THE SUFFOLK LAWYER

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September 2014

INSIDE...
SEPTEMBER 2014
FOCUS ON
REAL PROPERTY

Changing Times at the Suffolk Academy of Law

Electronic course materials, e-mailed publicity, more full-day conferences, CLE "bundles," designated course levels, and other innovations are in place or on their way.

By Dorothy Paine Ceparano

Resisting alteration "when it alteration finds" may, as Shakespeare tells us, be an apt definition of love. For continuing legal education, however, Victor Hugo might be more on point:

"Change your opinions, keep to your principles; change your leaves, keep intact your roots."

It was the year of the American Bicentennial when the Suffolk Academy of Law received its absolute charter as an educational corporation from the New York State Board of Regents. Through the nearly four decades since, continuing legal education has seen many changes. In Suffolk, the Academy was founded through the efforts of a stalwart group of SCBA leaders who saw continuing legal education as a vital principle of professionalism. CLE, at that time, was an aspiration rather than a mandate. Then, in the 1990's, the New York State Court System turned CLE into *M*CLE, and a prescribed number of continuing legal education credits became a requirement for practicing attorneys. And now, in the second decade of the new millennium, mandatory CLE – while still ably provided by bar associations and established educational institutions like the Academy – has seen a new phenomenon gain prominence: for-profit organizations offer free CLE as a loss-leader, a means of attracting practitioners to other products or services; and

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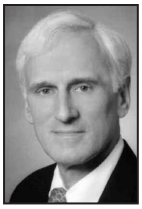
Beautiful day on the water for the SCBA

Photo by Barry Smolowitz

SCBA members and their friends climbed aboard the Osprey V for a day of fishing at this summer's annual outing, while others enjoyed some time on the green at the Port Jefferson Country Club at Harbor Hills. (See story on page 6)

PRESIDENT'S MESSAGE

Welcoming Future Lawyers to Our Profession



William T. Ferris

By William T. Ferris

Last spring, prior to my installation, I met with Dean Patricia Salkin of Touro Law School for the purpose of introducing law students from Touro into the Suffolk County Bar Association. Law students are our future lawyers, and our Bar Association can provide the opportunity for students to meet and network with practitioners, participate on committees in areas of law that interest them and attend most of our Academy of Law programs.

In order to promote and further the relationship, and based on my conversation with Dean Salkin, the Board of Directors, at the June meeting, adopted several resolutions: All law students, who are enrolled in any law school, can join the Suffolk County Bar Association at no charge either online or by filling out a membership application.

The Board also approved the creation of the Law Student Committee, chaired by Treasurer Justin M. Block, Board Director Leonard Badia, and immediate past Board Director Hon. Andrew A. Crecca. Its mission is to ensure a presence at Touro, assist in reaching out to the other law schools in the area and maintain a continued dialogue alerting the students to SCBA events and programs. With the assistance of Dean Salkin, Touro has appointed a law school student, Jeremy M. Miller to serve as a student liaison to the Bar Association and the Law Student Committee.

With the approval of the Board of Directors, articles written by the Touro faculty or a law student would be published in the Association's newspaper *The Suffolk Lawyer* on a monthly basis. Access to our newspaper provides

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BAR EVENTS

Annual Ira P. Block Memorial Golf Classic
Monday, September 22, shotgun 1 p.m.
Westhampton Country Club
Westhampton Beach
Sponsored by the SCBA's Lawyer Assistance Foundation. Contact jane@scba.org for the flyer.

SCBA's Annual Judiciary Night
Thursday, October 2, at 6 p.m.
Capt. Bill's Restaurant, Bay Shore
$85/person. Register online or email jane@scba.org for flyer.

SCBA Charity Foundation Wine & Cheese fundraiser
Friday, October 17 at 6 p.m.
SCBA's Great Hall
Music by *Just Cause Band.*
$20/person. Pre-Registration required. Email jane@scba.org for flyer.

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SPECIAL EDITION

Suffolk County Bar Association

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SCBA Calendar

OF ASSOCIATION MEETINGS AND EVENTS

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.

SEPTEMBER 2014

4 Thursday	Leadership Development Committee, 6 p.m. Board Room
8 Monday	Executive Committee, 5:30 p.m. Board Room
17 Wednesday	Traffic & Parking Violations Agency (TPVA), 6:00 p.m. Board Room
22 Monday	The Annual Ira P. Block Memorial Golf Classic, sponsored by the SCBA Lawyer Assistance Foundation, Golf Package $350; Cocktails and dinner only $125. Register on line or call the Bar Center for further information. Shotgun start 1 p.m. at the Westhampton Country Club, Westhampton Beach, NY
23 Tuesday	Board of Directors Meeting, 5:30 p.m. Board Room

OCTOBER 2014

6 Monday	Executive Committee Meeting, 5:30 p.m. Board Room
9 Thursday	SCBA celebrates Annual Judiciary Night, a gathering with the Bench and Bar, 6:00 p.m. Capt. Bill's Restaurant, Bay Shore, NY. $85/person. Register on line or call the Bar Center.
17 Friday	SCBA Charity Foundation Wine & Cheese Celebration, 6:00 p.m. Bar Center. Donation $20/person. Music by *Just Cause Band.* Pre-registration required.
20 Monday	Board of Directors Meeting, 5:30 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."

Magistrate vacancy

There is one full-time United States Magistrate Judge position vacancy at the Long Island Courthouse of the Eastern District of New York, Central Islip, NY, effective August 5, 2014.

An application form can be accessed on-line at the district's website: www.nyed.uscourts.gov. Application forms may also be obtained from the Clerk of the Court, 225 Cadman Plaza East, Brooklyn, NY, (718) 613-2270.

Applications must be personally prepared by potential nominees and must be received no later than September 19, 2014. A disk in Word or PDF and 17 copies of the completed application must be mailed or delivered to the Office of the Clerk of Court at the above address.

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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NYSBA Continues to Grapple With Mandatory Pro Bono Reporting

By Scott M. Karson

The annual summer meeting of the New York State Bar Association was held from June 19-21, 2014 in Cooperstown, New York. The meeting featured yet another spirited debate within the Association's policy-making body, the House of Delegates, concerning mandatory pro bono reporting.

By way of background, in 2013, the courts amended Rule 6.1 of the *New York Rules of Professional Conduct* by establishing an aspirational goal of 50 hours of pro bono service annually for New York lawyers, and an annual aspirational financial contribution by New York lawyers to organizations providing legal services to poor persons in an amount at least equivalent to one billable hour (the rule also prescribes certain alternative aspirational financial goals for lawyers who are not compensated on the basis of a billable hour). However, in conjunction with these aspirational provisions of the *Rules of Professional Conduct*, the courts also enacted section 118.1(e)(14) of the Rules of the Chief Administrator of the Courts, which requires lawyers to state under oath in their biennial registration forms the number of hours spent providing voluntary legal services to poor and underserved clients during the previous registration period, as well as the amount of voluntary financial contributions made to organizations primarily or substantially engaged in providing in providing legal services to the poor and underserved during the previous registration period. This rule was imposed without consultation with the New York State Bar Association and is contrary to established Association policy against mandatory pro bono reporting.

At the Association's annual meeting in New York City in January 2013, the House was asked to approve a resolution sponsored by the NYSBA Executive Committee

Photo courtesy of Scott M. Karson

Scott M. Karson speaking at the NYSBA meeting in Cooperstown.

providing, in pertinent part, "that the Association reiterates and reaffirms its opposition to mandatory reporting of pro bono services and mandatory reporting of financial contributions to organizations engaged in providing legal services to the poor and underserved. . . [and] shall continue to express its opposition to such mandatory reporting . . . and shall pursue such other and further actions as may be appropriate for the purpose of achieving the repeal of Rule 118.1(e)(14) of the Rules of the Chief Administrator." However, after much debate from a broad spectrum of delegates, including those who believe that mandatory reporting is justified and, on the other hand, those who believe that the Executive Committee resolution is too weak, the resolution was postponed to the June 21, 2014 summer meeting.

At the June 21 meeting, the resolution was re-presented to the House, but further debate on the merits of the resolution was curtailed when NYSBA President Glenn Lau-Kee moved to postpone consideration of the resolution to the next meeting of the House on November 1, 2014, citing on-going negotiations with Chief Judge Jonathan Lippman and Chief Administrative Judge A. Gail Prudenti aimed at resolving the parties' differences. After further debate on the motion to postpone, President Lau-Kee's motion was granted.

In connection with the debate on mandatory pro bono reporting, an informational report was presented to the House by the NYSBA Committee on Legal Aid and the NYSBA President's Committee on Access to Justice. The report supports mandatory reporting because, based on the experience in other states in which lawyers are required to report their hours of pro bono service and financial contributions, it leads to an increase in pro bono service and contributions, and provides useful data regarding the extent to which voluntary pro bono service and contributions are meeting the needs of poor and underserved populations. However, in order to address some of the concerns of attorneys opposing the current rule, the report suggests that the information be collected and made available to the public only on an aggregate – rather than on an individual lawyer – basis. The report also recommends that while the core definition of pro bono should continue to be limited to the provision of legal services to the poor, a separate category encompassing a broader definition of pro bono should be established as well.

On the question of defining pro bono service, one distinguished member of the House, Michael Miller of New York County, noted that he had served as an Election Supervisor in war-torn Bosnia shortly after the Dayton Accords in 1996 and, in 1999, under the auspices of the U.S. Department of Justice, in association with the Central and East European Law Initiative, he interviewed Kosovo refugees for evidence of war crimes and crimes against humanity – evidence to aid in prosecutions at the International War Crimes Tribunal in the Hague. Further, in the aftermath of the Sept. 11 attacks, he led efforts to provide legal relief efforts in New York City, for which he received the American Bar Association's *Pro Bono Publico* Award and other awards in recognition of his work. Mr. Miller pointed out, however, that none of his remarkable efforts would have qualified as reportable pro bono under the current New York rule.

On a less controversial note, the meeting of the House featured the formal installation of Glenn Lau-Kee as the 117th President – and the first Asian-American President – of the Association. The oath of office was administered to the new President by Senior Associate Judge Victoria A. Graffeo of the New York Court of Appeals, and was witnessed by the Lau-Kee family, including the President's father, with whom he practices law. Mr. Lau-Kee succeeds David Schraver of Rochester.

Other highlights of the House meeting included the introduction of the Association's new Executive Director, David R. Watson, and an address by Robert M. Carlson of Montana, the Chair of the American Bar Association House of Delegates.

The House also approved amendments to its bylaws and related policies in order to be in compliance with the Nonprofit Revitalization Act of 2013.

The next meeting of the House of Delegates will be held on Saturday, November 1, 2014, at the State Bar Center in Albany, New York.

Note: Scott M. Karson is the Vice President of the NYSBA for the Tenth Judicial District and serves on the NYSBA Executive Committee and in the NYSBA House of Delegates. He also serves as Chair of the NYSBA Audit Committee. He is a former President of the SCBA, a member of the ABA House of Delegates, a member of the ABA Judicial Division Council of Appellate Lawyers and a partner at Lamb & Barnosky, LLP in Melville.

Meet Your SCBA Colleague

Leonard J. Badia, a New York State officer, is an SCBA Director and an adjunct instructor of law at Touro, St. Joseph's College, and Suffolk County Community College. He's always been a techie, with a passion for law and a true believer in the importance of education.

By Laura Lane

As an instructor of law at Touro you use your role to impart more than your course curriculum, right? I tell the students and the interns at court that the law is not the television show Law and Order, but instead, an opportunity to change the world. Ultimately we are a nation of laws, which are created and contested by lawyers.

You too were once a student at Touro, right? Yes, but I didn't pursue law at first. As an undergrad I worked at the Fashion Institute of Technology and ended up working there for 18 years after college. It was the 1980's and the computer revolution had just begun. I worked as a computer technician and instructor there until the early 1990's. That's when I had to decide whether or not I wanted to go into law enforcement.

How did you end up in law then? When I entered the Court Officers Academy I fell in love with the law, particularly criminal justice. When I was promoted to captain I decided to go to law school. From my first few days at Touro I knew I was in the right place.

In your current position as the Commanding Officer at Cohalan you are no longer able to practice law. Even so, are you able to share your legal knowledge? Hardly a day goes by where my phone doesn't ring with an attorney calling me asking a question. I've been very lucky. We ran CLE's here in the arraignment courtroom and of course at the Academy.

What type of CLE's did you run at the courthouse? Law school students come to some of them allowing them to see different disciplines of the law. They get experience they won't get in law school. At Touro they do value experiential learning and encourage the students to come into court.

What do you enjoy about teaching? Well I believe teaching in and of itself is a performing art. I like being able to monitor during the lecture what I'm getting across. And I enjoy teaching the law by utilizing cases, not just teaching from a casebook, but using real life examples from my own experiences.

Who do you see as a role model? There are role models all around us. But one person who comes to mind right away is Judge Prudenti. She started court tours, creating a synergy with the courts and community. She's a great leader.

Do you see yourself as a leader? My job is a leadership role. I'm in command of over 100 officers. I like being the person that looks to find the solution. In my capacity as a leader, I'm proudest of the way that I've ensured that when people go to the Cohalan Court complex they are treated with respect and dignity. I'm so proud of my officers who make everyone who comes into this building feel safe, secure and that they are always treated with respect and dignity, regardless of whether they are wearing handcuffs coming through the door. I got that from Judge Prudenti and others.

When did you get involved in the SCBA and how? I joined from the get-go because I knew fine lawyers and they happened to be leaders at the SCBA. Art Shulman and Barry Smolowitz invited me to the CLEs the Academy offered. I attended many and participated in CLEs too. From there I knew I wanted to be involved in other aspects at the SCBA.

What did you get involved in back then? I joined the District Court Committee and I ended up running into the attorneys I saw in court. This committee was actually my springboard to my greater involvement. Two years ago I was nominated to be a director.

What do you enjoy about being a director? I enjoy being a part of policy and like the responsibilities involved in doing so. I enjoy being a part of a group whose decisions have a great impact on the organization, where it is going. I'm honored to be on that board.

Why would you recommend others join the SCBA? It's very important to be a member of this premier group of lawyers even if you are new to the profession. The opportunity to meet these folks is limitless; you can learn from these people. Membership will offer newer attorneys a resource to grow in the profession. Everyone at the Bar is rowing in the same direction to make the attorneys better trained, more civil to each other.

Leonard J. Badia

You are co-chairing a newly created committee this year, right? Yes with Judge Crecca and Justin Block. We are chairing the Law School Committee. We set up a table at Touro at a barbeque the other day and will do this at other law schools too. Our objective is to have law school students network and learn from our colleagues at the SCBA. There are role models all around us at the SCBA.

BENCH BRIEFS

By Elaine Colavito

SUFFOLK COUNTY SUPREME COURT

Honorable Paul J. Baisley, Jr.

Motion to dismiss denied; evidentiary facts establishing that there are issues of fact as to whether the action was timely.

In *Gregory A. Beroza v. The Sallah Law Firm, P.C., Donald R. Sallah, Esq., Dean J. Sallah, Esq., and Patrick M. Kerr, Esq.,* Index No.: 33959/2013, decided on April 2, 2014, the court denied the defendants' motion for an order dismissing the complaint pursuant to CPLR §3211(a)(5).

The court stated that a movant seeking to dismiss a complaint against it as time-barred pursuant to CPLR §3211(a)(5) has the initial burden of proving through documentary evidence that the action was untimely commenced after its accrual date. Here, the court noted that an action to recover damages for legal malpractice must be commenced within three years from accrual. A legal malpractice claim accrues when the malpractice is committed, not when it is discovered. Generally, in a matrimonial action the plaintiff's cause of action accrues at the latest, when a judgment of divorce is entered in the action. Based upon the submissions, the court concluded that defendants established prima facie that this action was commenced more than three years after the cause of action accrued. In opposition to the motion, plaintiff argued that the doctrine of continuous representation applies. The court pointed out that the period in which to commence a legal malpractice action may be tolled by the continuous representation doctrine. Pursuant to this doctrine, the statute of limitations is tolled where there is a mutual understanding by the attorney and the client of the need for further representation on the specific subject matter of the underlying lawsuit. Further, for the doctrine to apply there must be a clear indicia of an ongoing, continuous, developing and dependent relationship between the client and the attorney. In the instant matter, the court found that the plaintiff submitted evidentiary facts establishing that there were issues of fact as to whether the action was timely. Accordingly, the motion by the defendants for an order pursuant to CPLR §3211(a)(5) dismissing the complaint was denied.

Elaine Colavito

Pre-answer motion to dismiss the complaint granted; Plaintiff proffered no proof that the defendant was served

In *Gladys Palacios v. Andrea S. Brown and Isabel U. Elizalde De Jouvin,* Index No.: 9895/2012, decided on October 2, 2013, the court granted defendant's pre-answer motion to dismiss the complaint. The court noted that plaintiff commenced this action to recover for serious personal injuries alleged to have been sustained when a vehicle in which she was a passenger, owned and operated by motion defendant was struck from behind by a vehicle operated by the other defendant's vehicle. In her affidavit, the moving defendant stated that she was never served with any papers in connection with the instant action. Plaintiff proffered no proof that the defendant was served. Accordingly, the motion was granted and the complaint was dismissed as to moving defendant.

Honorable Peter H. Mayer

Motion for an order pursuant to CPLR §3211(a)(7) dismissing the complaint denied; although the 14 causes of action in the complaint were somewhat redundant, the allegations did express actions recognizable by the court.

In *Jennifer Capobianco-Comesky v. Steven J. Comesky,* Index No.: 24097/2012, decided on May 9, 2013, the court denied the defendant's motion for an order pursuant to CPLR §3211(a)(7) dismissing the complaint. In the instant matter, the plaintiff commenced an action by service of a summons and verified complaint dated August 6, 2012 to cancel, set aside, and declare null and void and of no force and affect a Separation Agreement entered into by the parties on February 28, 2011. The defendant brought within motion to dismiss plaintiff's action pursuant to CPLR §3211(a)(7). In deciding the motion, the court noted that despite seeking a dismissal for failure to state a cause of action, the supporting papers by the defendant, as well as the opposition and reply papers, generally charted a summary judgment course. They appeared to set forth the proof necessary to establish that no questions of fact existed as to the fact that the parties freely and voluntarily entered into the Separation Agreement and that grounds did not exist upon which to set it aside. Here, the court noted that pursuant to CPLR §3212(a) a party may move for summary judgment in any action, after issue has been joined. Thus, the court stated that it would be improper as premature to convert the dismissal motion into a summary judgment motion pursuant to CPLR §3211. Consequently, in determining whether to dismiss the complaint pursuant to CPLR §3211(a)(7), the court noted that in determining if a pleading stated a cause of action, the sole criterion for the courts was whether from the four corners, factual allegations were discerned which taken together manifested any cause of action cognizable at law. The court found that although the 14 causes of action in the complaint were somewhat redundant, the allegations did express actions recognizable by the court.

Motion by the defendant seeking an extension of time to answer the summons and complaint denied; cross-motion by plaintiffs for a default judgment against the defendants granted; where motion papers are unopposed, the uncontroverted facts set forth therein are deemed admitted.

In *Stephen R. Stern, P.C. and Stephen R. Stern v. Scott Morrell, JEM Caterers of Woodbury, LTD., d/b/a Morrell of Woodbury, Morrell Caterers Management Company, LLC, Morrell caterers of Lawrence, LTD.,* Index No.: 25335/2013, decided on July 9, 2014, the court denied the motion by the defendant seeking an extension of time to answer the summons and complaint,

(Continued on page 25)

VIEWS FROM THE BENCH

Reporter Not Required to Testify in Colorado Shooting Case

By Hon. Stephen L. Ukeiley

In 1786, Thomas Jefferson recognized the significance of having a free press when he stated "[o]ur liberty depends on the freedom of the press, and that cannot be limited without being lost." More than two centuries later, the question of a reporter revealing confidential news sources grabbed the headlines in the aftermath of the 2012 Aurora, Colorado movie shooting which resulted in the senseless deaths of a dozen people and an additional 70 wounded.

Shortly following the shootings, New York's Fox News reporter Jana Winter, citing unnamed "law enforcement sources," reported that the defendant James Holmes mailed to his therapist gruesome details of the diabolical plot. The reference to law enforcement sources was curious because the Arapahoe County (Colorado) District Court Judge had previously issued a gag order in the case (*In re Holmes*, 110 A.D.3d 134 (App. Div., 1st Dep't Aug. 20, 2013) (Saxe, J., dissenting)). The defense claimed leaking the information warranted sanctions against the prosecution, and counsel further requested a hearing in which the reporter would have to reveal her sources.

Although a hearing was scheduled in the Colorado case, Ms. Winter refused to appear. A lengthy legal challenge ensued in New York to determine whether the New York resident was required to appear in Colorado.

Securing witnesses in criminal cases

New York Criminal Procedure Law § 640.10 sets forth the procedures for directing the appearance of out-of-state witnesses in criminal cases pending within and outside New York. Typically, a civil proceeding is commenced and the cooperation of judges of both states is required to make the appearance compulsory.

Hon. Stephen Ukeiley

In *Holmes*, a civil proceeding was commenced in New York State Supreme Court to enforce a Colorado subpoena directing the reporter's appearance. Pursuant to CPL § 640.10(2), a New York resident may be required to testify in a criminal proceeding in another state where the judge in the requesting state certifies that the individual is a material witness. The statute further requires that the New York court conduct a hearing to determine whether (1) the witness is material and necessary to the out-of-state prosecution and (2) if the appearance would result in "undue hardship" to the witness.

If satisfied, the New York judge may, upon request of the requesting state, have the witness taken into custody and immediately brought to that state. Otherwise, the witness is given a date and time to appear and is reimbursed at a rate of $.10 for each mile traveled and $5 per day. Noncompliance may result in prosecution in New York.

Compulsion would constitute a violation of New York Public Policy

Both the New York trial court and Appellate Division held that Ms. Winter was required to appear in the Colorado proceeding because her testimony is material and necessary to an ongoing criminal proceeding in that state. Moreover, the courts explained that there would be no "undue hardship" because the defendant agreed to reimburse Ms. Winter for her travel costs and accommodations (*In re Holmes*, 110 A.D.3d at 134 (*citing Matter of Tran*, 29 A.D.3d 88, 92 (App. Div., 1st Dep't 2006)).

Generally, privilege issues are reserved for the requesting state. Thus, the Appellate Division emphasized that its role was to determine the merits of compelling Ms. Winter's appearance without consideration of whether she would be required under Colorado law to divulge her sources (*Id.* (*citing Matter of Codey*, 82 N.Y.2d 521 (1993) ("privileged status . . . of evidence is not a proper factor for consideration" in determining whether the witness should be compelled to appear))). Colorado law provides a qualified privilege to protect confidential news sources. By contrast, under New York law, reporters have an absolute privilege (*Cf.* N.Y. Civ. Rights Law 79-h(b) and Colo. Shield Law, C.R.S. § 13-90-119).

Ms. Winter appealed to the Court of Appeals, which reversed in a narrow 4-3 decision. Contrary to the Appellate Court, the Court of Appeals considered the probable outcome of the confidential news source issue under Colorado law. The Court of Appeals concluded that if Ms. Winter appeared in Colorado, she most likely would be required to disclose her confidential news sources. Since she was aware of and relied upon the absolute privilege afforded reporters under New York law "[w]hen she made promises of confidentiality," the court held as a matter of public policy that the state's commitment to protecting and preserving New York law was paramount (*Holmes v. Winters*, 22 N.Y.3d 300 (2013), *cert. denied*, 2014 U.S. LEXIS 3747 (May 27, 2014)).

Accordingly, Ms. Winter is not required to appear in the Colorado case. The court emphasized that its ruling was not intended to create a bright line test but rather addressed an exception authorizing the application of New York's journalistic laws.

A divided Court of Appeals concluded that protecting and preserving the integrity of New York's Shield Law in the *Holmes'* case was warranted as a matter of public policy and justification for an exception to the general rule that privilege issues are to be determined by the requesting state.

Note: The Honorable Stephen L. Ukeiley is a Suffolk County District Court and Acting County Court Judge and is the presiding judge of Suffolk County's Human Trafficking Court. Judge Ukeiley is also an adjunct professor at both the Touro College Jacob D. Fuchsberg Law Center and the New York Institute of Technology and the author of numerous legal publications, including his most recent book, The Bench Guide to Landlord & Tenant Disputes in New York (Second Edition)©. He is also a member of the Board of Directors of the Suffolk County Women's Bar Association.

** 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.*

TOURO

Foreclosure Update

By Leif I. Rubinstein

Leif I. Rubinstein

Extension of CPLR 3408 & RPAPL 1304

On June 19 of this year, Governor Andrew Cuomo signed into law a bill, NY LEGIS 29 (2014), 2014 Sess. Law News of N.Y. Ch. 29 (A. 9354, S7119) (McKINNEY'S), that among other things, extends for an additional five years the sunset provisions for N.Y. C.P.L.R. 3408 (a) (CONSOL. 2013) and N.Y. REAL PROP. ACTS. 1304.1(CONSOL. 2012). The bill, co-sponsored by Assemblywoman Helene Weinstein and State Senator Jeffrey Stein, passed unanimously in the Assembly and had only one nay vote (Syracuse State Senator John A. DeFrancisco) in the State Senate. As a result of the signing into law of this bill, N.Y. REAL PROP. ACTS. 1304.1 (CONSOL. 2012) will now expire on January 14, 2019 and N.Y. C.P.L.R. 3408 (a) (CONSOL. 2013) will expire on February 13, 2019.

