; Jeffrey G. Stark, Esq.; Paul B. Sweeney, Esq.; James M. Wicks, Esq.**

Time: 1:30–5:00 p.m. (Sign-in from 1:00)

Location: SCBA Center **Refreshments:** Lunch Reception from 1:00 p.m.

MCLE: 4 credits (1 professional practice; 2.5 skills; 0.5 ethics)

Evening Seminar

SALIENT ISSUES IN ELDER LAW

Monday, October 15, 2012

This must-attend for elder law attorneys covers Medicaid issues related to nursing homes and a variety of key topics from a renowned guest presenter.

Presenters: **Jeanette Grabie, Esq.** (Grabie & Grabie); **Rene H. Rexiach, Esq.** (Woods Oviatt Gilman, LLP–Rochester)

Program Coordinators: George Tilschner (Academy Advisory Committee) and Eileen Coen Cacioppo (Academy Curriculum chair)

Time: 6:00–9:00 p.m. (Sign-in from 5:30)

Location: SCBA Center **Refreshments:** Light supper

MCLE: 3 credits (2.5 professional practice; 0.5 ethics)

Evening Seminar Presented in Conjunction with the NYS Association of Criminal Defense Lawyers

PLEA BARGAINING: Serve Your Client; Protect Yourself

Tuesday, October 16, 2012

The U.S. Supreme Court decisions, *Frye* and *Lafler*, were game changers for criminal defense lawyers. Now, good advocacy requires considerably more than making a realistic "deal" with the prosecution. Client communication is paramount, and savvy attorneys must protect their own as well as their clients' interests. The skilled faculty gathered for this program will cover:

- Plea Bargaining 101 (Defense Perspective)
- Plea Bargaining 102 (Prosecutor's Perspective)
- Ramifications of *Frye* and *Lafler*
- Comparison with Federal System
- Obligations to the Court vs. Obligation to the Client
- Sentencing Parameters and Plea Limitations

Presenters: **Hon. Mark Cohen; Harry Tilis, Esq.; John Wallenstein, Esq.; Richard Haley, Esq.; William Ferris, Esq.; Stephen Kunken, Esq.; Representative of Suffolk D.A.'s Office.**

Program Moderator: Stephen Kunken (Academy Advisory Committee)

Time: 6:00–9:30 p.m. (Sign-in from 5:30)

Location: SCBA Center **Refreshments:** Light supper

MCLE: 4 credits (2.5 skills; 1.5 ethics) 18B - 4 Hours

Morning Seminar Presented in Conjunction with the Suffolk Chapter of the NYS Society of CPAs

ESTATE TAX EXAMINATIONS

Friday, October 19, 2012

When wealthy tax payers die, their estate tax returns are often selected for a tax audit. This program, which provides both CLE and CPE credits, will address issues that the IRS may raise on the examination of a federal estate tax return. Program topics include:

- The selection process of an estate tax return
- Estate tax audit techniques
- IRS audit issues involving limited liability companies and family limited partnerships
- Current estate tax developments
- Statute of limitations issues

Presenters: **Cecilia Ameranti-Byrne, Esq.** (Internal Revenue Service); **Seymour Goldberg, CPA, MBA, JD**

Coordinators: Eileen Coen Cacioppo (Curriculum Chair); David R. Okrent (Academy Advisory Committee)

Time: 9:00–11:00 a.m. (Sign-in from 8:30)

Location: SCBA Center **Refreshments:** Continental Breakfast

MCLE: 2 credits (Professional Practice–Non Transitional)

CPE: 2 hours (Intermediate)

Evening Seminar

FUNDAMENTALS OF FEDERAL PRACTICE

Tuesday, October 23, 2012

The Federal Court is in our backyard, and NYS practitioners may find many advantages to bringing cases in this venue. Learn the fundamentals of federal civil practice in this information-packed seminar.