RPAPL 1304: Notice and Service Requirements in Foreclosure Actions

N.Y. REAL PROP. ACTS. 1304.1 (CONSOL. 2012) requires that "at least ninety days before a lender, an assignee or a mortgage loan servicer commences legal action against the borrower… such lender, assignee or mortgage loan servicer shall give notice to the borrower…" This section further requires that the notice warn the homeowner that they are on the verge of losing their home. *Id.* The notice provides key information relaying how many days the mortgage is in default, how much is owed and the deadline by which it is due. *Id.* Service of the notice gives the homeowner time to be able to come up with a possible solution to saving their home such as negotiating for a modification or getting the lender's approval for a short sale. *Id.* at 1304.3.

N.Y. REAL PROP. ACTS. 1304.2 (CONSOL. 2012) mandates service of the notice by "registered or certified mail and also by first class mail to the last known address of the borrower, and if different to the residence which is the subject of the mortgage."

Non-Compliance with the Service Requirement as Cause for Dismissal

Service of the 1304.1 notice is critical to the successful prosecution of the foreclosure action. In *Aurora Loan Servs., LLC v. Weisblum*, the Second Department found such notice to be a statutorily condition precedent to commencement of the foreclosure action and that the "plaintiff's failure to show strict compliance requires dismissal." 85 A.D. 3d 95, 103, 923 N.Y.S.2d 609, 614 (2d Dep't 2011). This rule was reiterated by the Second Department in the 2013 case of *Deutsch Bank Nat'l Trust Co. v. Spanos*. 102 A.D. 3d 909, 961 N.Y.S.2d 200 (2d Dep't 2013).

CPLR 3408: Mandatory Settlement Conferences in Foreclosure Actions

N.Y. C.P.L.R. 3408 (a) (CONSOL. 2013) establishes a mandatory settlement conference in all foreclosure actions. Within 20 days of the plaintiff filing a proof of service of the summons and complaint "the court shall hold a mandatory conference…for the purpose of holding settlement discussions pertaining to the relative rights and obligations of the parties under the mortgage loan documents…" *Id.*

Good Faith Negotiations between Lenders and Borrowers

N.Y. C.P.L.R. 3408 (f) (CONSOL. 2013) requires that the lender and homeowner "negotiate in good faith to reach a mutually agreeable resolution, including a loan modification, if possible." 22 NYCRR 202.12-a states that "[t]he court shall ensure that each party fulfills its obligation to negotiate in good faith and shall see that conferences not be unduly delayed or subject to willful dilatory tactics so that the rights of both parties may be adjudicated in a timely manner."

Sanctions and Penalties for Non-Compliance to the "Good Faith" Negotiations Requirement

Unfortunately, courts have acknowledged that N.Y. C.P.L.R. 3408 (CONSOL. 2013) does not *compel* a lender to modify a mortgage. In *Wells Fargo Bank, N.A. v. Meyers*, the Appellate Division, Second Department stated that "it is obvious that the parties cannot be forced to reach an agreement, CPLR 3408 does not purport to require them to, and the courts may not endeavor to force an agreement upon the parties." 108 A.D.3d 9, 20, 966 NYS 2d 108, 116, (2d Dep't 2013). In another Wells Fargo case the Appellate Division, First Department stated that "the mere fact that plaintiff refused to consider a reduction in principal or interest rate does not establish that it was not negotiating in good faith." *Wells Fargo Bank, NA v. Van Dyke*, 101 A.D. 3d 638, 638, 958 N.Y.S.2d 331, 332 (1st Dep't 2012).

These cases notwithstanding, it remains the obligations of both parties in a foreclosure action to negotiate in good faith. Courts are imposing penalties on lenders who fail to negotiate in good faith by prohibiting them from collecting legal fees, interest, arrears, and late fees. They are imposing sanctions on both the lenders AND *their attorneys* and have even stayed the foreclosure action or dismissed the action without prejudice forcing the lender to re-file. *See Bank of America, N.A. v. Rausher*, 43 Misc. 3d 488, 981 N.Y.S.2d 269 (2014); O*ne West Bank, FSB v. Greenhut*, 36 Misc.3d 1205(A), 957 N.Y.S.2d 265 (2012); *Wells Fargo Bank, N.A. v. Hughes*, 27 Misc. 3d 628, 897 N.Y.S.2d 605 (2010).

In further sanctioning parties in a foreclosure action, the courts also can rely on Part 130 of the Rules of the Chief Administrative Judge, which in part authorizes financial sanctions for frivolous conduct in civil actions as well as imposes sanctions or costs for unjustified failure to attend a scheduled court appearance. *See Rules of the Chief Administrative Judge*, *Part 130. Costs and Sanctions*, NYCOURTS.GOV, http://www.nycourts.gov/rules/chiefadmin/130.shtml (last visited July 10, 2014).

Why the extension of the CPLR and RPAPL?

Increases in Foreclosure Cases Filings and the Drastic decline in Defaults for Foreclosure Action Defendants

The extension of the sunset provisions for both N.Y. REAL PROP. ACTS. 1304.1 (CONSOL. 2012) and N.Y. C.P.L.R. 3408 (a) (CONSOL. 2013) came about partly because of indications that foreclosure cases will continue to increase in New

(Continued on page 22)

Dean Salkin Named Co-Chair of State Bar's Legal Education and Admission to the Bar Committee

Touro Law Dean Patricia Salkin has been appointed the new co-chair of the New York State Bar Association's Committee on Legal Education and Admission to the Bar. The influential committee is charged with studying developments in legal education and admission to the bar, maintaining adequate standards of legal education, and monitoring the bar admission process. Dean Salkin will serves with co-chair Eileen D. Millett, Esq. of the prominent national firm Epstein Becker & Green, P.C.

"I am delighted that Dean Salkin has agreed to serve as co-chair of this committee," said New York State Bar President Glenn Lau-Kee. "I am confident that she will provide valuable leadership and insight, and that with co-chair Eileen Millet will make a real impact and have a positive, lasting effect at this challenging time for legal education and the legal profession."

"I am honored that State Bar President Glenn Lau Kee has appointed me to co-chair this important committee," said Dean Salkin. "I look forward to sharing my long-standing commitment to legal education reform and experiential learning as we continue to monitor rapid developments and trends in the profession and how they impact legal education. I am pleased that the State Bar is committed to New York emerging as a leader in this regard. Further, the opportunity to work with Eileen Millett, a long-serving co-chair of the committee, who brings perspective as a leading practitioner who has taught in law school, is exciting and presents great opportunity for new ideas and initiatives."

Patricia Salkin was named the first female dean of Touro Law Center in 2012 and serves as the fifth dean in the school's history. Dean Salkin is a current member of the Committee on Legal Education and Admission to the Bar and a member of the City Bar's recently completed Task Force on New Lawyers in a Changing Profession. She is a past chair of the American Association of Law School's State & Local Government Law Section, and is the author of hundreds of books, articles and columns including recent pieces in the Journal of Legal Education and the Pace On-Line Environmental Law Journal on incorporating best practices into the teaching of land use law.

A member of the American Bar Association's House of Delegates, Dean Salkin holds and has held many leadership positions within both the ABA and the New York State Bar Association (NYSBA) including: Past Chair of the ABA State and Local Government Section and current member of the Standing Committee on Governmental Affairs (ABA); Past Chair of the NYSBA Municipal Law Section and Founding Member and Past Chair of the NYSBA

Dean Patricia Salkin

Committee on Attorneys in Public Service; and she has chaired numerous NYSBA task forces, including those focusing on government ethics, eminent domain, and town and village justice courts.

A nationally recognized scholar on land use law and zoning, Dean Salkin is the author of the popular blog, Law of the Land, http://lawoftheland.wordpress.com/. Her land use publications include the four volume 4th edition of New York Zoning Law & Practice (1999-present); the five volume 5th edition of American Law of Zoning (2008-present); Land Use & Sustainable Development: Cases and Materials, 8th ed. (Thomson West) (with Nolon) (2012); Climate Change and Sustainable Development Law in a Nutshell (Thomson Reuters) (with Nolon) (2010); Land Use in a Nutshell (Thomson West) (with Nolon) (2007); Town and Gown: Host Communities and Higher Education (ABA) (with Baker) (2013) and the annual Zoning and Planning Law Handbook, ed. (Thomson Reuters).

She has served on the Board of Directors of the New York Planning Federation, and has been active in land use reform efforts including membership on the Land Use Advisory Committee of the NYS Legislative Commission on Rural Resources. She is a reporter for the American Planning Association's Planning & Environmental Law and on the Editorial Advisory Board for The Urban Lawyer produced by UMKC School of Law for the ABA. Dean Salkin continues to serve as the long-term chair of the American Planning Association's Amicus Curiae Committee. She has consulted on land use issues for many national organizations including: the American Planning Association, the American Institute of Certified Planners, the National Academy for Public Administration and the National Governor's Association.

SCBA's Annual Outing a big success

At the first appearance of light in the sky that Monday, August 11, I knew it would be a gorgeous day for fishing aboard the Osprey V, which sailed out of Port Jefferson harbor with fishing devotees and sunbathers on the top deck. Sam Dimeglio, Bobby Sarnowski, Joe Rocanova and Jodi Jacobs, known as the "Road Kings," were ready to play great music for the benefit of the members and guests who decided to fish that day.

Thank you to the law firm of Barry M. Smolowitz and Tony Chan's Foo Luck Restaurant, Commack, NY who sponsored the fishing trip. A special thank you to Captain Amanda Cash and her crew who kept the big 65 ft Gilliken boat on an even keel. Todd Houslanger won the prize for the most fish caught and Kim Smolowitz won the prize for the biggest fish caught.

The day was perfect for golf and President Elect Donna England, driving a golf cart for the first time, had a wonderful time greeting the players on the course President William T. Ferris welcomed the members and guests at the cocktail awards celebration in the early evening. Bill presented the prizes to the winners of the tournament: Longest Drive went to Sue Pierini and Sal LaCova; Closest to the Pin to Christine Grobe and Harvey Besunder; Men's low gross first and second prizes went to Jerry Kennedy and Ed McCarthy; Women's low gross was awarded to Sue Pierini and Coleen West; Men's low net first and second prizes Pat Carrol and Steven Everson; Women's low net first and second prizes Kim Brennan and Kathy Small. A very special thank you to Regina Vetere of CBS Coverage Group and Ellen Birch of Realtime Reporting who donated the bulk of the raffle prizes and created the beautiful bucket containers.

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

– LaCova

Photo by Ron Pacchiana

Susan Pierini, Dawn Hargraves, Colleen West, Kim Joyce Brennan, Lynn Poster-Zimmerman, Kathy Small and Timothy Mazzara joined President Bill Ferris at the Annual Outing.

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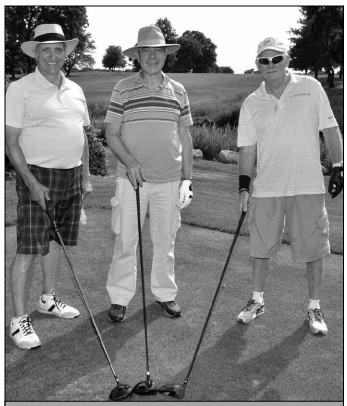
Notice from the New York State Commission on Judicial Nomination

The Commission on Judicial Nomination is seeking recommendations and applications of persons who may be qualified to serve as an Associate Judge of the state's highest court, the Court of Appeals of the State of New York. The Commission is seeking candidates for the upcoming vacancy on the court that will occur as of January 1, 2015, due to Associate Judge Robert S. Smith's mandatory retirement by reason of age. In addition, the Commission is now considering applications to fill the upcoming vacancy on the court that will occur as of November 29, 2014, due to the expiration of the term of office of Senior Associate Judge Victoria A. Graffeo. For a copy of the press release contact jane@scba.org.



More photos from the Annual Outing on pages 16-17

SIDNEY SIBEN'S AMONG US

On the Move…


Jacqueline Siben

Emily Bermudez has joined Jakubowski, Robertson, Maffei, Goldsmith & Tartaglia, LLP as an associate attorney. She will be concentrating her practice in the fields of Family Law and Criminal Defense. **Anastasia Larios** has joined the firm as a recent law graduate, having sat for the July 2014 NYS Bar Examination. She will clerk until her admission and will then join our Litigation Department as an associate attorney.

The Law Offices of Tusa & Levin, located at 732 Smithtown Bypass, Suite 101, Smithtown, New York 11787, has opened. The firm brings together 65 years of litigation experienc in the Personal Injury field.

Announcements, Achievements & Accolades…

Karen Tenenbaum, Yvonne Cort, Christopher Bourell, and **Brad Polizzano**, of Tenenbaum Law, P.C., recently presented a speech for the National Conference of CPA Practitioners, Nassau/Suffolk Chapter. The attorneys spoke on the topics of New York State Voluntary Disclosure, and IRS and New York State Offers in Compromise.

Yvonne Cort of Tenenbaum Law, P.C., recently presented at the New York City Bar Association on updates and developments in New York State residency audits.

Christopher Bourell of Tenenbaum Law PC, spoke at the 6th Annual NYU Tax Controversy Forum about Collection Due Process Hearings on a panel of expert practitioners.

Farrell Fritz partners **Ilene Sherwyn Cooper,** a past president of the SCBA and SCBA member **John R. Morken** were selected by their peers for inclusion in *The Best Lawyers in America* 2015.

Karen J. Halpern, RN, ESQ. was elected to the Board of Directors of The Association for Healthcare Risk Management Professionals [AHRMNY] and the Board of Directors for The American Association of Nurse Attorneys [TAANA] New York Metropolitan Chapter. She is a nurse attorney and Of Counsel to the law office of Lawrence, Worden, Rainis & Bard, PC in Melville.

Michele A. Pincus, a partner at Sahn Ward Coschignano and Baker, PLLC was recently reappointed and sworn in as a board member of the Women's Economic Developers of Long Island (WEDLI). The term is for two years. In addition, she will serve as co-chair of the Membership Committee.

Mark Mulholland, Managing Partner, and senior member of the Ruskin Moscou Faltischek, P.C.'s Litigation Department, has been elected a member of the Touro Law Center Board of Governors.

Farrell Fritz partner **Louis Vlahos**, also a *Suffolk Lawyer* frequent contributor, was an Attorney of the Year finalist at Citibank's SmartCEO 2014 CPA & ESQ Awards.

Congratulations…

To SCBA Treasurer **Justin M. Block** who received the 2014 Distinguished Alumni Award from Hauppauge High School. Justin graduated Hauppauge HS in 1980, received a Bachelor of Science from Cornell University in 1984 and a Juris Doctor from Hofstra University School of Law in 1988.

Congratulations to SCBA past President and New York State Bar Association past President **John P. Bracken,** who was recently nominated by SCBA's Executive Committee for the Leadership in Law Lifetime Achievement Award hosted by *Long Island Business News*.

Condolences…

To Supreme Court Justice **W. Gerard Asher** and his family on the passing of his father, William C. Asher, on August 4, 2014 at the age of 97.

To the family of former District Court Judge **William J. Burke III,** a Court Attorney Referee, who passed away on July 23, 2014.

To the Henry Family on the passing of **Judge Patrick Henry's** brother and **Judge Jennifer Henry's** uncle, Thomas Henry.

To the family of longtime member **Francis "Frank" Patrick Murphy** who passed away on August 19, 2014.

New Members…

The Suffolk County Bar Association extends a warm welcome to its newest members: **Emily Bermudez, Daniel R. Bernard, Kenneth S. Beskin, Mark F. Brancato, Britt Burner, Nicholas J. Damadeo, Neil Diskin, Kaitlyn A. Eisen, David S. Feather, David T. Fowler, Christina M. Gaudio, Robert G. Gingher, Alfred C. Graf, Hayley Gregor, Annemarie Jones, Stephen F. Kiely, Samuel E. Kramer, Thomas Kwon, Walter D. Long, Christine Malafi, Suzanne A. Manaseri, Alita P. McKinnon, Holly C. Meyer, Brian C. Morris, Kevin M. Mulligan, Michelle Murtha, Anna M. Pacca, Renee Pardo, Michael S. Pernesiglio, Jonathan J. Platt, Patricia A. Rooney, Katherine Ryan, Anthony Senft, Ted J. Tanenbaum, Rosanne Trabocchi, Richard Vandenburgh** and **Howard W. Yagerman.**

The SCBA also welcomes its newest student member and wishes him success in his progress towards a career in the law: **Amy Addenberg, Laura A. Ahearn, Joice Avila, Abraham Baya, Christopher M. Bergold, Nicole Berkman, Vanessa Cavallaro, Deirdre Cicciaro, John Cioffi, Jenna Cohn, Andrea Coraci, Justin S. Curtis, Thomas D. Aleo, Kelly Decker, Crystal Dookhan, Leor Edo, Maria E. Feldman, Robert Fogarty, Irene Gaye, Alexsis Gordon, Carrie Holgerson, Farhan Imtiaz, Nick LaStella, Brian LoCascio, Brandon Maharajh, Lilit Manukyan, Giulia Marino, Sean McLeod, Catherine Mendolia, Jeremy M. Miller, Kimberly Moloche, Margaret Rago, Joseph Rizza, Jose Rojas, Jamie Ruiz, Keetick Sanchez, Cristina Sandoval, Jay Sheryll, Lawrence Singer, Igor Stolyar, Jennifer Tocci, Matthew S. Walker** and **Svetlana Walker.**

The SCBA is proud to recognize the contributions and support of this year's Sustaining Members:

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The Real Property Committee Report – 2014

By Andrew Lieb

The Suffolk County Bar Association's Real Property Committee is proud to report on the activities of our committee and the happenings in real estate throughout this past year.

With respect to the committee, we are organizing a public primer on flood insurance to be offered in September or October for the citizens of this county. This primer is essential now that the Homeowners Flood Insurance Affordability Act of 2014 is law and we are no longer subject to the harsh realities of Biggert-Waters. The public needs to be educated about issues with flooding and how to protect themselves in an era where hurricanes, super storms and flash flooding seem to be our new normal.

FOCUS ON REAL PROPERTY SPECIAL EDITION

We need your help as members of the bar to join the committee, participate, and to take advantage of your opportunity to have you voice heard, while gaining access to a great group of attorneys whose collaborative spirit is contagious. As a committee member, we need your input in finding our next issue to tackle.

Andrew Lieb

This issue of *The Suffolk Lawyer* displays the breadth of the field of real estate. I am delighted to see articles on such divergent topics as drones, title insurance regulations, mortgage foreclosures and workouts as well as the new transactional requirements promulgated by the Consumer Financial Protection Bureau.

I am excited about real property, this committee and Suffolk County. Yet, when I forget how important this topic is in our county, all I need do is turn on any channel of the television or open a magazine or a newspaper and I am instantly reminded that Suffolk County includes vineyards and farmland on the North Fork; shopping centers, malls and developments in our core; waterfront bungalows, homes and mansions on both shores; inspired developments and we also have the Hamptons, perhaps the most fabulous real estate playground in the entire world. This is our county.

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

A Brief Tour of New York's New Title Agent Regulation

By Vincent G. Danzi

In January of this year, Governor Andrew Cuomo presented Budget Bill S6357-D Part V / A8557-D Part V (hereinafter the "Bill"), which provides for the licensing and regulation of title insurance agents by the New York State Department of Financial Services (hereinafter the "DFS"). The Bill was approved by the Legislature and signed into law on April 1, 2014. It is slated to become effective at the end of September 2014[1]. Proposed regulations (hereinafter the "Regulations") to implement the purposes of the Bill were recently published July 23, 2014, and are available on the web here: (http://www.dfs.ny.gov/insurance/rproindx.htm).

The Bill and the Regulations will require every title insurance provider in New York State to reexamine their business policies, forms, and procedures, to make sure that they are in compliance with the new rules. The following is a brief tour of some major points of interest to be found in the Bill and the Regulations.

FOCUS ON REAL PROPERTY SPECIAL EDITION

Title agent licensing

This fall New York State will join dozens of other states which license title insurance agents alongside other types of insurance agents as "insurance producers." Title insurance agent licensing has been a subject of discussion among settlement services providers for many years, with New York State a part of an ever-evaporating pool of states that did not directly regulate title insurance agents. With the Bill and with the DFS's new Regulations, thus arrives a long awaited answer to the question of how New York would finally propose to directly regulate the title insurance agent. Nationally-speaking, regulation of the role of the title insurance agent, and its oftentimes companion role, the, "settlement agent," can vary greatly from state to state. In Texas for instance, where land records are most often retrieved from private, "title plants," rather than a county clerk's office, the state has a long history of intense regulation of title insurance agents and "escrow officers."[2] In neighboring Connecticut, by statute, the role of the title insurance agent is reserved to attorneys at law only (with a diminishing population of grandfathered exceptions)[3]. However, in most states east of the Mississippi River, the title insurance agent is regulated alongside other insurance producers as New York has now chosen to do. In states where the title insurance agent can be a licensed non attorney, the role of lender's settlement agent ("bank attorney" in New York), is often left in a sort of "demilitarized zone," between, "services incidental to issuance of a title insurance policy," and the practice of law. While the Bill and the Regulations do provide for disclosures and exemptions for attorneys, they do not appear to make any discernable statements regarding the role of the title agent, bank attorney, or settlement agent vis-à-vis the practice of law. Current New York title agents who can demonstrate to the superintendent (of the DFS) that they have been regularly and continuously performing the functions of a title insurance agent for at least five years, will enjoy a year-long period where they will be able to apply for a producer's license without having to take a written examination.[4] Licenses will have to be renewed and continuing education courses taken.[5]

Vincent G. Danzi

Disclosure of Fees

As to the disclosure of fees, the Bill concerns subject matter also covered by the federal Real Estate Settlement Procedures Act (hereafter "RESPA"), itself of current focus due to the extensive revamping of RESPA's implementing regulations, which will take effect on August 1, 2015, less than one year after the effective date of this Bill. During this dovetailing regulatory implementation period, the "good faith estimate" should merit special attention. The Bill reuses the "good faith estimate" terminology, which has hitherto been the well-known long name of RESPA's, "GFE."[6] Interes-tingly this comes as the current guardian of RESPA (the Consumer Financial Protection Bureau or CFPB) appears to be phasing out the term by replacing the presently used "Good Faith Estimate" with the "Loan Estimate."

Although similar terminology is used, it is worth noting that the estimates required under RESPA are to be provided by a *lender* who is originating a federally-related mortgage loan, whereas the estimates provided for in the Bill are to be provided by the *title agent*, and are not limited to transactions involving federally-related mortgage loans.

However, lest we be tempted to think of the Bill's good faith estimate disclosures independently of RESPA, we need only observe the integral role most title providers presently play in enabling lenders to make their required disclosures under RESPA.

Other subjects:
Premium accounts

The Bill provides that title insurance agents shall be regarded as fiduciaries in connection with "all funds received or collected as insurance agent or insurance broker."[7] The Regulations provide information on how to establish and use a "premium account".[8]

Title closers

Another CFPB-related concept of liability for, and vetting of, third party providers is dealt with in the Bill in the context of Title Closers.[9]

Websites and fee sheets

Title agent websites now must provide information sufficient to allow an applicant to, "independently determine the applicable charges." [10] Title agents who do not have websites must provide similar information in printed form.

Time deadlines and content requirements for Title Reports:

There are now parameters for when Title Reports shall be delivered and what they should contain.[11]

Several things can be fairly said of New York's long awaited title agent regulation. The Bill and the Regulations pierce into sundry issues, and they come at a time when other laws and regulations that cover the same transactions are also changing. A framework has been established for "grandfathering," of current agents, but that framework will not remain open forever. Lastly, DFS has set forth rules in its Regulations that will require a fresh look at the policies and procedures of all title insurance agencies operating in New York, especially as they relate to overlapping law and regulations found at the federal level.

Note: Vincent G. Danzi is the principal of Law Office of Vincent G. Danzi.