Presenters: **Peter Ausili, Esq.** (Chief Law Clerk to Hon. Leonard Wexler); **D. David Engstrand, Jr.** (Doniger & Engstrand)

Time: 6:00–9:00 p.m. (Sign-in from 5:30)

Location: SCBA Center **Refreshments:** Light supper

MCLE: 3 credits (2.5 professional practice; 0.5 ethics)

Full Day at Belmont Park Turf & Field Club

A DAY AT THE RACES

Saturday, October 27, 2012

Spend a fall day with friends and colleagues, and gain insights into New York's racing, breeding, and wagering industry. The day includes a CLE seminar, tours of the backstretch, a non-CLE program on handicapping, a lavish luncheon buffet, and the races.

Coordinator: **Howard Baker, Esq.** (Academy Advisory Committee)

Time: Registration from 8:00 a.m. Location: Belmont Park

Refreshments: Continental breakfast and luncheon buffet

MCLE: 3 credits (2.5 professional practice; 0.5 ethics)

SEPTEMBER 2012 REGISTRATION FORM

Return to Suffolk Academy of Law, 560 Wheeler Road, Hauppauge, NY 11788

Circle course choices & mail form with payment // Charged Registrations may be faxed (631-234-5899) or phoned in (631-234-5588). Register on-line (www.scba.org).

Sales Tax Included in recording & material orders.

COURSE	SCBA Member	SCBA Student Member	Non-Member Attorney	Season Pass	12 Sess. Pass	MCLE Pass	New Lawyer MCLE Pass	DVD	Audio CD	Course Book
ANNUAL UPDATES										
New York Civil Practice Update	$155	$100	$185	Yes	Yes	3 cpn	3 cpn	N/A	N/A	N/A
Criminal Practice Update	$100	$50	$135	Yes	Yes	3 cpn	3 cpn	$125	$115	$25
DMV Update ☐ East End ☐ SCBA	$100	$75	$125	Yes	Yes	2 cpn	2 cpn	$110	$100	$20
EARLY FALL PROGRAMS										
Linked In for Lawyers	$55	$40	$75	Yes	Yes	2 cpn	2 cpn	$95	$90	$40
Challenges in Will Drafting	$155	$100	$185	Yes	Yes	8 cpn	8 cpn	$200	$195	$45
Get More Out of Your Computer	$45	$20	$50	Yes	Yes	2 cpn	2 cpn	$95	$90	$15
Fiduciary Duties of Non-Profit Bds	$75	$50	$75	Yes	Yes	2 cpn	2 cpn	$100	$95	$25
Persuasive Writing & Oral Advoc.	$95	$50	$110	Yes	Yes	2 cpn	2 cpn	$120	$110	$25
Electronic Filling–Surrogate's Crt	$55	$35	$75	Yes	Yes	2 cpn	2 cnp	N/A	N/A	N/A
The Domestic Violence Court	$85	$50	$100	Yes	Yes	3 cpn	3 cpn	$100	$95	$20
Commercial Lit in NYS Courts	$250	$200	$300	Yes	Yes	4 cpn	4 cpn	$350	$300	N/A
Salient Issues in Elder Law	$100	$85	$125	Yes	Yes	3 cpn	3 cpn	$135	$125	$40
Plea Bargaining	$85	$50	$100	Yes	Yes	3 cpn	3 cpn	$135	$125	$30
Estate Tax Exams	$65	$65	$65	Yes	Yes	2 cpn	2 cpn	N/A	N/A	N/A
Federal Practice Fundamentals	$85	$50	$100	Yes	Yes	3 cpn	3 cpn	$135	$125	$45
Day at the Races	$125	$100	$125	N/A	N/A	N/A	N/A	N/A	N/A	N/A

Name: _____

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

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

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

Account # _____ Exp. Date: _____ Signature: _____

Bench Briefs (Continued from page 4)

the court held that the questions propounded by plaintiff's counsel were material and relevant to plaintiff's claims, were neither "plainly improper" nor prejudicial, and were not otherwise objectionable, and defendant's counsel improperly directed the witnesses not to answer the questions.