1. Budget Bill S6357-D Part V / A8557-D Part V §18 of the Bill
2. See the Texas Basic Manual of Title Insurance (found here: http://www.tdi.texas.gov/title/titleman.html)
3. Connecticut Statutes, Chapter 700a, Sec. 38a-402(13)
4. NY Insurance Law § 2139(g)(1)
5. NY Insurance Law § 2132
6. New York Insurance Law §2113(b)
7. NY Insurance Law §2120(a)
8. 11 NYCRR 20.3(b)(1)
9. 11 NYCRR 35.8
10. 11 NYCRR 35.6(b)
11. 11 NYCRR 35.7

The CFPB's New Integrated Mortgage Disclosure Forms

By Yuliya Viola

New real estate transaction forms are coming soon. After more than two years of research and testing the Consumer Financial Protection Bureau (CFPB) unveiled the RESPA-TILA Integrated Mortgage Disclosures Final Rule (the Final Rule). The Final Rule will replace four current mortgage disclosures that have been in effect for more than 30 years – the Good Faith Estimate (GFE), the initial and final Truth in Lending Statements, and the HUD-1 Settlement Statement – with two new forms.[1] The Final Rule, which amends 12 C.F.R. Parts 1024 and 1026, includes significant changes to the content, timing, and tolerance level of current disclosures that lenders must provide to consumers for most closed-end consumer mortgage loans secured by real property. The nearly 1,900-page Final Rule is effective, and new disclosures will be required to be given on or after August 1, 2015.[2]

Directed by the Dodd-Frank Act[3] to issue rules that combine and simplify certain Real Estate Settlement Procedures Act (RESPA) and Truth in Lending Act (TILA) disclosures that consumers receive in connection with their mortgage application and closing process, the CFPB has created two new forms – the Loan Estimate and the Closing Disclosure.[4] The CFPB claims that the new simplified integrated disclosure forms provide information in a manner that is more readable and understandable to consumers. The new disclosures are intended to improve understanding as to the costs and risks of mortgages, facilitate comparison of the cost of different loan offers, and avoid costly surprises at the closing table.[5]

Yulija Viola

The Final Rule does not apply to home equity lines of credit, reverse mortgages, mortgages secured by a mobile home or by a dwelling that is not attached to real property, and loans made by a creditor who makes five or fewer mortgages in a year.[6]

The Loan Estimate, a three-page form, integrates and replaces the current initial TILA disclosure and the GFE, and also includes new disclosures. It provides a summary of the loan terms, estimated loan costs, and closing costs. It is intended to make it easier for consumers to compare the terms, costs, and risks of different loans. The Closing Disclosure, a five-page form, integrates and replaces the current final TILA disclosure and the HUD-1 Settlement Statement, and also includes new disclosures and a detailed accounting of the transaction. It provides the final loan terms and all costs associated with the loan. It is designed to improve consumer understanding of all final costs of the transaction and loan repayment.

FOCUS ON
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The Loan Estimate must be provided to consumers within three business days after they submit a loan application.[7] Additionally, creditors must deliver the Loan Estimate to the consumer or place it in the mail at least seven business days before consummation of the transaction.[8] The CFPB recognized that consumers may work closer with either a mortgage broker or creditor and as a result, either a mortgage broker or creditor must provide the Loan Estimate form to a consumer upon receipt of an application by a mortgage broker. However, without regard to who provides the Loan Estimate, the creditor will remain responsible for compliance with all requirements.[9]

The consumer must receive the Closing Disclosure form at least three business days before the consumer closes on the loan.[10] This timing requirement differs from the current practice in that consumers today often receive this information at or shortly before closing. Furthermore, under current law, settlement agents are required to provide the HUD-1 to consumers, while creditors must provide the revised TILA disclosure. This requirement has been modified and the Final Rule requires creditor to deliver the Closing Disclosure form to the consumer, but allows creditors to use settlement agents to provide the Closing Disclosure so long as they comply with the requirements of the Final Rule.[11]

The Final Rule also specifies the required content of the Loan Estimate and the Closing Disclosure.[12] On both forms, the interest rate, monthly payment, and the total closing costs are presented on the first page. While a majority of the information contained in the Loan Estimate form is the same as the information contained in the existing disclosures, there are some significant additions. The Loan Estimate now includes the total interest percentage (TIP), which is defined as "the total amount of interest that you will pay over the loan term as a percentage of your loan amount." Furthermore, the Loan Estimate provides the projected amount of payments at five years into the loan term. This requirement represents a departure from the current law in that the initial TILA disclosure shows the total finance charge and the total of payments over the term of the loan but does not provide estimated totals at five years. In addition, the prepayment penalty section of the Loan Estimate form contains a new maximum prepayment penalty amount. The Loan Estimate also includes payment calculations, comprised of scheduled principal, interest rate, mortgage insurance, and estimated escrow, which are presented in separate periodic payment periods. This allows consumers to understand the changes in the amount of monthly payment that may result, for example, from interest-rate changes, balloon payments, or the cancellation of escrow. Finally, the closing cost breakdowns in the Loan Estimate are modified in their presentation from the GFE and the HUD-1 forms.

The Closing Disclosure provides a more detailed breakdown and presentation of information than current disclosures. The Closing Disclosure is similar in content to the Loan Estimate form, but expands upon it. For example, the Closing Disclosure form now contains the lender's partial payment policy. It also includes a warning that if the loan is sold, the new lender may have a different policy. Additionally, the Closing Disclosure contains more information concerning escrow, such as whether the consumer's loan will have an escrow account and certain details as to payments. This form also includes a warning to consumers as to the consequences of cancelling escrow and failing to pay property costs or taxes.

The Loan Estimate and the Closing Disclosure forms are intended to benefit consumers, but lenders and other mortgage providers will face substantial costs and compliance challenges in implementing the Final Rule.

(Continued on page 31)

No Drone For You – The FAA Bans the Use of Drones in Real Estate Brokerage

By Dennis C. Valet

When I hear or see the word "drone," an unmanned United States military airplane that conducts air strikes in combat zones comes to mind. Apparently, when the Federal Aviation Administration (FAA) defines the word "drone," it also considers little Jimmy's Christmas present to be the same thing as a bomb dropping warplane. According to the FAA, both are an "unmanned aircraft system", or as it is more commonly known today, a "drone." In fact, the FAA confirmed this divergent understanding of aircraft on the drone spectrum within a 2007 Federal Register Notice, wherein it defined a "drone" as "an unmanned aircraft… that is used… for flight in the air with no onboard pilot. These devices may be as simple as a remotely controlled model aircraft used for recreational purposes or complex as surveillance aircraft flying over hostile areas in warfare."[1] So, the FAA treats these two completely different aircraft exactly the same when applying its regulations.

Civilian remote control aircraft technology has taken a monumental leap forward in the past few years, prompting companies such as Amazon to announce plans for widespread use of drones and giving Joe Schmoe Rodeo, who lives down the block, free access to an aircraft capable of flying hundreds of feet in the air while carrying a Go-Pro or other camera device.

The FAA's reaction to the apparent threat of skies filled with drones has been to put the lid on the drone industry almost entirely at its outset. A February 26, 2014 update on the FAA website, titled "Busting Myths about the FAA and Unmanned Aircraft,"[2] makes it explicitly clear that the FAA's 2007 Federal Register Notice was still applicable – no person may fly a drone for commercial purposes unless they are a certified pilot flying a certified aircraft with operating approval.

Dennis C. Valet

In its June 18, 2014 Interpretation of the Special Rule for Model Aircraft, the FAA reaffirmed its regulatory reach and stated that it considers model airplanes to be aircraft and therefore, can be regulated. However, the FAA is prohibited by the FAA Modernization and Reform Act of 2012 from promulgating any rule or regulation regarding *model* aircraft. The basis for this prohibition is the fact that model aircraft are inherently less dangerous than large aircraft, which take up significant airspace and pose a real threat to those on the ground and in the air. For once it seems that the government may have used some common sense, however, the FAA Modernization and Reform Act of 2012 contains one fatal flaw – in order to qualify as a model aircraft, the drone must be flown strictly for hobby or recreational use.

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The non-commercial use requirement is puzzling, as it does not relate in any way to the policy behind prohibiting the FAA from regulating model aircraft. If the policy behind permitting the free use of model aircraft by civilians is the fact that the aircrafts are essentially harmless because of their size and range of operation, why does it matter whether the flight is for recreational or commercial purposes? The way the restriction is currently worded, I am free to fly my drone above my own house and take pictures for my own personal use; however, if I sell the pictures to someone, my drone flight has miraculously become dangerous and needs to be regulated by the FAA.

Taking advantage of this non-commercial use requirement, the FAA began passing out $10,000 fines to individuals / companies using drones for commercial purposes. Its first major fine was against Raphael Pirker who used a drone to take photographs and video near the University of Virginia for compensation.[3] The FAA's June 18, 2014 Interpretation of the Special Rule for Model Aircraft brings the threat of the very same fine into the realm of real estate brokerage. As an example of flights which it considers "Not Hobby or Recreation" (and therefore commercial) the FAA specifically lists "[a] realtor using a model aircraft to photograph a property that he is trying to sell and using the photos in the property's real estate listing."[4]

The FAA also fired more shots across real estate brokerages' bows when it subpoenaed numerous New York brokerages looking for evidence of commercial drone use.[5] These targeted threats have caused the National Association of Realtors (NAR) to recommend its members not use drones in connection with their listings.[6] NRT, a leading brokerage nationwide, likewise has banned all of its agents in the northeast from using drones.[7] Both policies cite the ambiguous and arbitrary nature of the restriction against commercial drone flights.

The FAA Modernization and Reform Act of 2012 requires the FAA to create rules to allow for the integration of drones into United States airspace, but the FAA's recent reactions to the use of drones for commercial purposes understandably puts a damper on any hopes of widespread drone use by businesses, including real estate brokerages. If businesses want to break free from the FAA's ban on commercial drone use, drone regulations must focus on the size of the aircraft and where it is operated, not the purpose for which it is being flown.

Rules developed by the FAA regarding the integration of small drones are due by August 14, 2014 (this article was written before the August 14 deadline, but they should be available as you read this) and full integration of non-governmental drones is scheduled for September 30, 2015. The FAA recently closed the window for submission of comments on its June 18, 2014 Interpretation of the Special Rule for Model Aircraft and received over 29,000 comments.[8] While we wait for the rules, keep an eye to the sky, but only if you're doing it for fun.

Note: Dennis C. Valet is an Associate Attorney at Lieb at Law, P.C., a law firm with offices in Center Moriches and Manhasset. Mr. Valet focuses his practice on real estate litigation with an emphasis on representing licensed real estate brokerages and their agents.

1 Unmanned Aircraft Operations in the National Airspace System, Docket No.: FAA-2006-25714.
2 Busting Myths about the FAA and Unmanned Aircraft, *available at* www.faa.gov/news/updates/?newsID=76240.
3 Interpreation of the Special Rule for Model Aircraft, Docket No.: FAA-2014-0396.
4 FAA Modernization and Reform Act of 2012, P.L. 112-95.
5 FAA v. Raphael Pirker, Decisional Order, NTSB Docket CP-217.
6 Interpretation of the Special Rule for Model Aircraft, Docket No.: FAA-2014-0396, Page 11.
7 FAA Subpoenas Practitioners Using Drones, *available at* www.realtormag.realtor.org/daily-news/2014/07/01/faa-subpoenas-practioners-using-drones.
8 Field Guide to Drones and Real Estate, *available at* www.realtor.org/field-guids/field-guide-to-drones-and-real-estate.
9 Drone Photography_NRT Policy Statement, *available at* www.scribd.com/doc/234981333/Drone-Photography-NRT-Policy-Statement.
10 Notice of interpretation with request for comment, *available at* www.regulations.gov e/#!documentDetail;D-FAA-2014-0396-0001.

On the Radar — Foreclosure Update

By Alicia M. Menechino

In light of the continuing high numbers of filings of foreclosure actions in Suffolk County, it is the rare practitioner who is not faced with questions or concerns regarding foreclosure, even if tangential to the primary dispute. A brief overview of recent developments and open questions is offered to assist the learned practitioner.

Extension of Mortgage Forgiveness Debt Relief Act — What's Happening Now?

Since 2007, the passage of the Mortgage Forgiveness Debt Relief Act has offered tax relief to homeowners who chose to sell their home in a short sale or who might otherwise be subject to a post-foreclosure deficiency judgment. The act gave relief for the "income" that becomes mandatorily reportable (Form 1099) by the lender upon such short sale or deficiency judgment of a primary home ("principal residence") due to the debt forgiveness and, consequently, reportable by the tax payer in their annual returns.

Alicia Menenchino

Often referred to as the "Qualified Principal Residence Indebtedness Exception," the tax relief has expired by the terms of the statute as of December 31, 2013. Whether the relief will be extended yet another year will not likely be determined before November 2014.

What's the hold-up, you might ask?

It would seem the proposal for the extension of the Mortgage Forgiveness Debt Relief Act of 2007 has been packaged with a number of other "extenders," i.e. tax relief extensions, for wholly unrelated financial concerns. It is these unrelated extenders, in particular, one in relation to an excise tax on medical devices that helps fund the Affordable Care Act, that appear to be to blame for the packaged bill not being passed. Although some proactive politicians have offered bills, which single out the MFDRA for extension, they too have not yet seen success in its passage.

As a result of this political jockeying, "short sellers" of a primary residence since January 1, 2014 remain in a state of limbo as to whether the debt forgiveness income will be exempt come tax time. Real estate practitioners representing short sellers would be wise to advise their clients of this pending issue of the potential tax liability. Of course, lender's attorneys and foreclosure defense counsel are equally wise to keep an eye on this development in order to fully and adequately counsel our clients.

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While the traditional insolvency and bankruptcy tax exceptions will continue to apply and may be alternatively applicable to your client, it is always best that the tax payer solicit the advice of a qualified accountant to illuminate each individual's options and potential obligations as it suits their unique situation upon a short sale or deficiency judgment.

There is a general optimism that the extension will be passed, but as of the date of this writing (the ides of August), the bill tracking websites only offer a 1 percent projection of the bill's passage. As a result, the "across the board" forgiveness for primary residence short sales remains in question.

Extension of Hamp — We're on for another two years

Like it or not, the famed Making Homes Affordable Program, has been approved for another two years, extending the previous December 31, 2013 deadline to December 31, 2015. Whether this is a dire outlook of the future of the mortgage banking crisis or an optimistic final "punch on the arm" remains to be seen.

Good Faith Not So Good — Spinner Strikes Again

Once again, on August 12, 2014, Suffolk County Supreme Court Judge Jeffrey Arlen Spinner offered up a decision in the action, *LaSalle Bank v. Dono et al.*, bearing Index No. 09-4422, that may strike fear into lenders.

In a motion that must have been most expertly crafted by our fellow brethren in a pro-bono / not-for-profit capacity by the Long Island Housing Services, Judge Spinner "permanently abated" years of interest, attorney's fees, and costs in a residential foreclosure action that commenced in 2009. Five years of litigation, settlement conferences, and negotiations culminated into a judicial finding that the combined alleged actions

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The Suffolk Lawyer wishes to thank Real Property Special Section Editor Andrew Lieb for contributing his time, effort and expertise to our September issue.

COURT NOTES

By Ilene Sherwyn Cooper

Appellate Division-Second Department

Attorney Resignations

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

Michael Stephan Allen
Diane Welling Cipollone
Stuart N. Cohen
Robert Connors
Geoffrey Drury
David A. Edstrom
Brian Paul Ferrara
Rachel Isabel Jones
David Lawrence Kahn
Jesse Lieberman
Ashley S. Miller
Richard J. McGrath
Richard Earl McKewen
Benjamin Peters
Kelly A. Priegnitz
Brian Joseph Schmidt
Herbert Mark Schoenberg
Gail A. Shields
John Mark Tifford
Michael Winn

Attorney Reinstatements Granted

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

Jamie K. Cohn
Bhargavi Mudambi Thannirkulam

Attorney Resignations Granted/Disciplinary Proceeding Pending:

Jerome Plotner: By affidavit, respondent tendered his resignation on the grounds that he was the subject of an investigation pending against him by the Grievance Committee for the Second, Eleventh and Thirteenth Judicial Districts based upon two complaints of professional misconduct alleging, *inter alia,* the mishandling of a lawsuit on a client's behalf, and that a check drawn on his Attorney Trust Account had been dishonored. He stated that he could not successfully defend himself on the merits against charges predicated upon the foregoing. Further, he stated his resignation was freely and voluntary rendered, that he was fully aware of the implications of submitting his resignation, and that he was subject to an order directing that he make restitution and reimburse the Lawyers' Fund for Client Protection. In view of the foregoing, the respondent's resignation was accepted and he was disbarred from the practice of law in the state of New York.

Ilene S. Cooper

Richard N. Tannenbaum: By affidavit, respondent tendered his resignation on the grounds that he was the subject of an investigation pending against him by the Grievance Committee for the Second, Eleventh and Thirteenth Judicial Districts based upon two complaints of professional misconduct involving improprieties in connection with real estate transactions. He stated that he could not successfully defend himself on the merits against charges predicated upon the foregoing. Further, he stated his resignation was freely and voluntary rendered, that he was fully aware of the implications of submitting his resignation, and that he was subject to an order directing that he make restitution and reimburse the Lawyers' Fund for Client Protection. In view of the foregoing, the respondent's resignation was accepted and he was disbarred from the practice of law in the state of New York.

Attorneys Disbarred

Susan Friedman Odery: By decision and order the respondent was immediately suspended from the practice of law, and the matter was referred to a Special Referee to hear and report. The petition against the respondent was based upon 11 charges of professional misconduct alleging that the respondent was guilty of, *inter alia,* converting funds entrusted to her charge as fiduciary, conduct involving dishonesty, fraud, deceit and misrepresentation, by altering a copy of a check and submitting the altered check to, among others, the Grievance Committee, commingling funds, and failing to produce her bookkeeping records in response to the legitimate demands of the Grievance Committee. Although personally served with the court's decision, the respondent failed to serve and file an answer. The Grievance Committee moved to deem the charges against the respondent established, and the respondent did not respond to the motion. Accordingly, the motion by the Grievance Committee was granted, the charges in the petition were deemed established, and the respondent was disbarred, on default, from the practice of law in the state of New York.

Thomas C. Sledjeski: By decision and order the respondent was immediately suspended from the practice of law, and the matter was referred to a Special Referee to hear and report. The petition against the respondent was based upon 13 charges of professional misconduct alleging that the respondent was guilty of, *inter alia,* knowingly making a false statement of law or fact, conduct involving dishonesty, fraud, deceit and misrepresentation, and intentional conduct that prejudiced or damaged a client during the course of the professional relationship. Although personally served with the court's decision, the respondent failed to serve and file an answer. The Grievance Committee moved to deem the charges against the respondent established, and the respondent did not respond to the motion. Accordingly, the motion by the Grievance Committee was granted, the charges in the petition were deemed established, and the respondent was disbarred, on default, from the practice of law in the state of New York.

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

TAX

New York Statutory Resident Denied Credit for Taxes Paid to Connecticut

By Matthew Ryan

In a Suffolk County Supreme Court case decision earlier this year, the judge rejected a constitutional challenge to the taxation of stock option income by a Connecticut couple being taxed as New York statutory residents. *Noto v. N.Y.S. Dep't of Taxation & Fin.*, 2014 NY Slip Op. 30578 (NY Sup. Ct., Suffolk Cnty. Mar. 3, 2014).

Prior to his retirement in 2001, Mr. Noto worked in Virginia and Texas and received stock options from two employers. In 2005 and 2006, those options were exercised. At that time, the taxpayers were domiciled in Connecticut, but were statutory residents of New York since they owned a vacation home in New York and spent more than 183 days in the state.

For the 2005 tax year, the taxpayers paid taxes on their total income to both New York and Connecticut and claimed a credit on their New York return for the taxes paid to Connecticut. The tax department denied the credit, claiming the stock option income was not derived from Connecticut sources within the meaning of Tax Law Section 620(a). The court agreed, citing the Court of Appeals decision in *Tamagni v. Tax Appeals Tribunal*, 91 N.Y.2d 530 (1998), *cert. denied,* 525 U.S. 931 (1998), and held the tax credit only applies to taxes imposed by the other state on income derived or earned in the other state. Intangible income, such as investment and stock option income, is not eligible for the credit since that income has no identifiable situs. The credit is generally only available to apply to taxes on income from a business, trade, or profession carried on in the other state.

Matthew Ryan

On their 2006 New York income tax return, the taxpayers submitted a disclosure statement, which stated that income not derived from sources within New York, including the stock option income, was excluded from the return. This resulted in an audit and the tax department issuing a deficiency notice.

For both tax years, the taxpayers argued that their income was taxed twice in violation of the Commerce Clause of the United States Constitution. They also argued that the New York tax laws burden interstate commerce by favoring individuals who work and live solely in New York compared to statutory residents who are domiciled in another state. The court again cited *Tamagni*, where the taxpayer made many of the same constitutional arguments and where that court held that the tax laws do not substantially affect interstate commerce. The court in *Tamagni* also held that the New York Tax on statutory residents did not violate the Commerce Clause, even though its effect is double taxation.

In situations like this, practitioners should advise clients on the tax effects of their intangible income and related federal and state tax liabilities. New York law imposes taxes on statutory residents' income from intangibles and limits any allowable credit to tax on income derived from sources within the other state. Depending on the employer and the nature of the income, there may be planning opportunities to structure the income so that it would be considered derived from property employed in a business, trade or profession.

Clients may also wish to exercise stock options or trigger the taxability of other intangible income prior to changing their domicile or residencies (or achieving "statutory resident" status, however that term is defined by each individual state). For example, if the taxpayer in this case had exercised the options while living in Texas, there would have been no state income tax. Even if Mr. Noto was a statutory resident of New York at the time the options were exercised, there would have been a stronger argument that the income was derived from sources within that other state and that the New York credit would apply to offset taxes paid to any other state (i.e. Virginia). While these options might conflict with the desired living location and life goals of the taxpayers, they should be aware of the tax consequences resulting from their choice of state residencies, especially their state statutory residencies.

Note: Matthew Ryan is an attorney and CPA with Albrecht, Viggiano, Zureck & Co., PC, whose practice primarily concentrates in federal and New York State tax matters. Matthew received a Bachelor of Science Degree in accounting from the State University of New York at Binghamton and his law degree from St. John's University School of Law.

NEGLIGENCE

School Bus Safety: What Can Our Schools do to Protect Our Children?

By Thomas J. Dargan and Adam H. Silverstone

School districts and school bus contractors are entrusted with the most important of all road users – our nation's children. In the wake of recent newsworthy accidents and attention grabbing headlines regarding unfit bus drivers, claims premised upon school bus accidents have become increasingly tangential and, in turn, personal injury attorneys have become increasingly creative in the application of theories to support these claims.

Two things occur when bus safety is taken lightly. First, children may get hurt. Second, personal injury attorneys seek to punish and expose potential defendants. The attorneys do so by using safety regulations as their sword.

To fully appreciate the impact of these claims, it is important to understand how New York State's laws and regulations regulate the retention of school bus contractors and how personal injury attorneys seek to hold both school bus contractors and school districts liable under alternative theories of 'negligent hiring' and 'negligent retention.'

Under 8 NYCRR§156, contracts for transportation are required "to be in writing and approved by each school's superintendent, who is charged with conducting an investigation into the drivers, routes, time schedules and other matters involving safety." [Education Law §3635(3)]; *Chainani by Chainani v. Board of Education of the City of New York,* 87 N.Y.2d 370 (1995). Essentially, the superintendent of schools is the bargaining agent for a school district [Civil Service Law §201[10], [12].

The Education Commissioner's regulations further requires that

> "[a]pplication for the approval of all bus routes and bus capacities, together with transportation contracts, including contracts for the operation of district-owned conveyances and all contracts for the maintenance and/or garaging of district-owned conveyances shall be filed by the superintendent or district superintendent of schools…. In addition thereto, such superintendent or district superintendent of schools shall file with the commissioner the instructions to bidders, bid forms and specifications upon which such contracts were awarded, a summary of bids submitted, a statement of the actions taken to solicit bids … and such other information as the commissioner may require."
> See 8 NYCRR§§ 156.1, 156.2 and 156.3.

Thomas J. Dargan

There are many broadly written state statutes and regulations in New York that govern school bus contractors and drivers. For example, Article 19-A of the New York State Vehicle and Traffic Law (hereinafter "V.T.L.") requires employers of bus drivers to obtain from bus driver applicants: current physical examinations, an employment background check, driving and drug test results, among other items. Although Article 19-A of the V.T.L. is broad in its scope and requires bus company employers and their employees to perform many tests, undergo various checks and report the results of these findings, as is the case with many regulatory statutes, the statute's follow up and compliance measures fall woefully short in ensuring that drivers are actually undergoing the mandated tests and training. In many cases, there are no affirmative compliance mandates to ensure adherence to the provisions within V.T.L. §19-A.

Even if a school bus contractor completes and files all of the appropriate V.T.L. §19-A regulatory paperwork, a single newsworthy or catastrophic event will lead to extremely close scrutiny and discovery of either detailed safety efforts or a lack of safety efforts by the school district and/or school bus contractor. *Everyone and everything is under the microscope should a serious accident occur.*

Adam H. Silverstone

Insurance coverage also plays a large role. Several employers are misinformed when it comes to insurance coverage and mistakenly rely upon the fact that they simply have liability insurance with high limits in place. Most school districts do require that the school bus contractor name the school district as an additional insured on their bus policies and require indemnification inuring to the benefit of the district in case of a serious liability event.

However, when there is a catastrophic or newsworthy incident, there are often allegations seeking punitive damages against the school district and the bus contractor for recklessness and/or gross negligence. It is well settled in New York that courts will not enforce liability insurance covering punitive damages. *Hartford Accident and Indemnity Company v. Village of Hempstead,* 48 N.Y.2d 218 (1979).