Motion to renew and reargue denied; failure to include complete report unreasonable excuse.

In *Anthony Smith v. Geico Insurance Company, Geico Insurance Company v. Liberty Mutual,* Index No.: 8799/10, decided on July 26, 2012, the court denied the motion by defendant/third-party plaintiff for leave to reargue and/or renew its prior motion for summary judgment. With regard to the portion of the motion which sought renewal, the court noted that it should be based upon new or additional facts "not offered on the prior motion that would change the prior determination" and "shall contain a reasonable justification for the failure to present such facts on the prior motion." Here, the court noted that Geico submitted a more complete copy of the police accident report than that submitted with its earlier motion. The newly submitted copy included a two page statement by the driver involved in the incident which allegedly injured the plaintiff. The court found that despite Geico's contention that its failure to include the entire police accident report in its prior motion was reasonable, the court found otherwise. In any event, the court pointed out that the newly submitted report, including the two page statement was inadmissible as it was not authenticated and consisted of inadmissible hearsay.

Honorable Joseph Farneti

Motion for protective order denied; prohibition of CPLR §3130(1) did not preclude the use of Interrogatories.

In *Sajib Hossain v. Chengpu Wang,* Index No.: 33619/08 decided on December 19, 2011, the court denied the motion by the defendant for a protective order. By way of background, at the deposition of the plaintiff, plaintiff's counsel indicated that they did not wish to depose the defendant. A stipulation was placed on the record in this regard. Thereafter, plaintiff served Interrogatories. Defendant filed the instant application for a protective order, alleging that CPLR §3130(1) limits the use of both a deposition and interrogatories, as the statute's purpose is to relieve the parties to a negligence action from being required to submit both a deposition and interrogatories. As the defendant was never actually deposed therein, plaintiff alleged that the use of Interrogatories was proper and did not run afoul of CPLR §3130(1). In denying the defendant's motion for a protective order, the court found that since the plaintiff never conducted the deposition of the defendant, the prohibition of CPLR §3130(1) did not preclude the use of interrogatories. Further, the court pointed out that where two discovery devices are used, a court may issue a protective order if the second disclosure device was intended to unreasonably annoy, disadvantage, or otherwise prejudice a defendant. Here, the court found that that was not the intent of the service of interrogatories.

Honorable Peter H. Mayer

Motion which sought an order of seizure pursuant to Article 71 denied; plaintiff failed to show a probability of success on the merits.

In *Michael Cavaniola v. New York City Custom Motorcycles, Inc., d/b/a NYC Choppers, Nicholas Genender and Ginta Genender,* Index No.: 24346/11 decided on March 9, 2012, the court denied plaintiff's motion which sought an order of seizure pursuant to Article 71. In deciding the motion, the court noted that CPLR §7102(d) states, in pertinent part, upon the presentation of an affidavit and undertaking and upon finding that it is probable the plaintiff will succeed on the merits and the facts are as stated in the affidavit, the court may grant an order directing the sheriff of any county where the chattel is found to seize the chattel described in the affidavit. In denying the motion, the court found that the plaintiff had not submitted any proof of ownership of the subject custom motorcycle, and had not denied owing the sales tax still due on the plaintiff's purchase of that motorcycle from the defendant. Therefore, the court held that the plaintiff failed to show a probability of success on the merits, and the motion was denied.

Honorable Arthur G. Pitts

Motion to disqualify counsel denied; defendants lacked standing.

In *JMC Studio and Jacquie Cao v. Margaret Whelan and Joseph Crotty,* Index No.: 45275/10, decided on January 18, 2012, the court denied the motion by the defendants for an order disqualifying the law firm of Lewis Johs Avallone Aviles, LLP from simultaneously representing the plaintiffs in this action and Defendant Winward builders, LLC in a related action entitled *Brentwood Door Co. v. Whelan*. In denying the motion, the court noted that disqualification of an attorney is a matter which rests within the sound discretion of the court. Although an attorney may not, generally speaking, represent in litigation clients with mutually antagonistic interests, a party's entitlement to be represented in ongoing litigation by counsel of its own choosing is a valued right which should not be abridged absent a clear showing that disqualification is warranted. Here, the court found that it did not appear that the defendants were former or present clients of Lewis Johs. Consequently, they lacked standing to seek its disqualification as the firm owed no duty to that party. With regard to the flexible application of the rules of standing, wherein one of the jointly represented parties is unlikely to make the necessary motion because it is unable or fearful to do so, the court pointed out that the assertions as to the existence of a conflict of interest were insufficient to meet defendant's burden.

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

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

Views From The Bench (Continued from page 4)

first round of jury selection to five minutes. The underlying facts of the case are eerily similar to a television drama.

The defendant Owen Steward was charged with nine felonies, four of which were Class B violent felonies, stemming from a 2006 robbery of a popular radio personality known as DJ Envy. The trial testimony elicited details regarding the defendant and an accomplice brandishing a gun outside a Manhattan nightclub demanding the victim's gold and diamond necklace valued at approximately $25,000. Following a high speed car chase, the victim detained the defendant and a fight ensued resulting in the hospitalization of the defendant. *Steward*, 17 N.Y.3d at 107-08.

The defendant was convicted of multiple counts of robbery – two counts in the first degree and one count in the second degree. On appeal, the Appellate Division, First Department affirmed the conviction.

The Court of Appeals reversed noting that five minutes for voir dire where the defendant was facing more than 20 years incarceration was "significantly shorter" than previously upheld time restrictions. The court further explained its decision was not to be construed as a bright-line rule because "[t]he formulation of precise standards or the fashioning of rigid guidelines" necessitates case-by-case review. *Id*., at 110-11.

Factors to consider in setting time restrictions

In *Steward*, several factors regarding time restrictions during voir dire were discussed. These factors include: the number of jurors selected and available peremptory challenges; the number and nature of the charges; whether the case garnered media attention; special considerations stemming from the legal issues raised and possible defenses; concerns about the identity of the defendant, victim, witnesses and/or attorneys; and the scope and breadth of the court's examination of prospective jurors. *Id*. This list is neither exhaustive nor determinative.

However, it is incumbent upon defense counsel to timely object to the time restrictions. Counsel must further demonstrate why ample time had not been provided and that the failure to allot additional time resulted in prejudice to the defendant. *Id*., at 113 (*citing People v. Jean*, 75 N.Y.2d 744, 745 (1989)).

The *Steward* Court cited multiple instances where time restrictions in criminal jury trials were upheld. For example, 40 minutes was sufficient in a case involving multiple assault counts. *See Jean*, 75 N.Y.2d at 744 (15 minutes during each of the first two rounds and ten minutes during the third round). Similarly, the Appellate Division, Second Department concluded 35 minutes was adequate in an attempted robbery case. *People v. Davis*, 166 A.D.2d 453 (2d Dep't), *lv. denied*, 76 N.Y.2d 985 (1990) (15 minutes in the first round and 10 minutes in the second and third rounds).

Moreover, a 10 minute limitation was upheld where the defendant was charged with felony driving while intoxicated and operating a motor vehicle while ability impaired. *See People v. Erickson*, 156 A.D.2d 760 (3d Dep't 1989), *lv. denied*, 75 N.Y.2d 966 (1990). In *Erickson*, the Appellate Division, Third Department reasoned that absent proof a fair opportunity to question the venire was denied, the conviction was affirmed. *Id*., at 761.1

The Court of Appeals took a different approach and imposed a lesser standard in *Steward*. Significantly, the court opined that where the record failed to refute defendant's claim of prejudice, a conviction could *not* be sustained. *Steward*, 17 N.Y.3d at 114. It is noteworthy that the majority acknowledged the trial judge's initial questioning of prospective jurors was "thorough" and that there may *not* have been any inappropriate bias against the defendant.2 Nevertheless, the conviction was reversed due to a limited record and because counsel was prohibited from asking typical follow-up questions to "problematic or provocative" responses from members of the venire due to the time restraints. *Id*.