Therefore, no New York licensed broker may lawfully place insurance coverage that would cover punitive damages because New York has ruled that insurance coverage for punitive damages is contrary to public policy. New York is not alone in this regard. California, Colorado, Illinois, Ohio, New Jersey, Rhode Island, and Utah among other states also have prohibitions against liability insurance coverage for "punitive damages." Additionally, many insurance policies do not cover sexual molestation claims and without the proper endorsements for alleged improper sexual acts, there may not be actual insurance coverage for claims of sexual abuse. According to a 2014 *School Transportation News* survey of school administrators, 76 percent of respondents do not know if their district's insurance policy includes liability coverage for sexual abuse cases involving employee and/or student perpetrators.

According to 2011 data from the federal Child Abuse Prevention and Treatment Act (CAPTA), approximately 61,472 children aged 1 to 21 reported that they were victims of sexual abuse. Unfortunately, sexual molestation claims are on the rise across the country. The hiring of an alleged predator or an alleged driver on drugs may leave a company or school district extremely vulnerable to such claims.

In the case where a high profile plaintiff's attorney has made allegations that may inflame a jury, the mere reliance upon insurance limits and indemnity agreements is foolish.

What can go wrong

A basic search for examples of school districts held liable by juries for the actions of school bus drivers reveals countless examples of high verdicts each and every week.

Recently, a San Joaquin, California jury found that the Lodi School District negligently hired a bus driver who had molested an 8 year old special needs student. The case settled for $4.75 million dollars after the verdict was rendered against the district. By way of background, the school bus driver was 60, with a clean record. However, it was discovered that in 2000, he was *arrested* for solicitation of sex with an adult prostitute. Indemnity agreements were in place, however, the jury found the Lodi School District *90 percent liable* for the sexual molestation acts and found the driver, Richard Evans, only *10 percent liable*. The plaintiff's attorney contended

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APPELLATE LITIGATION

Cell Phones and Search Warrants

By Steven A. Feldman

Steven A. Feldman

Sometimes, it takes time for the law to catch up with technology. It used to be that the police could search cellular telephones, and even obtain a caller's location, based on historical data from cell company records, all without a warrant. But two recent cases have changed that.

In *Riley v. California*, 2014 U.S. LEXIS 4497 (June 25, 2014), the Supreme Court recently ruled that the police must obtain warrants before searching cell phones taken from people who are placed under arrest.

The High Court actually addressed two separate cases. In *Riley*, the police stopped the defendant's car, and seized his phone, without a warrant. They then saw photos and videos, which revealed gang activity that resulted in an increased sentence. In the other case, *United States v. Wurie*, the police arrested the defendant and then checked his phone call log, before going to an apartment where they found evidence of drugs.

In both cases, the government argued the search fell an exception to the Fourth Amendment — the search incident to arrest. They claimed that the police could search a person's body and immediate surroundings without a warrant, both for their own protection and to prevent the destruction of evidence.

The Supreme Court disagreed. It reasoned that cell phones do not fall within that exception because the expectation of privacy in a phone's contents outweighs the immediate needs of law enforcement.

This is particularly true, it noted, where today's smartphones are "minicomputers," which contain "vast quantities of personal information," from financial and medical records to archives over many years of private correspondence and records of places the owner has been. Riley, 2014 U.S. LEXIS 4497 at * 22, 34.

Two weeks before *Riley* was decided, the Eleventh Circuit Court of Appeals decided *United States v. Davis*, 2014 U.S. App. LEXIS 10854 * 28 (11th Cir. June 11, 2014), which turned not on a physical search of the phone, but on the historical data maintained by the cell phone company. Law enforcement traditionally seeks that data to determine whether a defendant was at the same location and time as a crime. Davis held that the police must obtain a warrant to obtain historical cell site data from phone companies. Citing *Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967), in which the Supreme Court accepted and relied on the privacy theory to hold interception of a conversation unconstitutional even in the absence of a physical trespass, the Davis Court reasoned that " ... it cannot be denied that the Fourth Amendment protection against unreasonable searches and seizures shields the people from the warrantless interception of electronic data or sound waves carrying communications." Id. at * 15-16.

It also found that this protection covered not only content, but the transmission itself, when it reveals information about the personal source of the transmission, specifically location. Id. It based its holding on *United States v. Jones*, U.S., 132 S. Ct. 945, 181 L. Ed. 2d 911 (2012), in which the Supreme Court found that the warrantless gathering of the GPS location information had violated Jones's Fourth Amendment rights. Id. at * 19.

Riley and *Jones* illustrate the age-old tension between the needs of law enforcement on the one hand, and the privacy rights of a free society on the other. But their holdings are far simpler: before the police can search a cell phone, or obtain records from a cell company, they need a search warrant.

Note: Steve Feldman, of Feldman & Feldman, located at Reckson Plaza, in Uniondale, New York, handles state, federal, civil and criminal appeals in New York, and throughout the United States. Inquiries from the bar on this, or any other appellate matter, are welcome at (516) 522-2828.

PRO BONO

Pro Bono Attorney of the Month: Richard F. Artura

By Ellen Krakow

The Suffolk Pro Bono Project is very pleased to honor Richard F. Artura for a second time**,** as its Pro Bono Attorney of the Month. Mr. Artura has accepted nearly 70 pro bono Chapter 7 bankruptcy cases since joining the Project in 2004. His level of generosity and constant dedication to pro bono work is practically unparalleled and most deserving of this honor.

Mr. Artura is a named partner at Phillips, Weiner, Artura & Cox, in Lindenhurst, N.Y. The firm practices divorce, criminal, personal injury, real estate and bankruptcy law. He joined the firm five years ago, bringing to their legal practice his consumer bankruptcy expertise. Approximately 20 percent of his practice is bankruptcy litigation. His clients are typically working class or considerably low-income individuals who have incurred substantial consumer debt.

Mr. Artura obtained his undergraduate degree from Hofstra University, an MBA from Penn State, and his law degree from St. John's University. He has been practicing consumer bankruptcy law since graduating from St. John's in 1985.

Richard F. Artura

A firm believer in giving back to the community, Mr. Artura is not only a stalwart contributor to the Suffolk Pro Bono Project, but also volunteers at Touro Law Center's Bankruptcy Clinic. Additionally, he provides substantially reduced fee services to those clients in his private practice who cannot afford his usual fee. Mr. Artura often represents individuals with physical or mental disabilities. Asked why he devotes such a substantial amount of time to pro bono and reduced fee legal work, he responded, " I feel for many of the clients I encounter — some of them the poorest of the poor. It's rewarding to know I'm providing assistance to them."

Mr. Artura describes the local bankruptcy bar as "an amazing group of people" and considers most the attorneys his good friends. He discovered just how kind and supportive his bankruptcy colleagues are when he recently was hospitalized for three months. Mr. Artura described how many of his colleagues continually called during his leave of absence to see how he was, and how several voluntarily covered his cases without ever accepting payment for their time. He is grateful to the many judges, clerks, and trustees in the Bankruptcy Court as well, who were also extremely understanding and accommodating during his three month leave.

Mr. Artura and his wife, Bridget have two sons, Jared and Brandon. Jared recently graduated from Touro Law Center. Brandon attends SUNY Plattsburgh, where he studies international business. When not working or spending time with his family and friends, he can be found restoring his classic 1965 Mustang.

In light of the continuous, outstanding work Richard F. Artura has done for the project, we are very pleased to recognize him as the Pro Bono Attorney of the Month.

The Suffolk Pro Bono Project is a joint effort of Nassau Suffolk Law Services, the Suffolk County Bar Association and the Suffolk County Pro Bono Foundation, who, for many years, have joined resources toward the goal of providing free legal assistance to Suffolk County residents who are dealing with economic hardship. Nassau Suffolk Law Services is a non profit civil legal services agency, receiving federal, state and local funding to provide free legal assistance to Long Islanders, primarily in the areas of benefits advocacy, homelessness prevention (foreclosure and eviction defense), access to health care, and services to special populations such as domestic violence victims, disabled, and adult home resident. The provision of free services is prioritized based on financial need and funding is often inadequate in these areas. Furthermore, there is no funding for the general provision of matrimonial or bankruptcy representation, therefore the demand for pro bono assistance is the greatest in these areas. If you would like to volunteer, please contact Ellen Krakow, Esq. 631 232-2400 x 3323.

Note: Ellen Krakow is the Suffolk Pro Bono Project Coordinator for Nassau Suffolk Law Services.

TRUSTS AND ESTATES UPDATE

By Ilene Sherwyn Cooper

Discovery

In *In re Bernfeld,* the court defined the obligations of a party who fails to produce documents on the grounds that they are not within the party's possession, custody or control. The court acknowledged that a party couldn't be compelled to produce information and documents which do not exist or which are not in the party's possession. However, relying upon the opinion of the Second Department in *WMC Mortgage Corp. v. Vandermulen,* 32 Misc3d 1206 (Sup. St. Suffolk County, 2011)*,* the court held when a party claims that he does not have requested documents that he should otherwise have in his possession, an affidavit must be submitted stating the efforts made to search for the demanded documents, as well as to and from whom the party, or someone acting on his behalf, ever transferred possession, custody or control, directly or indirectly, of the documents. In other words, the affidavit must provide the court with a basis to find that the search conducted was a thorough one, or that it was conducted in a good faith effort to provide the records requested.

In re Bernfield, N.Y.L.J., Apr. 10, 2014, at 29 (Sur. Ct. Nassau County).

Motion to Dismiss Proceeding for Revocation of Letters Denied

In a proceeding seeking the removal of the decedent's spouse, as one of the three trustees of the testamentary trusts created under the decedent's will, the respondent moved the Surrogate's Court, New York County, for an order dismissing the petition for failure to state a cause of action.

The decedent died, testate, in 2002, survived by his spouse and an infant daughter. His will established several trusts for his benefit, and named his spouse, his attorney and his accountant and trustees. At his death, the decedent had an 89 percent ownership interest in a luxury car dealership on Long Island, which interest was to fund two of the trusts established under Article VI of the instrument. The trusts were not funded until 2009, and in the interim, the attorney-trustee resigned and was ultimately replaced by the petitioner.

Ongoing disagreements among the fiduciaries regarding administration of the trusts provoked the removal proceeding *sub judice*, which was joined in by the trustee/accountant, as well as a proceeding for removal by the decedent's spouse, and a request by her for a determination that the corporation's amended operating agreement removing her as sole managing member of the company, was void *ab initio.* All three trustees were directed to account.

Ilene S. Cooper

Before addressing the merits of the motion, the court noted that the movant failed to annex a copy of the petition to her pleadings. While recognizing that this defect could serve as a basis to deny the motion, the court held it would consider the motion nonetheless, instructing that the filing of a motion, which requires the court to search its records for a pleading, was not an advisable litigation strategy.

As to the merits, the court opined that on a motion to dismiss for failure to state a claim, the court must accept the facts as alleged in the pleading as true, accord petitioners every benefit of every favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory. Whether a petitioner can ultimately establish his allegations is not part of the calculus.

Within this context, the court held that the petitioner had established a claim for relief pursuant to SCPA §711. In significant part, the petition alleged that the respondent engaged in acts of self-dealing and interference with the operations of the business, which included paying her "personal" staff from the company, hiring her former husband as a marketing director at a salary of $300,000 per year, when he had no marketing experience, and hiring an "unqualified friend" to oversee an $8,000,000 renovation to the dealership. The petition alleged that because of these acts and others, the trustees amended the company's operating agreement in order to remove the respondent as its sole managing member, and establish a Board of Managers to operate the business. Nevertheless, the respondent continued to interfere with the company, by refusing to recognize the agreement, and continuing to refer to herself to manufacturers and others as the company chairman. Other acts of improvidence alleged in the petition included claims that respondent had stated at a trustees' meeting that she viewed all the money in the company as hers, and hiring an accountant, who purportedly had a conflict of interest with the company, to sit on the company's Board of Directors and Audit Committee.

The court found that respondent's contentions that the petition failed to support a claim for breach of trust and fiduciary duty to be based on a "selective and self-serving characterization of the allegations" and unavailing. The court held that the petition clearly informed the respondent of the specific acts of misconduct that were at issue, which it deemed true for purposes of the motion.

Accordingly, the motion to dismiss was denied.

***In re Terian,* N.Y.L.J., Feb. 27, 2014, at 25 (Sur. Ct. New York County).**

Standing to Compel Accounting

Before the court in *In re Moloney,* was a proceeding by the decedent's grandson against the trustee of a revocable trust and irrevocable life insurance trust created by the decedent seeking, *inter alia,* breach of fiduciary duty, negligence, fraud, tortious interference with trust benefits and an accounting. The trusts in issue held the decedent's business interests and life insurance, respectively. The respondents, the trustee of the trusts, and officers and directors of the decedent's businesses moved, by way of two separate motions, to dismiss the petition on the grounds that it failed to state a cause of action, the petitioner's lack of standing, and the documentary evidence required dismissal as a matter of law.

The petition before the court alleged that the trustee acquiesced in certain conduct by the officers and directors of the decedent's businesses, which interfered with his obtaining a license as a funeral director and prevented him from becoming a full time employee of the decedent's business. Further, the petitioner alleged that the subject trust instruments entitled a full time employee of the decedent's business, who was also one of the decedent's issue, to, *inter alia,* distributions of income during the business' operation.

In support of his motion to dismiss, the respondents alleged that the complaint was essentially one for wrongful termination of employment, and thus was outside the scope of the court's subject matter jurisdiction. Further, the respondents maintained, based upon a reading of the terms of the trust instruments, that the petitioner lacked standing to seek the relief requested. Additionally, they claimed that the petitioner's interest in the subject trusts were too remote and indeterminate to accord him with a sufficient basis to compel an accounting.

The petitioner opposed the motions, arguing that the language of the trust instruments provided him with the requisite standing, and that regardless, he was entitled to an accounting.

Based upon a review of the record, and the documentary evidence, the court determined that the petitioner lacked standing to institute the proceeding, and that absent petitioner having a present interest in the trusts, the remaining claim for relief sounding in wrongful termination constituted a dispute between living persons that was beyond the purview of the court's jurisdiction.

Although the court found that the petitioner had a contingent, albeit remote, interest in both trusts, it noted that the occurrence of several layers of contingencies had to occur before his interest could vest. The court opined that while such an interest would theoretically provide petitioner with the requisite standing to compel an accounting, it concluded that it would not be in the best interests of the trusts to compel one at the present time, particularly given its determination with respect to the remaining relief requested by the petitioner. Significantly, in reaching this result, the court determined that the language of the trust instruments indicated that the trustee was not required to account unless specifically ordered to do so on the application of the trustee or a beneficiary of the trust or on the court's own motion. Finding that the term "beneficiary" meant current beneficiary, and therefore, did not include the petitioner, the court held that petitioner lacked standing to request an accounting.

Accordingly, the motions to dismiss were granted.

***In re Moloney,* N.Y.L.J., May 13, 2014, at 27 (Sur. Ct. Suffolk County).**

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

COMMERCIAL LITIGATION

Curtailing the Negligence Standard for Spoliation of Electronic Information

By Leo K. Barnes, Jr.

Electronically stored information ("ESI") encompasses many realms of electronic data, including, most notably, e-mails, computer files, and text messages. Preservation of ESI, as well as the imposition of sanctions when such information is destroyed, is an important aspect of both federal and state commercial practice. However, proposed changes to Rule 37(e) of the Federal Rules of Civil Procedure, which governs the imposition of sanctions for failure to preserve electronically stored information ("ESI"), may dramatically alter the threshold concerning the imposition of sanctions for the loss of data in litigations pending in federal court.

The present Rule 37(e), adopted in 2006, provides:

> Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

The existing rule did not limit an adverse inference instruction for spoliation where a party's culpable state of mind included only ordinary negligence in failing to preserve ESI once that party reasonably anticipates litigation. See, e.g., *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99 (2d Cir. 2002) and *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003).

In late May 2014, however, the Committee on Rules of Practice and Procedure (the "Standing Committee") approved the submission of the proposed amendment to Rule 37(e)[1] to the Judicial Conference of the United States, where the proposed amendment will be considered at the Judicial Conference's September meeting. The proposed rule explicitly rejects the negligence standard in *Residential Funding Corp.* and its progeny, and is intended to remedy the current split among the Circuit Courts of the U.S. Court of Appeals.

The text of the proposed Rule 37(e) sets forth:

> (e) Failure to Preserve Electronically Stored Information. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court may:
>
> (1) Upon finding prejudice to another party from loss of the information, order measures no greater than necessary to cure the prejudice; or
>
> (2) Only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation:
>
> (A) presume that the lost information was unfavorable to the party;
>
> (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
>
> (C) dismiss the action or enter a default judgment.

Leo K. Barnes, Jr.

Accordingly, proposed Rule 37(e) applies *only if*: (i) ESI is lost which should have been preserved in the anticipation or conduct of litigation; *and* (ii) the party failed to take reasonable steps to preserve it. If both elements are not met, the rule is inapplicable.

If, however, the court finds that the rule is applicable, the inquiry then turns to subdivisions (e)(1) and (e)(2). Under subdivision (e)(1), the court, *only upon a finding of prejudice*, may order measures "no greater than necessary to cure the prejudice." The proposed Committee Note states that the range of remedial measures a court may employ are broad, and much is entrusted to the court's discretion. However, the proposed Committee Note explicitly sets forth that the court may not order the remedial measures contained in subdivision (e)(2) unless the court finds that "the party acted with the intent to deprive another party of the information's use in the litigation." Where the court finds that that the party acted with the intent to deprive another party of the information's use in the litigation, then, and only then, may the court order the following severe measures in accordance with subdivision (e)(2):

- an adverse inference instruction that permits or requires the jury to pre-

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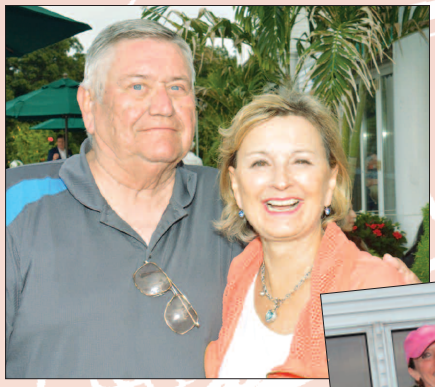
SCBA Outing: Fun in the Sun on Land and Sea

Photo by Barry Smolowitz and Ron Pacciana



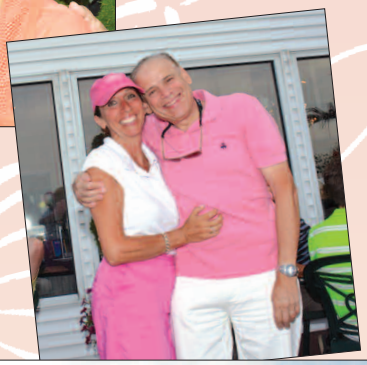


Photo by Barry Smolowitz and Ron Pacejiana

EDUCATION

NY Court of Appeals Rejects Local Cyberbullying Law

By Candace J. Gomez

The New York Court of Appeals recently struck down an Albany County local law that resulted in a 15-year-old high school student being criminally prosecuted for cyberbullying fellow classmates on Facebook. *People v. Marquan M.*, 2014 N.Y. Slip Op. 04881 (2014). Although the court concluded that the local law was "overbroad and facially invalid under the Free Speech Clause of the First Amendment," the court also recognized that "the government unquestionably has a compelling interest in protecting children from harmful publications or materials." *Id*. at *8.

While, on its face, the court's opinion may be viewed as a setback to lawmakers' endeavors to stop child cyberbullying, but the court's opinion also appears to send subtle instructions to lawmakers regarding how to draft more narrowly focused child cyberbullying laws that may be upheld by the Court of Appeals in the future.

People v. Marquan M. is a particularly egregious case of cyberbullying and the Court of Appeals had no doubt that the "defendant's Facebook communications were repulsive and harmful to the subject of his rants, and potentially created a risk of physical or emotional injury…" *Id*. Defendant Marquan M. used Facebook to anonymously post photographs of high-school classmates and other adolescents with detailed descriptions of their alleged sexual practices and sexual partners. *Id.* at *4. Following a police investigation, which revealed that the defendant was the author of the posts, the defendant was charged and pleaded guilty to violating the local law's prohibition on cyberbullying. Pursuant to the local law, the following acts were prohibited:

Candace J. Gomez

> "any act of communicating or causing a communication to be sent by mechanical or electronic means, including posting statements on the internet or through a computer or email network, disseminating embarrassing or sexually explicit photographs; disseminating private, personal, false or sexual information, or sending hate mail, with no legitimate private, personal, or public purpose, with the intent to harass, annoy, threaten, abuse, taunt, intimidate, torment, humiliate, or otherwise inflict significant emotional harm on another person ". *Id*. at *3.

Notably, this law was enacted in 2010 in response to what local lawmakers deemed to be a shortcoming in New York State's Dignity for All Students Act ("DASA"), which prior to its amendments in 2012, did not originally appear to encompass cyberbullying, especially cyberbullying that occurred off school premises. N.Y. Education Law §§10, *et seq*. While local lawmakers may have been motivated by a desire to protect children, the law also targeted what the Court of Appeals deemed to be constitutionally protected modes of expression by adults and corporate entities. *Id.* at *6.

Although the county admitted that the text was too broad and asked the Court of Appeals to sever the offending portions and uphold the remaining portions of the law, the Court of Appeals declined the opportunity to sever the portion of the local law that applied to adults and corporate entities, finding that it was "not a permissible use of judicial authority" to employ the severance doctrine in this circumstance. *Id.* at *7.

The silver-lining for lawmakers, educators and school attorneys who seek stronger measures against cyberbullies that target children, is that the majority's opinion and Justice Smith's dissenting opinion are two-fold. On the one hand, they have made it fairly clear where Albany County legislators went wrong in drafting this local law and, on the other hand, the Court of Appeals has seemingly drawn a map for other local legislatures to follow in order to draft cyberbullying laws that *can* pass the court's strict scrutiny test. It remains to be seen whether another legislative body is willing to test the judicial waters by drafting a criminal law that is narrowly focused on the areas that the Court of Appeals seems to find the most compelling, namely, three types of electronic communications sent with the intent to inflict emotional harm on a child: (1) sexually explicit photographs; (2) private or personal sexual information; and (3) false sexual information with no legitimate public, personal or private purpose. *Id.* at *7-8.

It will be interesting to follow whether the *Marquan M.* case motivates lawmakers to draft cyberbullying laws that have a better chance of passing judicial muster. Likewise, another relevant case worth following is the United States Supreme Court case of *Elonis v. United States*, 134 S.Ct. 2819 (2014), in which the court will grapple with the issue of the free speech rights of those who make threats or deliver violent rants on social media websites.

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. Ms. Gomez is also the Nassau County President of the Long Island Hispanic Bar Association. Follow her at http://nyedulaw.com/ and https://twitter.com/@nyedulaw

TAX

Family Transfers, Part II: Gifts

By Lou Vlahos

This is part two of a five part series.

In an earlier article, we noted that a parent who owns a business faces some difficult issues regarding the disposition of that business among his or her children. Among the options to be considered is a sale of the business, which would allow the parent to treat the children equally, inasmuch as each may share in the proceeds of the sale. However, a sale may not represent the best long-term economic choice where the business is profitable and growing, and where at least one of the children is capable of operating the business. In that case, the parent must consider how to transition ownership of the business to his or her family.

The tax laws have historically hampered the ability of business owners to transfer their interests in the business to their children, with the main obstacles being the gift tax and the estate tax, though the income tax has also been an important consideration.

In the last few years, Congress has made some significant changes in the gift, estate, and income tax planning landscapes. The likelihood of more changes is far from remote. Thus far, these changes have not directly targeted any specific intra-family transfer vehicles, though there are several proposals outstanding which aim to do just that; for example, short-term and zeroed-out GRATs, GST-exempt dynasty trusts, and transactions with grantor trusts have all been highlighted as potential targets. Until Congress acts, however, these transfer techniques remain viable and, when combined with the recent tax changes, in particular, the increased gift tax exclusion and GST exemptions amounts. They provide a parent with the tax-efficient means for reducing his or her taxable estate while benefiting the family.

The following summarizes the tax goals of a gifting program as they relate to interests in a family business. It also describes the various transfer methods by which these goals may be attained.

Lou Vlahos

Goals of Gifting

Generally speaking, one goal of gifting property to a family member is not only to remove the value of such property from the parent's estate, but also to "remove" any subsequent appreciation in the value of that property from the estate. A taxpayer's sale of appreciating property to a child in exchange for a promissory note will freeze the value of the property in the parent's hands at the amount of the note, while shifting the property and any appreciation to the child.

Had the parent not transferred the property during his or her life, the full value of that property as of his or her date of death would be included in his estate and be subject to transfer tax.

Another goal of gifting is to position the remaining business interests held by the parent in a more favorable valuation posture for estate tax valuation purposes (for example, by putting the parent in a minority interest position).

What is a Gift?

Before exploring the various transfer vehicles by which a parent may transition business interests to a child (which will be covered in the next post), it would be helpful to lay some conceptual groundwork.

When a parent gives property to a child, no gift has occurred if the parent receives adequate and full consideration in exchange for the property transferred.

A gift occurs, in most cases, if the consideration received is less than the fair market value ("FMV") of the property transferred. In that case, the amount of the gift is equal to the excess of the FMV of the property transferred over the amount of the consideration received; to the extent that adequate consideration has been received, there has been a taxable sale of property by the transferor. A part-sale/part-gift may occur where the business interest transferred "by gift" is "subject" to a liability and the child "assumes" that liability, a not infrequent event in the case of interests in a partnership or LLC.