The dissent – preserving jury selection issues for appeal

The dissent did not begrudge the majority's holding but questioned whether the issue was preserved for appeal. Defense counsel, who had previously appeared before the trial judge, merely asserted a general, non-specific objection that "some subjects" were omitted during jury selection due to the time restrictions. No details regarding the types of questions that would have been asked or to which jurors they would have been directed was provided.

This poses yet another intriguing issue for defense counsel. Although perhaps the subject of a future article, in *Steward,* less was clearly more. Counsel may opt to proceed accordingly as each case will be evaluated on its own merits.

The trial court has broad discretion in imposing time restrictions during jury selection in criminal cases. Counsel must merely be afforded a fair opportunity to question prospective jurors regarding relevant matters. Although determination as to whether ample opportunity was provided is a case-by-case decision, in *Steward* the conviction was reversed because the record did not discount defendant's claim of prejudice.

Note: The Honorable Stephen L. Ukeiley is a Suffolk County District Court Judge. Judge Ukeiley is also an adjunct professor at the New York Institute of Technology, a member of the Board of Directors of the Suffolk County Women's Bar Association, and a member of the Executive Committee of the Alexander Hamilton American Inn of Court. He is also a frequent lecturer and author of numerous legal publications, including The Bench Guide to Landlord & Tenant Disputes in New York© (available to the public).

The information contained herein is for informational and educational purposes only. This column should in no way be construed as the solicitation or offering of legal or other professional advice. If you require legal or other expert advice, you should consult with an attorney and/or other professional.

1. The Appellate Court held based on the record "[w]e must assume that the time limitation imposed was reasonable and not an abuse of discretion".
2. Parenthetically, in *People v. Jabot*, 941 N.Y.S.2d 311 (3d Dep't 2012), the Appellate Division, Third Department reversed a criminal conviction for burglary in the second degree and conspiracy in the fourth degree where the trial court refused to permit the exercise of a peremptory challenge moments after counsel mistakenly accepted the prospective jurors even though the panel had yet to be sworn-in.

Three "R's" of CLE *(Continued from page 32)*

in Law and Technology Related to Predictive Coding." In the latter, Academy Officer Glenn Warmuth and DOAR representatives explain predictive coding (a boon to e-discovery) and explore the ramifications of a new decision.

TRANSACTIONAL PRACTICE

Where does "readin','ritin' and 'rithmetic," albeit all on a highly sophisticated level, come into more play than for lawyers who handle real estate matters, wills and estates, and business transactions? For this group of practitioners, the Academy's fall syllabus holds a number of appealing classes

"Challenges in Will Drafting" is the theme of a September 21 full-day program featuring an elite corps of experienced estate practitioners. Presenters include Eileen Coen Cacioppo, Ilene Cooper, Robert Harper, Eric Kramer, Marilyn Lord-James, Scott McBride, George Tilschner, Richard Weinblatt, and Ernest Wruck. Topics include ethical issues in will drafting, drafting to avoid a contest, trusts in wills, elective share issues, estate tax considerations, and much more.

Estate Tax Examinations are covered in a morning program on October 19 featuring Cecilia Ameranti-Byrne, an attorney with the IRS, and the always popular Seymour Goldberg, CPA, MBA, JD. Insights into the selection process for estate tax returns, audit techniques, accuracy penalties, statute of limitations, and more will be provided.

On Friday, October 5 (9:30 a.m.), presenters from New York State E-Filing Resource Center will tell practitioners all about **"E-Filing in Surrogate's Court."** The program will be held at the Surrogate's Court in Riverhead.

For the attorney who focuses on elder law, the date of Monday, October 15, should be reserved for an important treatment of **"Salient Issues in Elder Law."** Jeanette Grabie will discuss Medicaid issues related to nursing homes, and guest presenter Rene Rexiach will address a number of pertinent matters for those in the field.

Transactional lawyers will also want to attend **"At the Table,"** a real estate closing demonstration scheduled for lunchtime on October 29, and a three-credit lunch program on December 4 focusing on **"Asset Purchase Agreements."**

LAW PRACTICE MANAGEMENT

A number of fall classes will help lawyers do what they do in an effective, ethically sound, manner. Consider **"Linked In for Lawyer,"** a September 14 afternoon program featuring Allison Shields, who has written a book on the topic for the American Bar Association (attendees will receive the book); **"How to Get More Out of Your Computer,"** a September 24 lunch program featuring Adam Michaelson, who will provide instruction on free websites and how to use them; **"Insurance Liability Practices,"** an October 3 breakfast program on what lawyers and businesses need to do to avoid harassment, retaliation and other such suits; and an October 17 late afternoon program on **"Retirement Options for Lawyers and Clients."**

Perhaps the most far-reaching fall program of this kind is a five credit (including two in ethics) symposium scheduled for Friday, November 16. Entitled **"Lawyers Helping Lawyers,"** the program, coordinated by the New York State Bar Association's and the Suffolk Bar's Lawyers Helping Lawyers Committees, will provide insightful, practical advice to help lawyers help those (colleagues, clients, family members, themselves) suffering from addiction, depression, and other mental health issues. The program is coordinated by Past SCBA President Sheryl Randazzo and features a faculty of skilled and caring practitioners. It is a program truly intended for *all* attorneys.

LAWYERS & OTHER PROFESSIONALS

Three fall programs this fall are intended for lawyers and others: **"Fiduciary Duties of the Not-for-Profit Board"** on the evening of September 27; **Sports Law: The NCAA Rules** on the morning of October 18; and the aforementioned December 3 **School Law Conference.** All provide the opportunity for lawyers to learn more about the particular area of law in the company of other professionals charged with abiding by the pertinent legal requirements.

FOR FUN!

"Readin' and 'ritin'" in the case of this last discussed program may translate into "handicapping," but as the saying goes, "all work and no fun...." Back by popular demand, **"A Day at the Races,"** has been scheduled for Saturday, October 27, at Belmont's Turf and Field Club. The day includes a CLE program, a tour of the backstretch, a program on handicapping (for guests not taking the CLE class), continental breakfast and buffet luncheon, and the races. For the CLE, Howard Baker, the program coordinator, has assembled a faculty well versed on legal issues related to New York's thoroughbred racing, breeding, and wagering industry.

In short, the "three R's" are supercharged for the Academy's return to school this fall. For more information on any Academy CLE offerings, attorneys are invited to call the Academy at 631-234-5588.

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

ACADEMY OF LAW NEWS

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

The Three "R's" of CLE

School Days Re-Imagined as Credit Hours

By Dorothy Paine Ceparano

In the lawyer's world, the pursuit of "readin', 'ritin', and 'rithmetic" may respond more to the bang of the judge's gavel than the swish of a hickory stick, but keeping up with educational exigencies still requires discipline and perseverance. Legislation changes, the body of legal knowledge grows, and the technology designed to help lawyers keep up inserts its own demands. But reading, writing, and arithmetic are still staples: evaluate a contract...develop a brief...calculate tax advantages...and what are you doing?

And so enter continuing legal education and its "school marm" equivalent, the dedicated volunteer presenter willing to share skills and knowledge with colleagues. This fall, the Academy goes back to school with a carefully designed curriculum, the "three 'R's" of CLE, with a little technology thrown in.

UPDATES

Reading about legal developments is, of course, an absolute necessity for practitioners. But there is a quicker way than studying numerous pieces of legislation and reviewing a myriad of decisions. The legal update allows someone else to do most of that for you. This fall, the Academy presents no less than seven updates and annual conferences.