It should be noted that a transfer made "in the ordinary course of business" is not treated as a gift even though the parent-transferor does not, strictly speaking, receive full consideration. A genuine business-related transfer qualifies for this exception if it is bona fide, at arm's-length, and free from donative intent (for example, a transfer ostensibly in exchange for services). However, the taxpayer must be prepared to overcome the IRS's predisposition to find a gift in a family setting.

Valuation

If a transfer of a business interest is a completed gift (and we will assume for our purposes that all of the transfers described herein are), the amount of the gift (i.e., the amount on which the gift tax is imposed), is the FMV of the interest on the transfer date.

The valuation of property for gift and estate tax purposes is based upon the "hypothetical willing buyer and willing seller" standard. In other words, it does not consider the actual transferor and transferee, and their relationship to each other (e.g., family) does not matter. These hypothetical individuals are under no compulsion to buy or sell, and they are each deemed to have reasonable knowledge of all the relevant facts (including, in most cases, the fact that the other owners of the business may be related to one another).

In the case of stock in a closely-held corporation or partnership, the FMV of an interest depends on the relevant facts and circumstances of each case. The IRS has set forth many of the factors to be considered (e.g., economic outlook, earning capacity, goodwill, the size of the interest to be transferred, etc.). The courts have accepted appropriate discounts in valuing these interests where they represent minority positions for which there is no ready market. Among these are the discounts for lack of control (LOC) and for lack of marketability (LOM). The application of these discounts does not yield a predictable discount for any given valuation scenario, since each presents a unique set of facts.

Thus, if the interest being transferred by way of a gift is a minority interest in a closely-held entity for which there is no ready market, a hypothetical willing buyer will realize that he cannot easily realize the pro rata value of the entity to which the minority interest "entitles" him. He or she cannot force a dividend distribution, a sale or a liquidation — it will be difficult to convince another hypothetical party to purchase his or her interest. Under these circumstances, the courts and the IRS

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WHO'S YOUR EXPERT?

The Double "D"s of Expert Witnesses

By Hillary A. Frommer

Due Diligence — this is the most important aspect when dealing with expert witnesses. Retaining a testifying expert typically starts with identifying the leaders in the particular area at issue in the case. From that initial research you find scholarly writings and publications by that expert and identify other cases in which the individual has testified as an expert witness. While highly pertinent, this information merely scratches the surface. There is much more you need to learn about your proposed expert. Although not exhaustive, the following steps should be considered by every lawyer when retaining testifying expert witnesses.

- Identify whether the individual historically testifies only for one side (plaintiff or defendant);
- Identify whether the expert has had any affiliation (professional or personal) with the opposing party, his attorneys, or his expert witness;
- Read everything the expert has written on the subject at issue in the case;
- Identify whether the expert has ever proffered an opinion that is contrary to the one he intends to offer at trial, and discuss those prior opinions with the expert;
- Identify whether the individual has ever been precluded from testifying as an expert or otherwise has been the subject of a *Daubert* or *Frye* challenge;
- Read the expert's trial testimony and deposition testimony (if possible) in other cases involving similar issues;
- Read prior expert reports written by that expert on the subject at issue;
- Read written decisions which address or discuss the expert, his testimony, or his opinion;
- Discuss the expert's entire professional background and experience in depth, including any gaps in employment;
- Perform social media searches of your expert, including Google, YouTube, Facebook, and LinkedIn; and
- Ask the expert the tough questions, such as whether he has ever been arrested or convicted of a crime, or professionally disciplined in any way.

Hillary Frommer

Through this due diligence, you can ensure not only that you have retained and designated the most appropriate testifying expert witness for the particular case, but also that the expert will be prepared for a thorough cross-examination at trial. Rest assured that if you are doing your due diligence, so too is your adversary.

Too often, however, lawyers and/or parties wait until the last minute to retain a testifying expert, and thus, lose the opportunity to conduct this important and time consuming, due diligence. This could have damaging effects on the case, especially if the expert's testimony is critical to establishing liability or damages. Consider the following hypothetical.

You represent a plaintiff who experienced headaches after he had a motor vehicle accident. The plaintiff sued the driver of the other vehicle in State Supreme Court, claiming that he was responsible for the accident, which caused the headaches. Believing that the case will settle before trial and concerned about the costs, you do not retain a testifying expert until after discovery was completed and trial is imminent. You then quickly identify an expert neurologist who, you learn from colleagues, is the head of neurology at a reputable hospital, has testified as an expert witness before, and has published articles over the years concerning headaches. You scan the expert's curriculum vitae, have a brief telephone discussion with him about the case, perform a conflict check, and then engage the expert. After reviewing most of the discovery,[1] the expert tells you that he is prepared to testify that, to a degree of medical certainty, the motor vehicle accident caused the plaintiff's headaches.

In preparing the expert for trial, you focus primarily on his direct testimony. You do not prepare extensively for cross-examination because you know that the expert has testified before, and he tells you that he can handle the "tough questions" on cross-examination.

On your case in chief, the expert testifies as to his professional experience, credentials, scholarly writings, his opinion that the accident caused the plaintiff's headaches, and the basis for that opinion. During cross-examination, the defense attorney shows the expert an article published 15 years earlier in the Journal of the American Medical Association (JAMA), in which your expert opined that the particular headaches the plaintiff experienced are not caused by the type of head trauma experienced in a car accident. The expert concedes that he co-authored the article and that JAMA is a reputable and authoritative publication. The article is admitted into evidence, and the jury now hears from the expert himself, that he had an opinion that was directly contrary to the one he now offers.[2] The expert also concedes that he has not published anything else on that issue, or ever retracted that opinion. The expert then reveals that his co-author is a neurologist professionally affiliated with the defendant's expert neurologist (who of course will opine that the crash did not cause the plaintiff's medical problems), and that he had a "falling out" with him years ago, and has disliked him ever since.

While you try to rehabilitate the expert on redirect, the damage has been done. However, with due diligence, you could have avoided that damaging and effective impeachment. You should have discovered that JAMA article and discussed it with the expert. You could have taken the proverbial "wind out of the defendant's sails" by introducing the article during your direct examination and have the expert cogently explain why he changed his opinion. On the other hand, you may have retained a different expert altogether if due diligence leads to you concluding that the article is too problematic and the expert cannot explain to your satisfaction why he changed his opinion 15 years later. Due diligence also would have revealed the expert's prior business relationship with the defendant's expert, and which also may have played a role in your decision to retain him in the first place.

But you didn't do any of those things. And now you look at the jury and wonder, do they believe your expert, or do they think that he is simply a hired gun who will say anything to settle an old score?

Is this an extreme hypothetical? Perhaps. Can it happen? Yes. Can it be avoided? Absolutely. How? The Double Ds.

Note: Hillary A. Frommer is counsel in Farrell Fritz's Estate Litigation Department. She focuses her practice in litigation, primarily estate matters including contested probate proceedings and contested accounting proceedings. She has extensive trial and appellate experience in both federal and state courts. Ms. Frommer also represents large and small businesses, financial institutions and individuals in complex business disputes, including shareholder and partnership disputes, employment disputes and other commercial matters.

1. It is critical that the lawyer gives the expert all of the discovery, and not pre-select that discovery which the lawyer believes is important for the expert to form his opinion.
2. An article can be used for impeachment so long as the expert admits that it is authoritative (*see, e.g.*, *Brown v Speaker*, 2008 NY Slip Op

LAND TITLE LAW

Non-Parties and the Notice of Pendency

By Lance R. Pomerantz

Many practitioners think of the notice of pendency ("NOP") as a routine paper that yields little in the way of controversy. Two recent New York Supreme Court determinations illustrate ways in which concerns about the rights of non-parties influence NOP practice.

The Unrecorded Contract of Sale

123 Powell, LLC v. Camacho, #23499/2013 (Sup. Ct., Queens Cty.) (reported at NYLJ 1202665019281, at *1, July 30, 2014) is an action for specific performance brought by a contract vendee, 123 Powell, LLC ("123 Powell"), against Camacho, the prior record owner. It turned out that Camacho had entered into two contracts, one with 123 Powell, and the other with Mansfield. Camacho wound up selling to Mansfield and 123 Powell brought the instant action, filing a notice of pendency against the property.

Mansfield, a non-party who was now trying to sell the property, sought to have the notice of pendency cancelled. The court (Justice McDonald) held that Mansfield had the right to seek cancellation despite her non-party status pursuant to CPLR §6514(b). That section permits the court, "upon motion of any person aggrieved … to cancel a notice of pendency, if the plaintiff has not commenced or prosecuted the action in good faith." In her motion, Mansfield alleged that 123 Powell's bad faith arose from their commencement of the action despite constructive notice of Mansfield's recorded deed from Camacho.

While allowing Mansfield to move for cancellation, the court denied the motion. Mansfield was claiming superior title pursuant to RPL §294(3), whereby a recorded deed to a "subsequent purchaser … in good faith and for a valuable consideration" trumps an unrecorded executory contract executed by the same seller.

The court held that the affirmation of 123 Powell's attorney was sufficient to raise a question of fact concerning Mansfield's actual or inquiry knowledge about the 123 Powell contract at the time she purchased the property. There is nothing in the opinion to indicate that an affidavit of someone with first-hand knowledge of the situation was submitted in support of 123 Powell.

The Mistaken Cancellation

Up in Westchester County, an E-filing glitch in a mortgage foreclosure gave rise to an interesting situation.

Lender's counsel had commenced the action by E-filing a summons and complaint, along with a NOP. An index number was immediately assigned. The following day a law firm employee sent an email to the county clerk's office indicating that the filing was in error and requesting "cancellation" of the action along with a refund of the filing fees.

Lance R. Pomerantz

The county clerk issued the refund and deleted the docket entries, but otherwise left the electronic file intact, permitting the filing of papers in the future. Both parties continued to file papers until the order of reference was granted by the court, at which time the problem came to light. Lender's counsel then moved, pursuant to CPLR §2001, to reinstate the index number, the summons and complaint, and the NOP, upon payment of the applicable fees.

The court (Justice Connolly) granted the motion concerning the index number and the summons and complaint, but denied it regarding the NOP. Restoring the NOP *nunc pro tunc* to the original filing date "potentially implicates the interests of non-parties" *i.e.* "parties who acquired an interest in the property during the period that the notice of pendency was deleted from the County Clerk's records." In the court's view, this difficulty cannot be addressed merely by doing an updated search, because off-record interests such as tenants can be implicated.

CPLR 2001 directs that a "mistake, omission, defect or irregularity shall be disregarded" so long as a "substantial right of a *party* is not prejudiced [emphasis supplied]," but the lender was seeking to reinstate a document that is intended for the benefit of non-parties. The court held that, in this instance, "the purpose and spirit of the statute can only be accomplished if consideration is given to the potential prejudice that could be caused to non-parties by granting the requested relief." *Wells Fargo Bank, NA v Gonsalves,* 2014 NY Slip Op 24143 (Sup. Ct., Westchester County, June 3, 2014). The lender was permitted to file a new NOP, but without retroactive effect.

The court jumped through some semantic hoops to reach this result, namely, by finding that the word "party" "is susceptible of two or more significations," before concluding that "party" can also mean "non-party." It seems as though the court could have more easily couched the decision as allowing a "mistake in the filing process[,] to be corrected, upon such terms as may be just," which is also permitted under CPLR §2001.

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

MATRIMONIAL

Litigating Child Care and Summer Camp Issues

By John E. Raimondi

The issues of child care and summer camp is frequently litigated in Family Court and Supreme Court in New York State. Pursuant to Family Court Act Section 413 [1] [c] [4] "where the custodial parent is working, or receiving elementary or secondary education or vocational training which the court determines will lead to employment, and incurs child care expenses as a result thereof, the court shall determine reasonable child care expenses and such child care expenses, where incurred, shall be prorated in the same proportion as each parent's income is to the combined parental income. Each parents pro rata share of the child care expenses shall be separately stated and added to the sum of subparagraphs two and three of this paragraph." As per Domestic Relations Law Section 240 [1-b] [c] [6] "Where the court determines that the custodial parent is seeking work and incurs child care expenses as a result thereof, the court may determine reasonable child care expenses and may apportion the same between the custodial and non-custodial parent. The non-custodial parent's share of such expenses shall be separately stated and paid in a manner determined by the court."

The case of *Amos-Richburg v. Richburg*, 94 A.D.3d 1112, 942 N.Y.S.2d 613 (2012) was an interesting case regarding the issue of child care. In *Richburg,* the Westchester County Support Magistrate, after hearing, denied the mother's request that the father pay towards the private school expenses of the parties' son. Additionally, the Support Magistrate, sua sponte, terminated the father's obligation to pay towards the child care expenses of his son.

John E. Raimondi

The parties 2003 Judgment of Divorce directed the father to pay $102.00 biweekly for child care. The parties Judgment of Divorce was also silent on the issue of the child's private elementary school expenses, as the parties' son had been receiving a full scholarship to private elementary school for several years.

In 2008, the mother filed an upward modification petition for an increase in child support and also requested that the father be directed to pay pro rata towards the child's private elementary school expenses as she had been paying the private school tuition, as the child no longer received a full scholarship. After the hearing, the Support Magistrate denied the mother's request for the father to contribute towards the private school expenses of his son and also terminated the father's obligation to pay towards the child care expenses of his son. The mother's objections were denied by the Westchester County Family Court.

The mother appealed and the Appellate Division Second Department reversed, holding that "Pursuant to Domestic Relations Law Section 240 (1-b) (c) (7) the court may direct a parent to contribute to a child's education, even in the absence of special circumstances or a voluntary agreement of the parties as long as the court's discretion is not improvidently exercised in that regard." The Second Department further held that "In this case, the child was enrolled in the private school with the father's approval and performed well in that school, circumstances which warrant a finding that it is in the child's best interest to remain at that school, rather than having his academic and social life disrupted by a transfer to a different school (see *Durso v. Durso*, 68 A.D.3d 1107, 893 N.Y.S.2d 81 (2009). Additionally, there was no evidence that the father's ability to support himself and maintain his own household would be impaired if he were directed to pay his pro rata share of the child's private school expenses. "The Appellate Division further reversed the decision of the Westchester County Support Magistrate terminating the fathers' child care obligation. The Second Department stated "Here the mother testified that she works as a private banker, which often requires her to work until 11 p.m. or midnight during the week. She testified that she did not believe that the child was old enough to be alone for such long periods of time after school, and that she paid a babysitter to watch him three or four times a week. Under these circumstances it was an error for the Support Magistrate to, sua sponte, terminate the father's obligation to contribute to child care expenses."

A frequently cited case regarding child care was the matter of *McBride v. McBride,* 238 A.D.2d 320, 656 N.Y.S.2d 290 (1997). In *McBride,* the mother was granted custody of the parties' two children. Although the mother was not employed outside the home, the Nassau County Supreme Court anticipating that the mother would seek and find employment directed that the father pay an additional $333.00 per month in child care. The father filed a motion two years later as the mother never sought nor obtained employment outside the home. The Nassau County Supreme Court denied the father's motion on the ground that the father had failed to demonstrate a substantial change in circumstances. The father appealed and the Appellate Division Second Department reversed. The Second Department held "It is undisputed that the plaintiff (mother) was not engaged in any of the activities set forth in the statute and did not incur any child care expenses. Requiring the defendant (father) to continue to contribute to nonexistent expenses is contrary to the intent of the CSSA and the apparent intent of the trial court. Under the circumstances, the court erred in denying the defendant's motion."

The case of *Bruckstein v. Bruckstein*, 78 A.D.3d 695, 910 N.Y.S.2d 176 (2010) was an appeal from the Nassau County Family Court. In *Bruckstein,* the parties' divorce directed that the father pay two-thirds of the summer camp obligation of his son. The father sought a reduction alleging that he suffered an unanticipated change in circumstances as he lost his employment. The father further argued that the "teen tour" summer program that his son attended did not qualify for summer camp and that the expense of the program was

(Continued on page 25)

VETERANS

Don't Overlook State and Local Veterans' Benefits

This is part one of a two part series.

By Ken Rosenblum

The federal government offers a wide range of generally well-known benefits in recognition of the service and sacrifice of the men and women who have worn the uniforms of our nation's armed forces: disability compensation, pensions, medical treatment, education, training, vocational rehabilitation, home loans, funerals, burial honors, cemeteries and more.

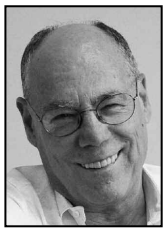
While the VA has been less than stellar in carrying out many of its obligations, its internet footprint has improved dramatically in recent years, and information and access to many federal veterans benefit programs has been centralized in a single user-friendly web portal, at http://www.benefits.va.gov/benefits/.

What is less well known, though, is that New York state and local governments also provide generous benefits to veterans and their families, from the familiar (real property tax reductions) to the practical (civil service preferences, tuition grants) to the arcane (discount hunting and fishing licenses, recreational passes, free pet adoption). The following is the first installment in a two part series summarizing New York state and local government veterans' benefits.

NYS Travel & Recreation

Free or reduced-rate hunting and fishing licenses

NY state residents on active duty get free hunting/big game, fishing and trapping licenses. NY state resident veterans with service-related disability ratings of 40 percent or more (annual proof required) can get reduced-fee hunting and fishing licenses and preference for Deer Management Permits. For more information, contact a DEC Regional Offices or the Deer Management Permit Information Hotline: (866) 472-4332 or visit the DEC website at: http://www.dec.ny.gov/permits/6097.html.



Ken Rosenblum

NY state parks pass

NY state resident vets with 40 percent or more disability rating can get the new Lifetime Liberty Pass for discounted use of state parks, historic sites, and recreational facilities. The new pass succeeds the former Access Pass (which remains valid) and includes free vehicle entry to state parks and DEC-operated day-use areas, as well as numerous state boat launch ramps, historic sites, arboretums and park preserves; free golf at 28 state park golf courses; free swimming pool entrance at 36 state park pools, and discounted camping and cabin rentals at all 119 State Park and DEC campgrounds. To qualify, the veteran must provide written certification from the VA or the NY State Division of Veterans Affairs of a 40 percent or greater service connected disability. For more information and an application: http://nysparks.com/admission/lifetime-liberty-pass.aspx.

Thruway E-ZPass for disabled veterans

The New York State Thruway Authority offers free, unlimited travel anywhere on the thruway to certain disabled veterans. The only qualifying criterion is a fee-exempt vehicle registration from the Department of Motor Vehicles (DMV). Fee-exempt registrations are provided to disabled veterans who qualify with the VA for vehicles with adaptive equipment. Eligibility is not determined by percent disabled designations, specialty license plates, or other similar criteria. For additional information and application: http://www.thruway.ny.gov/ezpass/veterans.html. The free EZPass may be used in any vehicle in which the veteran is traveling.

CDL road test waiver

New York State DMV waives commercial driver's license road tests for veterans with qualifying driving experience for up to 90 days after discharge. Applicants must be regularly employed, or have been regularly employed, within the last 90 days in a military position requiring operation of a commercial motor vehicle, and also have operated a vehicle that is similar to a civilian commercial vehicle for at least two years immediately preceding discharge. Applicants must also certify that they have not had their license suspended, revoked, cancelled or denied in the last four years. http://dmv.ny.gov/commercial-drivers/get-military-skills-test-waiver-0.

(Continued on page 31)

American Bar Association Establishes Veterans' Claims Assistance Network (ABA VCAN)

The ABA, in partnership with the U.S. Department of Veterans Affairs (VA), has created an opportunity for volunteer lawyers to help veterans with disability compensation claims currently pending in the VA's case backlog.

Volunteer attorneys will:

Take part in free, online training on VA claim development, and obtain expedited VA attorney accreditation;

Be matched with a veteran whose claim has been in the VA backlog for more than 125 days;

Receive from ABA VCAN the veteran's full VA file along with a memo analyzing the veteran's legal needs and a recommended course of action; and

Have access to ongoing expert support and consultation resources while handling the veteran's case.

Within 60 days of accepting a veteran's case, the volunteer attorney will submit a completed claim package to ABA VCAN that will receive expedited adjudication by VA, resulting in the veteran receiving his or her long-awaited disability benefits.

For more information and to sign up and give back to our nation's veterans, visit www.ABAVCAN.org.

CONSUMER BANKRUPTCY

Debtor Awarded Attorney's Fees for Discharge Violation

By Craig D. Robins

Louis A. Scarcella, our newest bankruptcy judge in the Eastern District of New York, was sworn in on May 16, 2014. Replacing Judge Dorothy T. Eisenberg, who retired in March, Judge Scarcella sits in the Central Islip Courthouse.

The Judge's first written decision, posted to the official written opinions page on the court's website, is an interesting one involving a creditor who cavalierly ignored a debtor's discharge and was ordered to pay the price for doing so. But, before discussing that decision, let me welcome Judge Scarcella to the bench.

Having regularly practiced here for some time, primarily in Chapter 11 matters, Judge Scarcella is known to many members of our bankruptcy bar. Most recently he was a partner at Farrell Fritz, P.C. in Uniondale, and prior to that was a partner at Phillips Nizer LLP and Scarcella Rosen & Slome LLP, concentrating his practice in creditors' rights, Chapter 11 bankruptcy, loan workouts and commercial litigation.

He also taught bankruptcy law at Hofstra University School of Law and has been a contributing author of several treatises including the Collier Bankruptcy Practice Guide. The Judge graduated *magna cum laude* from Providence College in 1973 and obtained his law degree from Hofstra Law School.

At a recent bench and bar breakfast sponsored by the Bankruptcy Committee of the Nassau County Bar Association in May, the newly appointed judge demonstrated his affable nature and familiarity with virtually all of the bankruptcy attorneys in attendance as he worked the room and warmly conversed with his former colleagues. Based on informal discussions with fellow practitioners, there appears to be a unanimous excitement to see Judge Scarcella ascend to the bench, and counsel are looking forward to his tenure as judge.

Judge Scarcella certainly picked a good topic to address in his first decision. The general objective in filing a consumer bankruptcy is to obtain a discharge, which will free the debtor from personal liability. When a creditor refuses to obey the order of discharge, the creditor is violating this elementary bankruptcy principle, and this is an affront to the Bankruptcy Court.

Craig D. Robins

So what exactly happens when a creditor ignores the discharge and continues to harass the debtor over a pre-petition debt? Judge Scarcella just issued an opinion on that issue, providing one judge's answer to that question. *In re Szenes*, No. 12-77382-LAS, (Bankr. E.D.N.Y. August 6, 2014).

Most abuses can be quickly stopped with a simple letter or phone call. Some recalcitrant creditors will nevertheless ignore the discharge as well as subsequent warnings from debtors' counsel, and engage in sometimes outrageous conduct, requiring court intervention to finally protect the debtor.

In *Szenes*, the debtors filed a typical Chapter 7 consumer petition in December 2012. They scheduled US Bank as a general unsecured creditor for $12,260. The debtors received a routine discharge in April 2013. Despite being notified of the bankruptcy filing and discharge, the creditor, in January 2014, sent a collection letter to the debtor advising him that the account was seriously past due.

Allan B. Mendelsohn of Huntington, one of our district's Chapter 7 trustees who was representing the debtors as their attorney, sent the creditor a warning letter in February 2014 advising them that their collection letter violated the debtors' bankruptcy discharge. The creditor did not respond to the warning letter.

Instead, the creditor sent the debtor another collection letter in March 2014. In response, debtors' counsel quickly filed a motion to reopen, asserting that the creditor continually violated the injunction and repeatedly harassed the debtors in an attempt to collect a discharged debt.

Interestingly, the creditor did not file any opposition, nor did it contact debtors' counsel to explain its conduct or discuss a resolution. In addition, it did not appear at the hearing to explain its conduct. Accordingly, the court permitted the debtors to reopen the case. One week thereafter, in June 2014, the debtors' counsel filed a contempt motion seeking to hold US Bank in contempt, as well as obtain sanctions of $100,000 and attorneys' fees, for the creditor's willful violation of the discharge injunction.

In an 11-page decision that the Judge marked, "Not for Publication," Judge Scarcella pointed out that the court has the power to enforce a debtor's discharge and its own orders by holding a party violating the order of discharge in contempt. He then observed that courts have awarded attorneys' fees when a party willfully disobeys a court order and is found to have acted in bad faith.

He also noted that violations of the discharge injunction that are unintended, or quickly remedied, do not warrant an award of attorneys' fees where there is no evidence of willfulness or bad faith. Here, he held that the creditor willfully disobeyed the order of discharge, and in doing so, acted in bad faith.

Judge Scarcella then turned to address the damages the debtors suffered. Since they incurred additional attorneys' fees of $3,050, as indicated by an invoice that counsel submitted to the court, Judge Scarcella awarded the debtors $3,050 in attorneys' fees as compensatory damages.

In addition, the Judge was upset by the creditor's failure to make any effort to offer an explanation for its conduct or assure the debtors that the collection activity would cease, and determined that a punitive sanction of $500 was also appropriate. He stated, "The Court can draw no other conclusion than US Bank's conduct exhibits a clear disregard and disrespect for the bankruptcy process."