The first, and perhaps best attended of any program of its kind, is the **New York Civil Practice Update** held this year on Wednesday, October 3, at the Hyatt Regency Wind Watch Hotel. This year's program features Albany Law Professor Patrick Connors, who has taken over Professor David Siegel's annual lecture and, to all accounts, is his heir apparent in matters related to developments in the CPLR.

For criminal practitioners, Hon. Mark Cohen and Kent Moston do their share. Their always well received **Criminal Practice Update** for Suffolk and Nassau lawyers will be held on Friday October 26, at the Nassau Supreme Court in Mineola.

Real estate guru Scott Mollen returns to Suffolk on Thursday, November 29, with a **2012 Real Property Update** covering developments in residential and commercial real estate, landlord-tenant affairs, land-use, and the like. And for a thorough exploration of **Landlord-Tenant Practice** issues**,** there is a November 13 treatment of the topic, complete with update, organized by Hon. Stephen Ukeiley. The program will include a book signing of Judge Ukeiley's acclaimed treatise on the practice area.

David Mansfield once again presents his **DMV Update** in two locations this year: on the East End (November 7 at Seasons of Southampton) and at the SCBA Center (November 14).

A **2012 Bankruptcy Update,** organized by Past Academy Dean Richard Stern, is slated for Thursday, December 6; As always, an erudite faculty will bring practitioners up to speed on changes and developments in bankruptcy law and their ramifications for other practice areas.

Finally, more than an update, but including coverage of new developments, the **Annual School Law Conference** covers matters affecting education law attorneys and educators. Presented with the Nassau Academy and organized by the Education Law Committees of the Suffolk and Nassau Bar Associations, this year's program will be held in Suffolk at a hotel location that will be announced shortly.

LITIGATION

Litigators and would-be litigators of all ilks must bring the three "R's," plus good verbal and, these days, technology skills to their endeavors. These lawyers will find a bonanza of offerings in the Academy's fall syllabus. One of the major programs – described in more detail on page 1 of this publication – is **"Successful Strategies for Winning Commercial Cases in New York State Courts."** Organized by Robert Haig of Kelley Drye in New York City and Suffolk's own Linda Margolin (Bracken Margolin Besunder), the program features Hon. Elizabeth Emerson, Hon. Emily Pines, Hon. Thomas Whelan, Hon. Leonard Austin, and 14 leading commercial litigators. As part of the program, all registrants will receive the third edition of the six-volume Thomson Reuters publication, *Commercial Litigation in New York State Courts*, which Mr. Haig edited and for which Ms. Margolin and Justice Pines wrote chapters. The date is Thursday, October 11; the program runs from 1:30 to 5:00 p.m. and is preceded by a luncheon reception.

Other courts are also covered this fall: On the evening of Wednesday, October 10, Hon. Toni Bean and Hon. Chris Ann Kelley address practice in the **Domestic Violence Court .** And on Tuesday, October 23, Peter Ausili (chief law clerk to Judge Leonard Wexler) and D. Daniel Engstrand, Jr. (experienced federal practitioner) provide the **Fundamentals of Federal Practice (Civil).**

A full-day program on **Effective Depositions** is scheduled for Friday, November 9. A. Craig Purcell and Daniel Tambasco will organize and lead a skilled faculty that will provide you with tips for making the best use of this stage of litigation.

Criminal practitioners can attest that the plea bargaining stage of litigation is key. And with two new United States Supreme Court cases this year, required skills go beyond good negotiation tactics. On the evening of Tuesday, October 16, a skilled faculty presents **"Plea Bargaining: Serve Your Client; Protect Yourself."** The four-credit program, presented in conjunction with the New York State Association of Criminal Defense Lawyers, features Hon. Mark Cohen, Harry Tilis, William Ferris, Rick Haley, John Wallenstein, Stephen Kunken, and a representative of the Suffolk District Attorney's Office. The course will cover, among other things, tips for effective plea bargaining, ramifications of the *Frye* and *Lafler* cases, discussion of sentencing parameters and plea limitations, attorney obligations to the court versus those to the client, and a contrast with plea bargaining in the federal system.