What can we glean from this decision? First, if the creditor had simply taken some kind of conciliatory action, it would not have gotten as deep into this mess as it did. However, I suspect many large banking institutions can't be bothered with getting involved with such proceedings, and write off the costs of sanctions as a part of doing business. Some judges are hesitant to award sanctions for a violation as simple as two computer-generated collection letters, but here, the creditor essentially snubbed its nose at the court and deserved to be punished.

As a practical tip, debtors' attorneys should consider taking active steps to protect their clients when creditors violate the automatic stay or order of discharge, and should consider seeking court intervention when creditors ignore counsel's efforts. However, if the creditor responds in an apologetic fashion and assures counsel that the violation will cease, I would not recommend seeking any relief from the court.

Finally, what does it mean when a judge indicates that an opinion is not for publication? It usually means that the judge has deemed the opinion to be "less important" and that it should be considered binding only on the parties to the particular case. Thus, there is an issue as to whether counsel can cite it, or rely on it, in future litigation.

Nevertheless, this opinion contains a good discussion of the issues a court must consider in deciding violation of discharge of issues, and shows how one judge resolved a particular situation. In 2006, the U.S. Supreme Court adopted a rule permitting litigants to cite unpublished opinions in federal circuit cases. If I had to litigate a violation of discharge issue, I would certainly cite Judge Scarcella's decision.

Note: Craig D. Robins, Esq., a regular columnist, is a Long Island bankruptcy lawyer who has represented thousands of consumer and business clients during the past twenty years. He has offices in Coram, Patchogue, 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.

CORPORATE

Heaven Sent — Raising Capital From an "Angel Investor"

By Joseph V. Cuomo

When an entrepreneur starts a company with plans of fast growth, there is almost always an immediate need for additional capital. While some founders are capable of financing the new venture on their own (*i.e.*, "bootstrapping"), typically, if the company is going to expand, outside capital will be required. Ideally, at this point, the company will have sufficient revenue and/or public interest so as to attract venture capital funds or other institutional investors. However, there are many instances where, at this stage in the company's development, the company has not been able to generate much, if any, revenue or public interest. As such, it is often premature for the company to get any serious consideration from the institutional investor community. To bridge the gap, many companies in this position look to "angel investors."

Angel investor

The typical angel investor is an individual, as opposed to a company or a fund. Angel investors generally have a high personal net worth, are financially savvy, and qualify as an "accredited investor" as defined in Rule 501 of Regulation D under the federal Securities Act of 1933. This rule is designed, in part, to provide a minimum baseline of the type of investor best suited to consider, and assume the risks associated with, investing in early stage private companies. In addition, many angel investors are folks that can also add strategic value to the company beyond mere investment dollars. This additional "value" can come in several forms – *e.g.*, mentorship, operational or financial advice, industry connections and expertise. The popular television show "Shark Tank" provides a good illustration of typical angel investors and the types of investments that they may make. For example, billionaire Mark Cuban often chooses to invest in Internet or sports-related startups; two fields that he has had extensive experience and connections in. The ability of a company to attract an angel investor of this stature often provides the company with instant credibility and exposure, which is often much more valuable than the actual dollars invested.

Hoesph V. Cuomo

Angel investor financing terms

While there are no hard and fast rules here, most angel investor financings are for under $1 million and for under a 25% stake in the company. Unlike the typical venture capital financing, which is almost always in the form of preferred stock, most angel deals are for common stock. As such, angel investors stand "shoulder-to-shoulder" with the founders as to the basic economic rights of company ownership.

Angel investors may, however, insist on having certain special non-economic rights (not inherent via their stock ownership) set forth in an investor's agreement or shareholders agreement. These rights may include: (a) a board seat; (b) board observer rights; (c) voting approval rights over certain fundamental corporate actions, *e.g.*, sale of the business; (d) basic information rights to receive annual and period financial statements and annual budgets; and (e) inspection rights to view company books and records.

Two of the most valuable rights angel investors often seek is "co-sale" (or "tag-along") rights and "pre-emptive" rights. Co-sale rights provide the angel investor with the guarantee that if a third party purchases a majority of the company's equity securities from the founding shareholders, the angel investor will be allowed to participate in the sale. "Pre-emptive" rights guarantee that in the event that the company determines to issue more shares of stock, the angel investor may participate in the new issuance by purchasing that number of new shares so as to maintain the angel investor's current percentage interest in the company.

Along with the rights provided to angel investors by agreement, angel investors are typically subject to a number of obligations to the company under such agreements. The first, not surprisingly, is a duty of confidentiality. As most angel investors will have some rights to receive and/or have access to sensitive and non-public company information, it is important that such investors be held by contract to a similar standard of

(Continued on page 23)

VEHICLE AND TRAFFIC

A Recap of VTL Developments

By David A. Mansfield

This article is a summary of recent developments in the Vehicle and Traffic Law and Department of Motor Vehicles administrative regulations.

The significant matters of interest to the Bar include a clear trend regarding the legal challenges to the Department of Motor Vehicles Regulations imposing of permanent driver license revocations on multiple alcohol and drug offenders under 15 NYCRR Part §136.

The administrative appeals of denial of driver license applications by anecdotal evidence seem to have been uniformly denied under Vehicle and Traffic Law §261.

At least six published CPLR Article §78 Supreme Court decisions have upheld the Department of Motor Vehicle Regulations, Matter of *Funes v. New York State Department of Motor Vehicles,* 2013 NY Slip Op 31082(U), *Gaebel v. New York State Department of Motor Vehicles*, 43 Misc 3d 185.

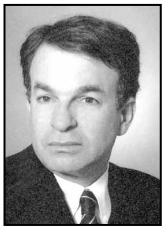
A recent decision was rendered by Justice Steven M Jaeger of Nassau County in Matter of *Brown vs. New York State Department of Motor Vehicle*s, 2014 Slip Op 24082. The Department of Motor Vehicles position prevailed in Matter of *Acevedo v New York State Department of Motor Vehicles,* 2014 NY Slip Op 30422 (U), Matter of *Nicholson v. Appeals Board of Administrative Adjudication Bureau,* 2014 NY Slip Op 31537 (U), *Argudo v. New York State Department of Motor Vehicles,* 1428/13, NYLJ 1202665198378.

The Acevedo case is well worth reading. Eric H. Sills, Esq. submitted an extensive very well written brief, which raised constitutional issues, such as improper delegation of authority, separation of powers and preemption.

The court also considered due process and administrative delay in acting on driver license application that was initially approved, only to subsequently have that approval withdrawn.

The court rejected these challenges and upheld the administrative action of the Department of Motor Vehicles in denying the driver license application.

These CPLR Article §78 challenges against the Department of Motor Vehicle regulations have become the third rail for Special Term. A final resolution of these challenges, for which there are compelling legal arguments, will be eventually be heard by the Court of Appeals.



David A. Mansfield

Part§132 hearings for high-point driving violations defined as five or more points for a single offense is an area of interest and concern. The Department of Motor Vehicles position is if the conviction for the high-point driving offense results in a revocation either after a waiver of hearing or an administrative hearing, your client's application for relicensing will go to Part §136.5 permanent revocation provisions.

The war on distracted driving continues, with the five points assessed 15 NYCRR Part§ 131.3(b) (4) (iii) for improper cell phone use and §1225-c and use of a portable electronic device while operating a motor vehicle §1225-d. These violations will be added to the probationary license suspensions or revocations under §510-b, for offenses committed on or after November 1, 2014, making these offenses primary offenses for a conviction that will result in a mandatory suspension or revocation if committed during probationary license period of six months.

Eligibility for a restricted use license will be determined by §530-6 and 15 NYCRR Part §135.

Upon restoration of a probationary license when the full license is restored or the 60 days is deemed served, that person will commence a new six- month probationary license period under §510-b(3). Please note that a conviction for this type of an offense committed while in the second probationary license status after having a probationary license restored will result in a mandatory minimum six-month revocation. Many times your client will be ineligible for a restricted-use license as they previously opted to obtain one to serve the initial probationary suspension with a restricted-use license.

The Suffolk County Traffic and Parking Violations Agency has been in operation for over one year. The agency has been launched successfully. The people at the agency are its greatest strength, but there is an area of concern.

When representing a client who received a scofflaw notice or a driver license suspension it is important to request a scofflaw lift confirmation. Counsel should advise their client in writing to carry with them a copy of the disposition, the notice of fine due or fine receipt to indicate that they have, in fact, complied with the directive to answer.

The Suffolk County Traffic and Parking Violations Agency unlike the former Suffolk County Traffic Violations Bureau is not networked to the Department of Motor Vehicles in Albany.

The predecessor Traffic Violations Bureau summonses were answered in real time on the Department's records; a separate process is involved in terminating or rescinding suspensions arising out of Suffolk County Traffic and Parking Violations Agency.

Normally, I would advise a client to carry any documentation indicating the matter was disposed of before the suspension date for at least 60 days. Should your client dispose of the matter after the suspension date, they will have evidence that they have paid the suspension termination fee and that the case was resolved.

The dates for the Vehicle and Traffic Law Update for 2014 are Wednesday, November 5, in Southampton for the East End and Thursday, November 12, at the home of our Association. The topics will likely include the state of affairs concerning continuing challenges to the Department of Motor Vehicles Regulations concerning the re-licensing of repeat alcohol and drug offenders, Part §132 hearings for convictions for high-point driving offense, issues arising at the Suffolk County Traffic and Parking Violations Agency and concerns regarding the mandatory ignition interlock law §1198 as relates to Declarations of Delinquency on conditional discharges.

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

President's Message *(Continued from page 1)*

an opportunity for a faculty member or law student to publish an article of interest to the members of the bar. This month you will read articles by Touro Professor Leif Rubinstein on foreclosure update as well as the first in a two part series on veteran's rights by Associate Dean for Administration and Director for Veterans & Service Members Rights Clinic Ken Rosenblum.

Law school students are invited, at no cost, to attend most of our Academy of Law continuing legal education programs.

Law school students will receive emails from the SCBA and the Academy of Law announcing programs and other events. To keep current on the latest bar news, including legal updates, CLE programs, volunteer and networking opportunities, The *Suffolk Lawyer* will be made available to the students at the law school and copies of our annual membership directory have been placed in the Gould Library at the Touro campus for the students' convenience. Also, being a member of our bar association, law students can access the membership directory online.

The initial response from Touro Law School has been enthusiastic. In early August, Board member Leonard Badia and Executive Director Sarah Jane LaCova attended a first year Student Orientation BBQ at Touro to share information with the students, student leaders and faculty on how the students can get involved in the activities of the bar association. The majority of students attending the welcoming event signed up to become members of our Bar Association.

The SCBA, on behalf of its Board of Directors and members, presented its inaugural Award for Law School Excellence to a June 2014 graduating student, Cristina A. Knorr. Cristina was the editor-in-chief of Touro's Moot Court Honors Board of Advocates. The award will continue to be presented to a graduating student who combines academic achievement, leadership skills and a commitment to the integrity and growth of the legal profession.

In late July, at the invitation of Dean Salkin, Lynne Kramer, a former SCBA president and adjunct faculty member of Touro, and I participated in a weekly radio show called "On the Docket" to discuss legal matters that affect Long Islanders. The show airs on Long Island News Radio-Channel 103.9 every Sunday at 4:30 p.m.

On behalf of the Suffolk County Bar Association, we are pleased to welcome all law school students to our membership. We celebrate the *Year of the Professional* and we want to do our part in welcoming law students to our profession for they surely are the future.

Foreclosure Update *(Continued from page 5)*

York for the foreseeable future. In a Memorandum in Support of the bills extending the expiration dates, New Yorkers for Responsible Lending cited a N.Y.S. Office of Court Administration estimate that "there are nearly 60,000 more foreclosure filings to come by the end of 2015." *New Yorkers for Responsible Lending*, *Mem. In Supp.*, EMPIREJUSTICE.ORG, http://www.empirejustice.org/assets/pdf/policy-advocacy/memos/nyrl-settlement-conf-extender.pdf (last visited July 10, 2014). In further support for the extension of the settlement conferences the Memorandum goes on to state that "the most impressive statistic perhaps is that prior to the conferences, over ninety percent of foreclosure cases ended in a default judgment against the homeowner, compared to less than ten percent default rate as reported after the first year." *Id.*

In a November 13, 2013 report, "2013 Report of the Chief Administrator of the Courts: Pursuant to Chapter 507 of the Laws of 2009," Chief Judge A. Gail Prudenti, reported that "from October 2012 to October 2013, a staggering 91,522 settlement conferences took place." *2013 Report of the Chief Administrator of the Courts: Pursuant to Chapter 507 of the Laws of* 2009, NYCOURTS.GOV, http*://www.nycourts.gov/publications/pdfs/2013ForeclosureReport.pdf* (last visited July 10, 2014). While over 63,000 of these conferences were adjourned, only 10,346 ended in default. *Id.*

RealtyTrac, a leading source of foreclosure data, stated in a June 8, 2014 report that nationwide foreclosure filings, default notices and auctions were down 26 percent from the previous year, however, in New York there was an 18 percent increase over that same period of time. This was also a 14 month high.

In a February 26, 2014 report, "Foreclosures Surging in NY-NJ Market," Prashant Goal of Bloomberg News concluded that the "epicenter of the U.S. foreclosure crisis is now firmly planted in New York." Prashant Gopal, *Foreclosures Surging in NY-NJ Market*, BLOOMBERG.COM, http://www.bloomberg.com/news/2014-02-26/foreclosures-climaxing-in-new-york-new-jersey-market-mortgages.html (last visted July 10, 2014).

In light of the expected increase in foreclosure filings it would appear that the extensions of the conference and notice statutes were justified. The calendars in the conference parts are full and the attorney referees are being overburdened. For the most part, gone are the days of a conference being adjourned 8, 10 or even 12 or more times. It is incumbent for litigants to be prepared for every conference. By sticking to the court imposed deadlines, and preparing and submitting documents in a timely manner, you won't risk jeopardizing your case or worse… being sanctioned by the court.

I would like to thank Jamie Ruiz, third year law student at Touro Law Center, for her assistance in researching and editing this article.

Note: Professor Leif Rubinstein is the Acting Director of Clinical Programs at Touro Law Center where he also teaches bankruptcy law and directs the Mortgage Foreclosure and Bankruptcy Clinics. A long time SCBA member and member of the Pro Bono Foundation, Professor Rubinstein resides in South Setauket.

AMERICAN PERSPECTIVES

Here We Go Again — The Supreme Court and the Affirmative Action Debate

By Justin Giordano

On Tuesday April 22, the U.S. Supreme Court by a 6 to 2 vote (Justice Elena Kagan recused herself, based on her having worked on the case in her then capacity as United States solicitor general) upheld the Michigan law that disallows "affirmative action" in college admission. The case in question was *Schuette v. Coalition* to defend Affirmative Action.

To provide context and background to this decision, the Michigan law or initiative, better known as Proposal 2, came into being as a response to the *Grutter v. Bolli*nger case, which was decided in 2003 and in that case the Supreme Court upheld the use of race as one factor among many in law school admissions. The rationale that they put forth in rendering their decision revolved around the principle of ensuring educational diversity.

In 2006 Proposal 2 was put to the Michigan voters and the measure passed by a very comfortable margin of 58 percent for and 42 percent against it, thus amending the State Constitution so that it prohibits discrimination or preferential treatment in public education, government contracting and public employment. The reaction from groups favoring affirmative action was predictable and not long in coming as they responded by suing to block the part of the law concerning higher education.

Six years later in 2012 the United States Court of Appeals for the Sixth Circuit, in Cincinnati, by a vote of 8 to 7, ruled that the Proposal 2 violated the United States Constitution's equal protection clause. In their ruling the majority of the Court of Appeals for the Sixth Circuit stated that the problem with the law was that it restructured the state's political process by making it harder for disfavored minorities to press for change. In turn the state of Michigan appealed the decision to the U.S. Supreme Court. However the proponents of affirmative action, who quite naturally were pleased with the appeals court's ruling, were confident that the Sixth Circuit's aforementioned reasoning would prevail in the high court. Obviously it did not as the decision that the Supreme Court rendered on April 22, 2014.

The Arguments: pro and con

The high court's 6 to 2 decision was somewhat a departure from its historical trend in this line of decisions, which tend to be decided along ideological lines and that has usually resulted in 5 to 4 splits, and particularly so in recent years. The 6 to 2 decision was thus slightly unusual in that Justice Stephen G. Bryer, typically a reliable vote on the liberal side of the ledger, also sided with the more conservative majority in this case. Although Justice Bryer did not adopt the majority's reasoning, the reasoning for arriving at his decision added substantially to the overall thinking of the court and highlighted an extremely valid point, namely and as he wrote, the U.S. Constitution may permit states to use race-conscious admissions for educational diversity but it certainly does not require the states do so. More specifically, and in his own words, Justice Bryer stated "the Constitution foresees the ballot box, not the courts, as the normal instrument for resolving differences and debates about the merits of these programs."

It should be pointed out that this decision encompassed five separate opinions, which were encapsulated in more than one hundred pages. Each one of these opinions, as penned by separate justices, delineated five notably conflicting viewpoints. In general the majority opinions coalesced around the principle that any policy impacting minorities that does not intentionally discriminate against them is not to be decided in a courtroom but rather via the ballot box.

Justin Giordano

Justice Anthony M. Kennedy, who wrote the controlling opinion for three justices, made sure to emphasize that the decision was a modest one. He also underscored, albeit wit a different emphasis, the theme contained in Justice Bryer's opinion. Namely Justice Kennedy's opinion, which was joined by Chief Justice John G. Roberts Jr. and Justice Samuel A. Alito Jr. pointed out that, "This case is not about how the debate about racial preferences should be resolved," it is about who may resolve it. There is no authority in the Constitution of the United States or in this court's precedents for the judiciary to set aside Michigan laws that commit this policy determination to the voters."

Justice Sonia Sotomayor strongly argued that the Court of Appeals for the Sixth Circuit's decision striking down Proposal 2 should have been upheld. To underscore her deep displeasure with the majority decision (or as many people in the media have described it, her passionate dissent), Justice Sotomayor read her summary of her minority opinion, which was joined by Justice Ruth Bader Ginsburg from the bench. As such she stated that Proposal 2 imposed on minorities a burden that other college applicants did not have to bear. She cited that athletes, children of alumni and students from underrepresented parts of the state, retained the opportunity to try to persuade university officials to give special weight or consideration to their applications. She also added the following: "The one and only policy a Michigan citizen may not seek through this long-established process is a race-sensitive admissions policy." Consequently, she opined that difference constitutes a violation of the equal protection clause of the Constitution. Finally Justice Sotomayor admitted, "The Constitution does not protect racial minorities from political defeat." However she hastened to add, "But neither does it give the majority free rein to erect selective barriers against racial minorities."

Naturally she also made reference to the Constitution requiring to be particularly vigilant in such cases given the history of slavery and Jim Crow as well, she stated, "recent examples of discriminatory changes in state voting laws." The latter assertion, presumed discriminatory changes in voting laws, most certainly lacks credibility in this writer's opinion and is certainly not pertinent to the issue at hand since, without getting into a lengthy tangential debate, requiring a photo ID (which is provided free of charge) for voting is a far cry from discrimination on the basis of race or ethnicity since everyone is required to provide it where such laws exist.

There are currently seven states that have measures in place similar to those that have been incorporated into the Michigan state constitution. These include Florida, California, Oklahoma, Washington, New Hampshire, Arizona and Nebraska. These states may be joined by others as in coming years. Time will tell. However no matter how many states eliminate affirmative action as policy or even if the U.S. Supreme Court should at some juncture render an opinion prohibiting the use of affirmative action in college admission and related uses, the debate will still persist. In fact in previous cases pertaining to affirmative action, the most recent being the case involving a challenge to the admission policies of the University of Texas, the Supreme Court in their June 2013 decision ruled that race-conscious selection may be constitutionally permissible, provided that as state wishes to enact such policies in states that wish to use them. This gives indication that the matter is not a settled one and thus the debate itself is far from having run its course.

As a matter of principle however, there's a strong argument to be made that much has been rectified with regard to eliminating barriers based on prejudice and bias against minorities as the enrollment statistics at colleges and universities nationwide demonstrate. California, which was the first to ban affirmative action in its state run colleges and universities, has not seen a drop in admission from minorities across the system. Yes there has been a drop in minority students attending the premier campuses in the system such as Berkeley, UCLA, Davis, and a few similarly situated institutions, however the ranks of minorities have increased in the majority of the other institutions as previously indicated.

It's also worth noting that in Justice Sotomayor's argument that other groups such as children of alumni and athletes can plead their case for their applications to be given additional weight is not a viable argument as it is not comparable to granting set-asides for entire groups. Those in the former categories have to make their case on an individual basis not as a group.

Perhaps Chief Justice Roberts summarized it best when in a 2007 decision he wrote, "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." Although Justice Sotomayor made a veiled attempt at mocking him by citing these words in her spirited dissent, the essence of those words encapsulate a fundamental principle. All must be treated equally based on their individual merits and abilities. American values have traditionally been intrinsically tied in to the principle that every individual is to have equal opportunity not equal or preferred status in applying to an institution of higher learning. The much touted motto associated with American jurisprudence is that "Justice is Blind." Then so it must be with regard to preferential treatment based on gender, race or ethnic background. Wrongs may have indisputably been committed in the past with regard to the mistreatment of minorities but many remedies have been applied since that time. The road to erasing any wrongs has been well traveled and to continue to perpetuate policies that accentuate the divisions among groups does not further the cause of equality for all.

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

Raising Angel Investor Capital *(Continued from page 21)*

confidentiality as company officers and directors. Complimentary to co-sale rights are "drag along" obligations. Under a drag-along provision, if the founders desire to sell a majority of the company's stock to a third party, such founders can force the angel investor to sell as well.

Many angel investor agreements will have restrictions on the angel investor's ability to sell or transfer his or her shares, which absent such contractual restrictions are generally freely tradable. To that end, perhaps two of the most significant obligations imposed on angel investors are the company's "right of first refusal" and the company's "call" right. A "right of first refusal" is a form of transfer restriction that provides that if the angel investor chooses to sell any shares to a third party, the company (or sometimes the founders too) will have the contractual right (but not the obligation) to purchase said shares, either at a pre-determined price or by matching the price negotiated with the third party.

Less often, sometimes angel investors are also subject to a company "call right" — which is the right to purchase (or call in) the angel investor's shares, under certain circumstances and conditions and under pre-defined terms. Angel investors may resist being subject to a call right under a concern that their shares might be "called" just before the company is about to engage in a significant event or experience a tremendous growth in value.

Typical angel investor deal documentation

An angel investor deal will often include an executive summary, which describes the company in businessman's terms and provides basic historical and projected financial disclosure. This document may also take the form of a full-blown business plan or short "teaser." There is usually some kind of purchase agreement to cover the terms and conditions of the stock purchase. The purchase agreement is commonly the document under which each of the company and the angel investor gives the other certain representations and warranties. The angel investor's stock certificate will be a deliverable under the purchase agreement. There will almost always be an investor's agreement or shareholders agreement (if the company is a corporation, or an operating agreement if the company is an LLC). This agreement will set forth the special rights and obligations of the parties discussed above.

While there is no set formula for what an angel investor financing will look like, and each one is unique like a snowflake, this article summarizes and examines some of the common elements. For startups that have outgrown the founder's garage, but have not yet attained the revenue stream or public adoration prized by venture capitalists, an angel investor is often the perfect fit.

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

School Bus Safety (Continued from page 12)

that the School District was liable for negligently hiring Evans and that the defendant School District ignored certain facts about the driver that could have been discovered with reasonable due diligence. The defendant School District had argued that a criminal background check was performed by the California Department of Justice and had confirmed that the alleged arrest had been dismissed and expunged, however, the jury still found the district liable for negligent hiring by placing a higher standard of responsibility upon the district.

Recently, there was a case involving an infant passenger upon a school bus within a school district in Suffolk County, New York. The plaintiff passenger alleged that the school bus operator caused the bus to swerve and veer at a high rate of speed.

The infant plaintiff's head and face reportedly struck a glass window along side the seat. The force of the collision with the window allegedly caused the window to crack. The infant, by his mother and natural guardian, filed a lawsuit against the school district, bus driver, school transportation supervisor, superintendent and school bus contractor. Several allegations of negligence were asserted for the operation of the school bus and gross negligence allegations were asserted against the school district and its contractor for negligently hiring and retaining the driver. Unbelievably, even though the parties entered into a high/low agreement which essentially capped the damages of any verdict to between $300,000 - $1,750,000, the jury determined that a brain injury was sustained as a result of the accident and awarded $3.175 million for pain and suffering and $600,000 for medical expenses per year for a period of 50 years. The jury award was for millions of dollars more than the agreed upon cap put in place. The Appellate Court reduced the award to $1,750,000 pursuant to the agreed upon high/low agreement.

The lesson learned is that when a catastrophic event occurs involving a child, a jury, even conservative juries, may award multiple seven figure verdicts that will either be outside of the insurance policy coverages or above liability limits.

Best Practices

Transporting minor children is a great responsibility. It is incumbent upon the school district to make sure that the selected bus contractor is not merely the lowest bidder. It is imperative that the bus contractors strictly comply and document compliance with the mandates of Article 19-A of the Vehicle and Traffic Law. When evaluating competing bids, the following considerations should be made:

- Safe and well maintained vehicles;
- Safety conscious and fit drivers (actual compliance with drug testing requirements on a regular basis);
- Competent bus contractors (i.e., school bus contractors that make their drivers and driver files available for 'spot reviews' by school districts).

Bus contractors that "go through the motions" when it comes to safety will be exposed and discovered in the event of a catastrophic incident. Discovery proceedings conducted by personal injury attorneys are conducted with microscopic attention to detail. In addition, if a given driver is no longer employed by the bus company at the time of his or her deposition two or three years after the accident (as is often the case), that driver is often willing to implicate the bus contractor with respect to their inattention to safety and training.

Preparation, vigilance, and due diligence is the key toward best practices for transporting children. Representatives of a school district or a bus contractor do not want to be featured in headlines indicating that the school district and/or bus contractor performed the bare minimum with respect to safety.

Richard Gallagher, Director of Transportation for the Bay Shore Union Free School District, made the following statement:

> "I believe that all carriers transporting students should, at a minimum, submit proof of performing all required testing and procedures required for school bus drivers. These should include drug and alcohol testing reports, and proof of driver assignment of drivers to a specific drug testing pool. At least 10 percent of drivers assigned to a school district should be interviewed by the school district to ensure that all procedures in place for the safety of students are being done. In addition, semi-annual review and evaluation of carrier performance should be done."

Toward that end, Mr. Gallagher has created a Contractor/District Review form that is attached as Exhibit "A." The attached checklist form is recommended for use by each and every school district. The New York Association approved the form for Pupil Transportation ("NYAPT").

There are currently no plans to wholly revamp Article 19-A of the New York Vehicle and Traffic Law and there are simply not enough compliance measures in place. Nonetheless, New York's laws and the Education Commissioner's regulations clearly place the burden squarely on the school superintendant to carefully select and oversee all bus transportation contracts. The Appellate Division, Third Department in the *Donlon v. Mills* matter stated

> "A superintendent of schools is charged with the power and duty to be the chief executive officer of the school district and to enforce all provisions of law and all rules and regulations relating to the management of the schools (*see,* Education Law § 1711[2][a], [b])."

See Donlon v. Mills, 260 A.D.2d 971, 973, 689 N.Y.S.2d 260, 263 (3d Dept. 1999). *See also* 94 N.Y. Jur. 2d Schools, Universities, and Colleges § 100 (2014).

Thus, it is up to the superintendant and bus contractor to be self-policing and vigilant in their decision-making so as to protect our children from serious preventable accidents due to driver misconduct. The potential fallout that can and will occur when it is discovered that safety took a back seat during this process is much worse than the initial steps necessary to make sure that safety is a priority. Everyone knows that accidents happen on the road every day. However, if a driver is unfit and should not have been allowed to drive in the first place, it can be ruinous for a lax school district and its superintendant.

Note: Thomas J. Dargan is a partner in the law firm of Lewis Johs Avallone Aviles, LLP in Islandia. He is the chair of the firm's Transportation Practice Group and specializes in the defense of transportation companies and school districts through national insurance programs. He is a graduate of Hofstra University School of Law (J.D., 1996).

Note: Adam H. Silverstone is an associate at the law firm of Lewis Johs Avallone Aviles, LLP in Islandia. He specializes in small to mid-size business advisory services while handling a variety of commercial transactions and general litigation matters in the areas of real estate, landlord-tenant, employment and environmental law. He is a graduate of American University Washington College of Law (J.D., 1992).

Foreclosure Update (Continued from page 10)

of the bank were not made in good faith pursuant to CPLR § 3408. The underlying foreclosure action still stands.

Of particular interest here is the fact that a loan modification had admittedly been offered to the borrower, albeit allegedly outside the applicable modification guidelines.

Citing support by many recent Second Department decisions, Judge Spinner noted that little was offered by the bank in the way of admissible evidence regarding the factual history to demonstrate the bank's good faith efforts (or to refute the borrower's claims that it had complied with all requests) in opposition to the motion.

The salve for the bank: what's the chance that the house will sell at auction for more than the principal due and owing, anyway? A potential deficiency judgment encompassing all the extra fees, costs, and interest is not likely worth much to the lender whether it is for $400 or $400,000 in light of the typical foreclosed borrower's lack of assets.

I smell an appeal. Still, lender beware!

Second Department Decides — Uniform Acknowledgment Plus Jurat Precludes CPLR 2309(c) Certificate of Conformity

In an action for residential foreclosure, the lender appealed a Nassau County Supreme Court decision dismissing the foreclosure complaint due to an uncertified out-of-state affidavit in the lender's unopposed motion for summary judgment and order of reference.

In its well-reasoned decision made on August 13, 2014, *Midfirst Bank v. Agho,* 2014 NY Slip Op. 05778, (2d Dept)(2014), the Second Department overruled the King's County Supreme Court and rejected the oft-held rule that all out-of-state affidavits require a Certificate of Conformity in order to be considered as competent and admissible evidence.

In particular the court held:

A combined reading of CPLR 2309(c) and Real Property Law §§ 299 and 311(5) leads to the inescapable conclusion that where, as here, a document is acknowledged by a foreign state notary, a separate "certificate of authentication" is not required to attest to the notary's authority to administer oaths. Real Property Law § 311(5) exempts the officers enumerated in Real Property §299, such as foreign notaries, from the requirement for a certificate of authentication. A certificate of authentication becomes necessary when an out-of-state acknowledgement is provided by a foreign officer other than one enumerated in Real Property Law § 299, or when an acknowledgment is taken in foreign countries other than Canada, or by foreign mayors or chief civil officers not under seal.

Id. (Internal citation omitted).

While the learned counsel is already aware that such a certificate can be submitted *nunc pro tunc* to cure the non-jurisdictional defect, this loosening of the necessary requirements is a boon to practitioners to whom speed and efficiency is often a priority.

What is best about this decision is its far reaching effects on our everyday practice. It is not just applicable to residential foreclosure actions, although tested and decided in that capacity. It is seemingly applicable to any and all out-of-state affidavits in which a notary is the administering officer, whether in relation to a personal injury action, medical malpractice action, contract action, or otherwise.

Most attorneys will agree, the Second Department has handed down a long-needed decision that sees to the original intent and purpose of the relative attestation statutes while minimizing the necessary "nuts and bolts" appurtenant to our daily practice.

Note: Alicia M. Menechino is a member of LaVelle & Menechino Law Office, LLP.

Spoliation of Electronic Information (Continued from page 15)

sume or infer that that the lost information was unfavorable to destroying party;
- dismissal of the action; or
- entering a default judgment.

Thus, the proposed rule forecloses the possibly of an adverse inference instruction or striking a pleading *unless* the court makes a finds that the destroying party acted with the requisite intent: to wit, the intent to deprive information from the other party.

It remains to be seen if the Judicial Conference will approve these changes. If adopted, the rule will be a dramatic departure from the current standard in both New York federal and state courts, which requires mere negligence for the imposition of, *inter alia*, adverse inference sanctions. Additionally, if adopted, the standard for spoliation of ESI will be more stringent when practicing in federal court (requiring intent to deprive) and more lenient in state court (requiring only ordinary negligence), another consideration for counsel when evaluating a proposed forum for a particular litigation, and another reason for early interaction between counsel, client and a client's IT personnel.

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

1. The Standing Committee's meeting Agenda Book containing the proposed Rule 37(e) can be found at http://www.uscourts.gov/uscourts/-RulesAndPolicies/rules/Agenda%20Books/Standing/ST2014-05.pdf

Bench Briefs (Continued from page 4)

and granted the cross-motion by plaintiffs for a default judgment against the defendants.

In rendering its decision, the court noted that although the pro-se defendant submitted a motion to extend time to answer, neither he nor any other defendant opposed plaintiffs' motion for a default judgment. Generally, where motion papers are unopposed, the uncontroverted facts set forth therein are deemed admitted. Here, even if the defendant's motion had been opposed, the plaintiffs submitted proof required by CPLR §3215 prior to entry of judgment by default and therefore, plaintiffs' motion for a default judgment as to liability was granted. All issues of damages were to be addressed at inquest. Inasmuch as the defendant's opposition failed to make the requisite showing of a meritorious defense or a reasonable excuse for the default and failed to include a proposed answer, the defendant's motion for an extension of time to answer was denied.

Honorable Arthur G. Pitts

Motion to confirm the referee's report on the amount due and a judgment of foreclosure and sale granted; argument that a plaintiff lacks standing is waived unless it is raised in an answer or a pre-answer motion to dismiss.

In *Hudson City Savings Bank v. Judi Simonson, Michael Henry, Maureen Henry,* Index No.: 24577/2012, decided on March 11, 2014, the court granted plaintiff's motion for an order confirming the referee's report on the amount due and a judgment of foreclosure and sale. In opposition to the motion, the defendant averred that plaintiff lacked standing to bring the instant action. In granting the application, the court noted that it is well settled that the argument that a plaintiff lacks standing is waived unless it is raised in an answer or a pre-answer motion to dismiss. Herein, the defendant failed to timely raise such defense and as such, it was waived.

Motion and cross-motion for summary judgment denied; conflicting evidence of the ownership of the subject equipment and the parties had not conducted any discovery as to such issue thereby rendering the motions premature.

In *MLS Funding Corp v. Comprehensive Cardiac Services of New York, P.C., Zaheed Tai, Sudhesh Srivastava and Hul Guan,* Index No.: 2081/2012, decided on April 23, 2014, the court denied the motion and cross-motion for summary judgment.

In deciding the motion, the court noted that although summary judgment was an extreme remedy, it was appropriate in cases where the documentary evidence allowed only one interpretation. Here, the court concluded that the documentary evidence proffered by the parties provided conflicting evidence of the ownership of the subject equipment and the parties had not conducted any discovery as to such issue thereby rendering the motions premature. Furthermore, the court noted that the function of the court upon a motion for summary judgment is issue finding not issue determination. It is a most drastic remedy, which should not be granted where there is any doubt as to the existence of a triable issue of fact, or where an issue is even arguable. According, plaintiff's motion and the defendant's cross-motion were each denied.

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

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

Litigating Child Care and Summer Camp Issues (Continued from page 20)

unreasonable. The Nassau County Support Magistrate found after a hearing that the father did not offer any explanation for his loss of employment. After trial, the Support Magistrate found that the father failed to prove that his loss of income was unavoidable. See *Kronenberg v. Kronenberg*, 101 A.D.2d 951, 475 N.Y.S.2d 638 (1984). In addition, after hearing, the father failed to prove that the program attended by the son did not qualify as a summer camp or that the cost was unreasonable. After trial, the Support Magistrate also granted the mother attorney's fees in the amount of $8,720.00, which was upheld on objection by the Nassau County Family Court and appeal to the Appellate Division Second Department. See Family Court Act section 438 [b] and *Nieves-Ford v. Gordon*, 47 A.D.3d 936, 850 N.Y.S.2d 588 (2008).

Another interesting case regarding child care is the case of *Scarduzio v. Ryan,* 86 A.D.3d 573, 926 N.Y.S.2d 909 (2011). In *Scarduzio,* the father appealed a decision after trial of the Westchester County Support Magistrate. The father's objections to the order of the Westchester County Support Magistrate were denied by the Westchester County Family Court. The father appealed. On appeal, the Appellate Division Second Department held that the father should be directed to pay for child care only his share of the child care expenses actually incurred by the mother. The Appellate Division Second Department further denied the father's argument that the cost of the after school program and the summer camp the child was enrolled in did not qualify for child care. The Appellate Division further stated "The father has offered no evidence to refute the mother's contention that these programs provide child care for the the child while she is at work. Accordingly, those programs qualify as child care expenses consistent with the purpose of Family Court Act Section 413 (1) (c) (4)." The Second Department further stated "where the custodial parent is working... and incurs child care expenses as a result thereof, the court shall determine reasonable child care expenses and such child care expenses, where incurred, shall be prorated [and] each parent's pro rata share of the child care expenses shall be separately stated and added: to the parent's basic child support obligation."

In the matter of *Shanon v. Patterson*, 294 A.D.2d 485, 742 N.Y.S.2d 653 (2002), the Queens County Supreme Court upheld the father's request to reduce the child care obligation from $1,700.00 per month to $964.00 per month. The Appellate Division Second Department held that "The record indicates that the child care expenses in excess of those for day care are required in conjunction with her full time employment. In light of the fact that the plaintiff is not currently employed, albeit she is seeking employment, the defendant husband should only be required to contribute to the cost of child care expenses related to the search for employment. (See Domestic Relations Law Section 240 [1-b][c][6]; *McBride v. McBride*, 238 A.D.2d 320, 656 N.Y.S.2d 290 (1997)."

Note: John E. Raimondi has been employed as a Family Court Magistrate since 1999. He was previously employed with the Suffolk County Legal Aid Society and was also a partner in Raimondi & Raimondi, P.C. He received his Bachelors Degree from John Carroll University, Juris Doctor from Creighton University School of Law and an LLM, Summa Cum Laude from Touro Law School. He is a former Officer of the Suffolk Academy of Law, a frequent lecturer at the Suffolk County Bar Association, an Advisory Committee Member of the Suffolk Academy of Law, a Program Coordinator with the Suffolk Academy of Law and an Adjunct Professor at Briarcliffe College.

Family Transfers, Part II: Gifts (Continued from page 18)

have recognized that various discounts may be applied to the so-called "normative" value of an equity interest in order to determine its fair market value.

Conversely, if the parent transfers a majority interest in the entity, which interest enables the holder (the child-transferee) to control the operation of the business, to cause it to make distributions to its owners, to sell the business or to liquidate it, etc., then the value of such interest is determined without regard to the discount for lack of control, though marketability discounts should still apply (depending, in part, upon the assets of the business).

Position for Estate Tax valuation

This valuation reality supports the wisdom (from a tax perspective) of making gifts of minority interests in the family business to family members. It also presents another benefit for lifetime transfers to family. Not only may such transfers remove the appreciation of the interests from the parent-donor's estate, they may also cause the interests retained by the parent to fall below 50 percent of the total outstanding equity of the business. In other words, it may cause the parent to become a minority owner, which, at his or her death, will cause the parent's remaining equity interest to be valued with the benefit of discounts for LOC and LOM.

Other considerations

Before describing some of the vehicles that are typically utilized in transferring business interests to family members, we should consider whether the parent's transfer would make sense from various perspectives in addition to the estate tax.

- First, and foremost, does the transfer make business sense? We will assume for our purposes that it does; otherwise, the discussion should end at this point.

- Second, can the parent "afford" to make the transfer; i.e., does the parent need the income stream generated by the business interest, and is the parent "comfortable" with giving up ownership of the interest?

- Third, what are the gift and estate tax benefits of the transfer? A gift will remove the business interest and its future appreciation from the parent's estate. It may reduce the value of the parent's remaining interests in the business (much the same way that inter-spousal transfers do, *a la* Bonner and Mellinger).

However, with the increased gift tax exclusion – and its unification with the estate tax – to $5.34 million in 2014 ($10.68 million per married couple), the indexing of the exclusion amount for inflation, and the ability of a surviving spouse to utilize the unused exclusion amount of a pre-deceasing spouse (the so-called "portability" election), the estate tax-based justification for gifting business interests may be much diminished for many parent-business owners.

Indeed, from the perspective of many business owners, depending upon the anticipated value of their taxable estate, the better tax plan may be to hold on to the business until their date of death. In this way, they can secure a step-up in the adjusted tax basis of the business interests. This will enable the beneficiaries of their estates to secure certain income tax benefits, including the reduction of gain on a subsequent sale of either the interests or of the assets of the business (depending upon some other factors), or the reduction of ordinary income as a result of increased depreciation or amortization deductions (for example, as the result of an IRC Sec. 754 election). This will be the subject of a later article.

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

Changing Times at the Suffolk Academy of Law (Continued from page 1)

on-line companies mass-produce "bargain" CLE courses, low-cost programs featuring vague, generic content often unrelated to actual New York practice.

Despite – or because of – these new realities, the Academy has reaffirmed its commitment to its original motto and primary mission: "Justitia per Eruditionem" — "Justice through Education." When John Calcagni was the Academy's dean, a few years back, he often articulated this motto, reminding Academy volunteers that in helping colleagues to pursue lifelong professional learning, they were serving the public, i.e., the clients who looked to lawyers for competent legal help and support. While John put it into words, other deans and the Academy's officers and volunteers have consistently pursued this mission, from the Academy's inception through the present day. While its raison d'etre remains solid, however, the Academy has deemed that it is time to change some of its practices in order to remain competitive and better serve the educational needs of its constituents.

Toward these ends, the Academy's current dean, Hon. James Flanagan, appointed a Strategic Planning Committee to look at Academy practices and procedures; anticipate future developments in the world of CLE; and recommend viable changes. The committee, chaired by Hon. John Leo and co-chaired by Charles Wallshein, includes current and past Academy Officers on its roster: Erin Benesch; Michael Brady; Eileen Coen Cacioppo; John Calcagni; Hon. James Flanagan; Gerard McCreight; Cheryl Mintz; Scott Mishkin; Joseph Rosenthal; Allison Shields; Barry Smolowitz; Richard Stern, Peter Walsh, and Glenn Warmuth.

Survey

One of the first steps implemented by the committee was an *on-line survey of SCBA members* to determine their CLE needs and wishes. The survey – which produced a return of approximately ten percent, mostly from among members admitted more than ten years – revealed that of the factors determining members' selection of CLE courses, topic was most important (84 percent), followed by location (50 percent), and, then, method of delivery (live, recording, on-line, etc.), cost, number of credits, instructional level, and speaker reputation (37 to 30 percent). Ethics, civil practice, estates, real property, and trial practice were chosen as the most desired topics, though virtually all conceivable practice areas were selected by at least some respondents.

Barry Smolowitz, a member of the committee and the SCBA's I.T. Director, compiled the survey responses and plotted them onto a graph that will serve as an ongoing reference for the Academy. Some of the survey findings seemed to confirm what Academy officers and volunteers knew empirically – i.e., that a large number of Suffolk lawyers practice in solo or small firm settings; that Academy tuition prices are regarded as reasonable by constituents; and that Academy courses are considered on a par with, if not better than, courses offered by other respected New York CLE providers.

Instructional Levels

Programming for the 2014-2015 academic year will take the survey results into account. Attempts will be made to provide more courses in desired areas and to offer them on a range of instructional levels. One new strategy should help constituents choose classes that meet their particular needs and are appropriate for their backgrounds and experience: Courses will be rated basic; intermediate; or advanced, utilizing the following definitions:

Photo by Barry Smolowitz

Lawyers fill the SCBA great hall for a recent, well-received CLE on a timely topic.

Basic: Courses will assume little or no experience in the area. Instruction will provide an overview of underlying law and guidance for best practices.

Intermediate: Courses will assume moderate knowledge of and experience in the practice area. Instruction will provide guidance for somewhat intricate or perplexing issues.

Advanced: Courses will assume a high degree of knowledge and extensive experience related to the practice area. Instruction will provide insights into highly complicated or challenging issues.

The New York State CLE Board, the regulator of mandatory continuing legal education in the State, requires that courses bear labels based on years of admission: i.e., Transitional (for new lawyers, admitted less than two years) or Non-Transitional (for lawyers admitted more than two years). In keeping with this requirement, the Academy's Strategic Planning Committee recommended that most basic and intermediate courses be labeled "transitional *or* non-transitional," and advanced courses,"non-transitional."

Electronic Delivery

One of the issues the Strategic Planning Committee addressed was how to make best use of the Academy's limited resources. With rising costs challenging the Academy's desire to keep per-credit tuition prices at or below current levels, the committee identified printing expenses as one budget line-item that could be reduced through available technology. Hence, recommendation was made **to** conduct most course publicity through email and postings on the SCBA website and to distribute most course books, especially voluminous ones, through electronic links.

While these measures save costs, they also serve the needs of Academy constituents. Emailed advertising allows for more timely notice of programs and for easy updates if program details change. Electronic course materials, provided to registrants in advance, may be reviewed before the program and may be printed or stored on a computer or other electronic device, as the recipient desires; moreover, electronic course materials come with built-in, searchable tables of contents, enabling the user to find a desired topic quickly and easily.

For these electronic delivery techniques to remain effective, however, SCBA members must participate in the effort. Quarterly catalogs will continue to arrive by regular mail, but the long-standing monthly CLE envelopes will not. Hence, members must check their emails and the calendar on the SCBA website to determine or verify what courses are on the immediate horizon. Members also must be sure to alert the SCBA if their email addresses change or if, through some glitch, they are not receiving emailed publicity notices.

CLE Bundles and Passes

The Academy has long provided volume discounts for loyal constituents, and this year, based on recommendations from the Strategic Planning Committee, added a new *CLE Bundle* to other tuition reduction options. The new bundle covers twelve credits and is available only to SCBA members, many of whom have already taken advantage of the offering, which was publicized with the SCBA membership renewal mailing. For only $199, the bundle allows access to most live CLE programs presented between June 1, 2014 and May 31, 2015.

Other long-standing, discounted tuition options continue: the Academy's *Season Pass* (covering virtually all CLE offerings during a given academic year); a *12-Session Firm Pass*; and two *MCLE Coupon Books*, one for lawyers admitted under two years and one for those admitted over two years.

Plans for *Recorded CLE Bundles* are also in the works. The goal is to create twelve-credit, discounted packages grouped by substantive legal topics. Constituents in immediate need of credits at license renewal time should find these bundles particularly attractive: They will be able to acquire credits quickly, not through random, quick-pick options, but through archived CLE seminars providing instruction in their particular practice areas.

Curriculum Development

The Academy's Strategic Planning Committee was charged with taking a critical look at practices and procedures, but much of the behind-the-scenes work that goes into planning a CLE syllabus falls to the Academy's *Curriculum Committee.* Chaired by Eileen Coen Cacioppo for several consecutive years, the current committee is composed of five appointed members – Glenn Warmuth, Hon. John Leo, Peter Tamsen, Arthur Shulman, and Harry Tilis – plus Dean Flanagan. Meetings, however, are open to all Academy officers, advisors, trustees and, indeed, any SCBA member with an interest in CLE planning.

At recent meetings, the Curriculum Committee made a number of recommendations that the Academy will implement in the coming year. More two-credit ethics seminars will be planned to meet the needs of the many who seek ethics credits. Solo and small law firm technology questions – including working with cutting-edge computer programs and avoiding cyber-threats (viruses, hacking, compromised confidentiality, etc.) – will be addressed through new courses. And – a boon for the lawyers who value skilled support staffs – training programs for legal secretaries and paralegals (and new lawyers without staff) will be developed in such areas as civil practice and procedure.

The Curriculum Committee also recognized that many CLE-goers would rather collect practice-specific credits through longer programs than through numerous shorter offerings. Hence, plans have been made to present more *full-day programs* in the coming year. Academy officers and advisors were charged with developing the conferences, and the following are in the works: *Commercial and Corporate Practice (*Patrick McCormick, coordinator); *Matrimonial & Family Law* (Hon. John Kelly, Hon. John Leo, and Hon. Isabel Buse, coordinators*); Elder Law* (Jeanette Grabie and Brette Haefeli, coordinators); *Estate Probate and Administration* (Brette Haefeli and Scott McBride, coordinators); *Criminal Practice (*Harry Tilis, coordinator); *CPLR* (Hon. James Flanagan and Michael Glass, coordinators); *Real Estate* (Peter Tamsen and Gerard McCreight, coordinators); *Bankruptcy* (Richard Stern, coordinator); and *Law Firm Management* (Allison Shields, coordinator). All of the programs will provide six-to-eight credits, and all will include complimentary breakfast and lunch. Specific dates will be announced shortly.

Two long-standing, full-day conferences are already in place: The *24th Annual Law in the Workplace Conference*, a product of the SCBA Labor and Employment Law Committee (chaired by Sima Ali and Troy Kessler), is scheduled for Friday, September 19, at the SCBA Center; and the *Suffolk-Nassau Annual School Law Conference* (chaired, for Suffolk, by Neil Block and Mary Ann Sadowski) will take place on Monday, December 8, at the Hyatt Regency Wind Watch Hotel in Hauppauge.

The Academy also plans to present an assortment of updates, multi-program series, lunch 'n learns, and three-hour evening programs on the topics members indicated were important to them and to work with the SCBA's substantive committees to monitor new legal developments that warrant CLE presentations.

Collegiality and Convenience

One of the incentives to attend CLE courses at a local bar association, constituents report, is the camaraderie that accompanies the opportunity to gain information and skills. Hence, the live seminar presented in the Association's great hall remains the staple of the Academy's curriculum: In this setting, lawyers have the opportunity not only to hear from knowledgeable presenters, but to network and share insights with other colleagues.

Traveling to the Bar Center, however, can sometimes be inconvenient for busy lawyers. Hence, more lunchtime programs will be presented at courthouses in Riverhead or Islip, enabling practitioners to easily go from the courtroom to the classroom. An ambitious syllabus of programs presented on the East End – organized by Academy Officers Peter Walsh and Brette Haefeli, in conjunction with an ad hoc East End CLE Committee – will continue. And most CLEs presented at the SCBA Center will continue to be available as live webcasts and, after the fact, as on-line video replays and audio or DVD recordings.