"Persuasive Writing and Effective Oral Advocacy" are skills all litigators need. And this is the subject matter for an October 2 (6:00–8:30 p.m.) presentation by Hon. Gerard Lebovits, whose presentation for Suffolk lawyers in Spring 2011 received rave reviews. Once again, the program is organized by SCBA Director Diane Farrell, who re-engaged Judge Lebovits in response to numerous requests from colleagues.

Finally, as lawyers know all too well, technology has entered the world of litigation in leaps and bounds. Two programs this fall will contribute to the litigator's success in dealing with technological demands. On Friday, November 2, attorneys from Thomson Reuters present an inexpensive lunch program on **"Exploring Litigation Solutions."** And on Monday, November 5, another lunch program explores **"Recent Developments**

(Continued on page 31)

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.

September		
7	Friday	Meeting of Academy Officers & Volunteers. 7:30–9:00 a.m. Breakfast buffet. All SCBA members welcome.
14	Friday	**Linked In for Lawyers.** 3:00–5:00 p.m. Followed by "Happy Hour."
21	Friday	**Challenges in Will Drafting.** 9:00 a.m.–5:00 p.m. Continental breakfast and lunch buffet.
24	Monday	**Get More Out of Your Computer: Free Websites & How to Use Them.** 12:30–2:10 p.m. Lunch from noon.
27	Thursday	**Fiduciary Duties of the Not-for-Profit Board.** 6:00–8:00 p.m. Light supper from 5:30.
October		
2	Tuesday	**Persuasive Writing & Oral Advocacy.** 6:00–8:30 p.m. Light supper from 5:30.
3	Wednesday	**Insurance Liability Practices for Law Firms & Businesses.** 8:00–10:00 a.m. Continental breakfast from 7:45.
3	Wednesday	**New York Civil Practice Update** (Professor Patrick Connors). 6:30–9:30 p.m. at the Hyatt Regency Wind Watch Hotel. Sandwich supper and cookie break.
5	Friday	Meeting of Academy Officers & Volunteers. 7:30–9:00 a.m. Breakfast buffet. All SCBA members welcome.
5	Friday	**Electronic Filing in Surrogate's Court.** 9:30–11:30 a.m. at Surrogate's Court in Riverhead.
10	Wednesday	**The Domestic Violence Court.** 6:00–9:00 p.m. Light supper from 5:30.
11	Thursday	**Commercial Litigation in New York State Courts.** 1:30–5:00 p.m. Luncheon reception at 1:00.
15	Monday	**Salient Issues in Elder Law** (Guest speaker: Rene Rexiach). 6:00–9:00 p.m. Light supper from 5:30.
16	Tuesday	**Plea Bargaining: Serve Your Client; Protect Yourself.** 6:00–9:30 p.m. Light supper from 5:30 p.m.
17	Wednesday	**Retirement Opportunities for Lawyers & Clients.** 4:00–6:00 p.m. Light refreshments from 3:30 p.m.
18	Thursday	**Sports Law: The Rules of the NCAA.** 9:00 a.m.–Noon. Continental breakfast from 8:30.
19	Friday	**Estate Tax Examinations.** 9:00 a.m.–11:00 a.m. Continental breakfast from 8:30.
23	Tuesday	**Fundamentals of Federal Practice.** 6:00–9:00 p.m. Light supper from 5:30.
26	Friday	**Criminal Practice Update** (Hon. Mark Cohen & Kent Moston). 1:30–4:30 p.m. at Nassau Supreme Court, Mineola. Sign-in from 1:00 p.m.
27	Saturday	**A Day at the Races.** Full day at Belmont Field & Turf Club. Continental breakfast and luncheon buffet.
29	Monday	**At the Table: Demonstration of a Real Estate Closing.** 12:30–2:10 p.m. Lunch from noon.

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