As plans go forth for the new academic year, the Academy is eager to build upon the information supplied through its survey and interpreted by its Strategic Planning and Curriculum Committees. All SCBA members are urged to let the Academy know about their CLE preferences and desires on an ongoing basis and are invited to attend curriculum committee meetings and monthly meetings of Academy Officers and Volunteers. (Meeting dates are listed in this publication and on the SCBA website calendar [www.scba.org].)

Note: Dorothy Paine Ceparano *is the executive director of the Suffolk Academy of Law.*

TRUSTS & ESTATES

2014 Legislation Update

By Robert M. Harper

During the 2013-2014 legislative year, the New York Legislature passed several trusts and estates-related bills. While Governor Cuomo already has signed several of the bills into law and certain others await review by the Governor's office (as of the writing of this article), trusts and estates practitioners should be aware of the legislative developments that arose during the most recent legislative year. This article serves to update trusts and estates practitioners on those legislative developments.

- New York State Estate-Tax Reform – The 2014-2015 budget contained well-publicized estate-tax reforms that greatly affect trusts and estates practitioners. Most notably, effective April 1, 2014, the New York State estate-tax exemption amount increased from $1,000,000 to $2,062,500 for decedents who die from April 1, 2014 to March 31, 2015; and gradually will increase to $5,250,000 by April 1, 2017, with indexing for inflation commencing in 2019 (to match the federal estate-tax exemption amount).[1] While the aforementioned increases in the state estate-tax exemption amounts are beneficial to certain taxpayers, several other provisions in the estate-tax reform proposals are less favorable, including, among other things: (a) the creation of a "cliff" that causes a taxable estate worth more than 105% of the basic New York State estate-tax exemption amount to pay estate taxes (at 16%) on the entire taxable estate, not just the percentage above the exemption amount; and (b) the imposition of an "add back" of gifts made within three years of a decedent's death for estate-tax purposes. Practitioners should be mindful of the recent estate-tax reforms when advising their clients.

- Delayed Legacies – In its current form, Estates, Powers and Trusts Law ("EPTL") § 11-1.5 provides that: (a) interest generally only accrues on a legacy, if the beneficiary thereof demands that the fiduciary pay interest before commencing a proceeding to compel payment of the legacy; and (b) if interest is due on a legacy, the interest rate typically is fixed at 6% per annum, beginning seven months after the issuance of letters (including preliminary letters testamentary) to the fiduciary.[2] According to a proposal that has passed both houses of the Legislature, interest would be due on a legacy, unless the decedent's will provides otherwise, regardless of whether a demand is made. The interest usually would be payable from the estate's residue; and the rate generally would be fixed on the first business day of the calendar year at the federal funds rate minus 1%, but no less than one-half of 1%. As of the writing of this article, this proposal awaits delivery to Governor Cuomo's office.

Robert Harper

- Inheritance Rights of Posthumously-Conceived Children – As technology has progressed, it is now possible for posthumously-conceived children to be born and questions have arisen concerning the inheritance rights of such children.[3] These disputes have manifested themselves in, among other things, litigation that reached the Supreme Court of the United States in 2012,[4] and caused the New York Legislature to take action in 2014. Indeed, the Legislature passed a proposal to add EPTL § 4-1.3 and to amend EPTL § 11-1.5 to provide that posthumously-conceived children be recognized as their genetic parents' distributees and beneficiaries of certain class gifts, subject to statutorily-prescribed notice, writing, and timing requirements. While this proposal has passed both the Assembly and Senate, it has yet to be delivered to the Governor's office, as of the writing of this article.

- Renunciation of Property Interests – Under EPTL § 2-1.11(d)(5), the fiduciary of an estate may renounce the estate's interest in property of which the decedent was a beneficiary, but which the decedent did not receive prior to death, subject to the requirement that the fiduciary obtain authorization to so renounce from the court that has jurisdiction over the estate. The Legislature has passed a proposal to amend EPTL § 2-1.11(d)(5) to omit the requirement that the fiduciary secure court approval before renouncing the estate's interest in such property. As of this article's writing, the proposal has been delivered to Governor Cuomo's office and awaits the Governor's review.

- Finder's Agreements and Unclaimed Funds – In response a new Office of Unclaimed Funds policy governing abandoned property location service agreements under Surrogate's Court Procedure Act ("SCPA") § 1310, the Legislature has passed amendments to EPTL § 13-2.3, which would prohibit the finder of unclaimed funds from filing such an agreement signed by a potential claimant with the Surrogate's Court.[5] The prohibition would apply when no estate fiduciary has been appointed by the Surrogate's Court, unless the potential claimant signing the agreement is the decedent's spouse or child or the amount in controversy is worth less than $1,000. While this bill has passed both houses of the Legislature, it has yet to be delivered to Governor Cuomo's office for the Governor's review.

- Decanting – Having been amended in 2011 and 2013, New York's decanting statute, EPTL § 10-6.6, has garnered a great deal of attention in recent years.[6] A primary reason is that EPTL § 10-6.6 allows the trustees of certain trusts, including some irrevocable trusts, to decant the principal assets of their trusts into new trusts, which may have different dispositive terms than the original trusts. Until recently, however, EPTL § 10-6.6(s)(10) erroneously referenced EPTL § 7-1.1, instead of EPTL § 7-1.11. The 2014 amendments to EPTL § 10-6.6(s)(10), which went into effect on July 22, 2014, correctly reference EPTL § 7-1.11, rather than EPTL § 7-1.1.

- Custodial Accounts – SCPA § 1724 concerns custodial accounts for individuals under twenty-one years of age.[7] Until recently, SCPA § 1724 referenced the Uniform Gifts to Minors Act ("UGMA"), which was repealed and replaced with the Uniform Transfers to Minors Act ("UTMA") in the late-1990s. Recent amendments to SCPA § 1724, which Governor Cuomo signed into law on July 22, 2014, have updated the statute to reference UTMA, rather than UGMA.

As demonstrated above, the 2013-2014 legislative year was an active one from a trusts and estates perspective. Practitioners should be aware of the legislative developments that arose during the 2013-2014 legislative year, as they advise their clients on trusts and estates topics.

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

1. N.Y.S.B.A. Trusts & Estates Law Section Comments on Parts I and X of Revenue Art. VII Legislation, *available at*: http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=47443 (last viewed on August 10, 2014).
2. N.Y. Assembly Mem. in Support of A.1185, *available at*: http://assembly.state. ny.us/leg/ (last viewed on August 10, 2014).
3. N.Y. Assembly Mem. in Support of A.7461, *available at*: http://assembly.state. ny.us/leg/ (last viewed on August 10, 2014).
4. *Astrue v. Capato*, 132 S. Ct. 2021 (2012).
5. N.Y. Assembly Mem. in Support of A.9759, *available at*: http://assembly.state. ny.us/leg/ (last viewed on August 10, 2014).
6. N.Y. Assembly Mem. in Support of A.9757, *available at*: http://assembly.state. ny.us/leg/ (last viewed on August 10, 2014).
7. N.Y. Assembly Mem. in Support of A.9055, *available at*: http://assembly.state. ny.us/leg/ (last viewed on August 10, 2014).

ADR

Federal Court Launches Arbitration and Mediation Program to Expedite Resolution of Storm-Sandy Related Claims

By Lisa Renee Pomerantz

After Sandy hit downstate New York in October 2012, the New York State Division of Insurance launched a mediation program administered by the American Arbitration Association (adr.org), to expedite the resolution of non-flood insurance related claims. This spring, the AAA partnered with the New York State Dispute Resolution Association and Fordham Law School to present a panel discussion, "Storm Sandy Mediation Program: Lessons Learned," attended by AAA program administrators, mediators, insurance company representatives, attorneys and others.

At the program, AAA representatives reported that over 2000 cases were mediated in a matter of months, that the settlement rate was high, and that participant satisfaction with the process and the mediators was very high. The AAA's on-line program administration system and the case management staff received high praise from mediators and insurance company representatives.

Areas of suggested improvement included: more guidance should be provided to the insured in preparing for the mediation process, including a checklist of information and documents to bring; telephonic participation in the mediation sessions should not be permitted for initial sessions or in later sessions without the mediator's permission; and there should be more meaningful sanctions available against insurance companies whose representatives did not comply with program participation rules requiring that they be knowledgeable about the claim, have copies of the entire file, and have authority to settle.

Lisa R. Pomerantz

Gerald Lepp, Administrator of ADR Programs for the United States District Court for the Eastern District of New York, encompassing Nassau, Suffolk, Queens and Brooklyn, attended the program. He reported that there were more than 800 Sandy related cases pending in federal court, most related to the FEMA flood insurance program, and that the court intended to use mediation to assist in their resolution.

After having served as a mediator in the AAA's Storm Sandy program, I was delighted to have been accepted to the EDNY arbitrator and mediator panels. I attended the May 22, 2014 training session and was interested to observe that some of the suggestions made at the panel discussion apparently have been implemented, especially so as to ensure prompt exchange of information and documents to maximize the productivity of mediation sessions. Also, although the court refused to mandate that FEMA representatives attend every mediation session (even though their consent to a settlement would be required), a procedure for addressing their absence was developed.

For more information about the EDNY's Storm Sandy ADR program, visit https://www.nyed.uscourts.gov/forms/all-forms/sandy_documents.

Note: Lisa Renee Pomerantz graduated from Harvard University and Boston University Law School. Following a stint in private practice, she worked for 15 years as a senior level in-house attorney. Since 2003, Lisa has had her own practice in Suffolk County. She works with innovative and creative enterprises to structure and foster successful business relationships and to resolve disputes amicably and cost-effectively. She is on the AAA Commercial Panel and represents clients in mediations and arbitrations. She serves on NYSDRA's Board of Directors and is co-Chair of the Commercial Section of the Association for Conflict Resolution. Lisa publishes the monthly e-newsletter, "Making the Connection." In 2010, she received Long Island Business News' Top Fifty Around 50 Award and, in 2011, the Long Island Business News Leadership in Law Award. Lisa also has chaired the Suffolk County Bar Association's ADR and IP Committees, and has been a Suffolk Academy of Law Officer.

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. Most programs listed in this issue will be presented during September and October.

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 (560 Wheeler Rd., Hauppauge); 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.

FALL UPDATES

Presented with the Nassau Academy in Mineola

ANNUAL CRIMINAL LAW UPDATE

Friday, October 24, 2014

This update will address significant developments reflected in recent NYS Court of Appeals and U.S. Supreme Court decisions.

Faculty: **Hon Mark Cohen** (NYS Supreme Court–Suffolk); **Kent Moston, Esq.**(Nassau County Legal Aid – Appeals)

Time: 1:00–4:00 p.m. (Sign-in from 12:30 p.m.) **Location:** Nassau Supreme Court (Mineola)

MCLE: 3 credits (2.5 professional practice; 0.5 ethics) - Transitional and Non-Transitional

Evening at the SCBA Center

ANNUAL NEW YORK CIVIL PRACTICE UPDATE

Wednesday, October 29, 2014

CPLR developments – and practical ramifications – will be addressed by an extremely well-versed and dynamic presenter.

Faculty: **Professor Patrick Connors** (Albany Law School)

Time: 6:30–9:30 p.m. (Sign-in from 5:45p.m.) **Location:** Suffolk County Bar Center **Refreshments:** Deli Buffet

MCLE: 3 credits (2.5 professional practice; 0.5 ethics) - Transitional and Non-Transitional

Presented Twice: Southampton and Hauppauge

ANNUAL DMV UPDATE

Wednesday, November 5, 2014, at Seasons of Southampton; Wednesday, November 12, 2014, at SCBA Center

Gain a thorough grounding in developments affecting representation of clients in motor vehicle and driver's license matters.

Faculty: **David Mansfield, Esq.** (Islandia)

Time—Seasons of Southampton (15 Prospect St., Southampton): **5:30–8:00 p.m.** (Sign-in from 5:00 p.m)

Time—SCBA Center (Hauppauge)**: 6:00–8:30 p.m.** (Sign in from 5:30 p.m.) **Refreshments:** Light supper–both locations

MCLE: 2.5 credits (professional practice) - Transitional and Non-Transitional

Evening at the SCBA Center

ANNUAL REAL PROPERTY UPDATE

Thursday, November 20, 2014

This information-packed update will cover developments affecting residential and commercial real estate contracts, condos and coops, land use, foreclosures, condemnation, landlord-tenant disputes, and other related areas.

Faculty: **Scott E. Mollen, Esq.**(Herrick Feinstein, LLP – NYC)

Program Coordinator: Gerard McCreight, Esq.

Time: 6:00–9:00 p.m. (Sign-in from 5:30 p.m.) **Location:** Suffolk County Bar Center **Refreshments:** Light supper

MCLE: 3 credits (professional practice) - Transitional and Non-Transitional

SEMINARS & CONFERENCES

Academy Welcome Social & CLE

SOCIAL HOSTING & DRAM SHOP LAWS

Friday, September 12, 2014

This kick-off for the Academy's Fall Semester is both a SOCIAL GATHERING and a CLE. The event will be formatted as a welcome party/happy hour for constituents, complete with complimentary wine, beer, and great food. After a summer during which you may not have seen colleagues, you will enjoy the opportunity to mingle and network with old and new friends in a non-adversarial setting. Within this social context, an information-packed CLE will be presented. New York State Dram Shop laws and Suffolk County laws on social hosting will be reviewed, and a highly regarded faculty will address a variety of related issues. Topics will include:

- Criminal (Prosecution and Defense) Issues in Social Hosting and Dram Shop Matters
- Civil Liability (Plaintiff and Defense) Issues in Social Hosting and Dram Shop Matters
- Practical Advice for Client Advocacy and Personal Decision Making
- Breathalyzer and Field Sobriety Demonstrations and Challenges

Faculty: **Michael Glass, Esq.** (Rappaport, Glass, Levine & Zullo, LLP)**; William T. Ferris, Esq.** (Bracken Margolin Besunder, LLP); **Leonard Badia, Esq.** (NYS Courts)**; Jennifer A. Mendelsohn, Esq.** (Ronkonkoma)**; Daniel Tambasco, Esq.** (Russo, Apoznanski & Tambasco)**; Representatives of the Suffolk County Police Department**

Planning Committee: **Cheryl Mintz, Esq.** (Chair); Michael Glass, Esq.; Leonard Badia, Esq.; William T. Ferris Esq.; Hon. James Flanagan; Lynn Poster-Zimmerman, Esq.; Jennifer A. Mendelsohn, Esq.

Time: 4:00–7:50 p.m. (Sign-in from 3:30 p.m.) **Location:** Suffolk County Bar Center (Hauppauge) **Refreshments: Complimentary Happy Hour**

MCLE: 4 credits (professional practice) - Transitional and Non-Transitional Instructional Level: **Basic/Intermediate**

Evening Seminar in Riverhead

SUFFOLK COUNTY FARMLAND PRESERVATION PROGRAM

Tuesday, September 16, 2014

This program, developed by the Suffolk County Law Department and Farmland Committee, will be of particular interest to lawyers who practice in the areas of municipal law, land use, real estate, environmental law, and estate planning. A skilled faculty will explain what happens – and how it happens – when the County purchases developmental rights from farmers. Topics include:

- Background, Intent, Accomplishments, & Trends of the Farmland Preservation Program
- Suffolk's Farmland Program (AKA Chapter 8) and Its Relationship to NYS's Agriculture and Markets Program
- The Farmer's Perspective and Recent Amendments to Chapter 8
- Overview of the Farmland Developmental Rights Acquisition Process and Permit Applications

BONUS: Remain after the seminar and observe an actual meeting of the Farmland Committee. (Witness applications for "agricultural development" and ""special use" permits on preserved farmland.) You will be awarded an extra hour of credit at no extra cost.

Faculty: **Robert Braun, Esq.** (Deputy Bureau Chief–Suffolk County Dept. Of Law); **Sara Lansdale, AICP** (Director of Planning– Suffolk County); **Lauretta Fischer** (Principal Environmental Analyst); **August Ruckdeschel** (Economic Development Specialist–Agriculture and Marine)

Time: 5:00–7:00 p.m. (Sign-in from 4:45 p.m.) // Farmland Committee Meeting at 7:00 p.m.

Location: Kermit W. Graf Cornell Cooperative Extension Building – 1`st Floor Conference Room – 423 Griffing Avenue, Suite 100, Riverhead **Refreshments: Boxed suppers**

MCLE: 2 credits (professional practice) + optional additional credit for observation of meeting - Transitional and Non-Transitional Instructional Level: **Basic/Intermediate**

Evening Seminar

USING EXPERT WITNESSES IN LITIGATION

Wednesday, September 17, 2014

This program, featuring a distinguished faculty, will provide insightful advice on the why's and wherefore's of using expert witnesses in conjunction with trials, trial preparation, and other aspects of litigation. Topics include:

- the litigation consultant vs. the testifying witness
- how to use expert witnesses in a cost-effective way
- do's and don'ts when working with an expert witness
- demonstration of an attorney working with an expert witness in preparation for trial

Faculty: **Harvey Besunder, Esq.** (Bracken Margolin Besunder); **Hillary Frommer, Esq.** (Farrell Fritz–Manhattan Office); **Elizabeth Shampnoi** (Stout Risius & Ross–NYC / Well-Known Advising Counsel on the Selection of Expert Witnesses)

Coordinator: **Robert Harper, Esq.** (Academy Officer)

Time: 6:00–8:00 p.m. (Sign-in from 5:30 p.m.) **ocation:** Suffolk County Bar Center (Hauppauge) **Refreshments:** Light supper

MCLE: 2 credits (1 professional practice; 1 skills) - Transitional and Non-Transitional ***Instructional Level:*** **Intermediate**

Full-Day Conference

24TH ANNUAL LAW IN THE WORKPLACE CONFERENCE

Friday, September 19, 2014

Developed by the SCBA's Labor and Employment Law Committee, this annual conference covers issues for labor and management in both the private and public sectors. Updates, breakout workshops, prestigious keynoters, and panel discussions of timely issues highlight a program intended for lawyers, CEOs, public administrators, bargaining group representatives, human resource managers, business owners, and others with an interest in the field. This year's program includes:

- Supreme Court and Second Circuit Update
- Public Sector Update
- Panel Discussion: Administrative Proceedings in NYS Division of Human Rights and NYS Department of Labor
- Luncheon Address: Independent Contractors v. Employees: Determining the Classification
- Private Sector Workshop: Restrictive Covenants
- Public Sector Workshop: PERB Procedures and Other Timely Topics
- Government Ethics in New York

Faculty: **Touro Professor Michael C. Schmidt; Richard Zuckerman, Esq.; John Bauer, Esq.,; Gregory Lisi, Esq.; Sima Ali, Esq.; Domenique Camacho Moran, Esq; Kathryn Russo, Esq.; Marc Wenger, Esq.; Cara Greene, Esq.; David M. Cohen, Esq.; Philip L. Maier, Esq.; Michael Krauthamer, Esq.; Steven Leventhal.** ***Esq.***

Program Coordinators: **Simi Ali, Esq.,** and **Troy Kessler, Esq. –** Co-Chairs, SCBA Labor & Employment Law Committee

Time: 8:30 a.m.–4:00 p.m. Location: Suffolk County Bar Center (Hauppauge) **Refreshments:** Continental breakfast and lunch

MCLE: 7 credits (6 professional practice; 1 ethics) - Transitional and Non-Transitional

Complimentary CLE Seminar

ELECTRONIC DISCOVERY: Managing, Collecting, and Producing Digital Evidence and ESI

Wednesday, October 1, 2014, at Seasons of Southampton OR Tuesday, October 7, 2014, at the SCBA Center

When faced with litigation and government investigations, electronic discovery (e-discovery) is a significant concern of businesses. The courts are becoming increasingly stringent in their requirements to produce electronically stored information (ESI) during the discovery phase of litigation. If not properly controlled, the costs, burdens, and risks of e-discovery can overshadow the substantive issues involved. This succinct presentation will cover:

- Legal Duty, Interviews, and Hold Process
- Collection, Planning, Post-Collection, and Technology
- Privilege, Quality Control, and Costs

The program is subsidized by Farrell Fritz, PC, and was developed by the firm's e-discovery practice group. Attendance and credit are free, but pre-registration is required. The program will be presented twice, first in Southampton, then in Hauppauge.

Faculty: **Kathryn Carney Cole, Esq.,** and **Aaron E. Zerykier, Esq.** (Counsel–Farrell Fritz Commercial Litigation Practice Group)

Time: 6:00–7:00 p.m. (Sign-in from 5:30 p.m.) – Both Locations

Location: Seasons of Southampton (15 Prospect Street, Southampton) on October 1; Suffolk County Bar Center (560 Wheeler Rd., Hauppauge) on October 7 **Refreshments:** Light supper **–** Both Locations

MCLE: 1 credit (professional practice) - Transitional and Non-Transitional ***Instructional Level:*** **Basic/Intermediate**

SUFFOLK ACADEMY OF LAW

OF THE SUFFOLK COUNTY BAR ASSOCIATION

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

Public Education

HOME INSURANCE: Guidance on Coverage & Procedures

Monday, October 6, 2014

This **free** program is intended to help homeowners determine how much insurance they need, what is covered by various policies, how to enter claims, and what to do if a claim is made against the home. Attorneys are asked to tell their clients about this important public-service offering. Lawyers are also urged to attend and may request MCLE credit for a small tuition charge. Topics include:

- Types of Coverage and Review of a Homeowner Policy (liability coverage; loss of use coverage; actual cash value v. replacement cost)
- Flood Insurance
- Determination of Insurance Needs (determining what you need; calculating liability; deductibles)
- Procedures to File a Claim after a Loss (timely filing; protection from further damage; recording the damage; maintaining list of repair expenses)
- Current Insurance Law Issues (liability of insurance brokers; Homeowners Flood Insurance Affordability Act)

Faculty: **Andrew M. Lieb, Esq.** (Lieb at Law, P.C.) with Insurance Broker and Adjuster

Time: 6:30–8:00 p.m. (Sign-in from 6:15 p.m.) **Location:** Suffolk County Bar Center (Hauppauge) **Refreshments:** Coffee and Cookies

OPTIONAL MCLE: 1.5 credits (professional practice) - Transitional and Non-Transitional ***Instructional Level:*** **Basic**

Full-Day Conference

ISSUES IN COMMERCIAL & CORPORATE LAW

Friday, October 17, 2014

A selection of important transactional and litigation issues will be addressed in this full-day treatment of commercial and corporate law. Presentations by a prestigious faculty will cover, among other things:

- Delaware Litigation in the Chancery Court and Supreme Court Appeals
- Challenging Ethics Issues That Arise in Commercial-Corporate Practice
- Using Forensic Accountants in Litigation Support and Business Valuations
- Nuts & Bolts of Mergers and Acquisitions and Potential Pitfalls
- Responding to Corporate Investigations
- Perspectives from the Bench

Faculty: **Joseph Campolo, Esq.** (Campolo Middleton & McCormick, LLP); **James Wicks, Esq.** (Farrell Fritz, PC); **Andrew Ross, CPA** (Getty Marcus); **Bruce Newman, Esq.** (President—Property Advisors); **William McDonald, Esq.** (Campolo Middleton & McCormick, LLP)**;** Representative of the Bench–TBA

Conference Chair & Coordinator: **Patrick McCormick, Esq.** (Campolo Middleton & McCormick, LLP // Academy Officer)

Time: 9:00 a.m.–4:15 p.m. (Sign-in from 8:30 a.m.) **Location:** Suffolk County Bar Center (Hauppauge) **Refreshments:** Continental breakfast and lunch

MCLE: 7.5 credits (4 professional practice; 2 skills; 1.5 ethics) - Transitional and Non-Transitional ***Instructional Level:*** **Intermediate**

Early Evening Seminar

DISCRETIONARY TRUST DISTRIBUTIONS

Tuesday, October 21, 2014

An always popular, well-received presenter will decipher the maze of trust standards, address liability issues and potential conflicts, and provide helpful drafting trips. The presentation will cover:

- Drafting and Administering Trusts with Discretionary Distribution Provisions
- Non-Ascertainable Standards
- Potential Liability in Dealing with Beneficiaries
- Avoiding Conflicts

Faculty: **David J. DePinto, Esq.** (Of Counsel–Lazer, Aptheker, Rosella & Yedid, PC)

Coordinator: **Eileen Coen Cacioppo, Esq.** (Academy Curriculum Chair)

Time: 5:00 p.m.–7:00 p.m. (Sign-in from 4:30 p.m.) **Location:** Suffolk County Bar Center (Hauppauge) **Refreshments:** Snacks

MCLE: 2.0 credits (professional practice) - Transitional and Non-Transitional ***Instructional Level:*** **Intermediate**

Early Evening Seminar

VACATING DEFAULTS IN FORECLOSURES

Thursday, October 23, 2014

Known for his cutting-edge presentations on foreclosure defense, the presenter will address the how's, why's, and wherefore's of vacating a default in a foreclosure action. Learn how vacating a default judgment in a foreclosure is similar to and different from vacating defaults in other legal matters – i.e., reasonable excuses, meritorious defenses, lack of jurisdiction, and so forth. Procedural tips and guidelines for effective orders to show cause will be included in the discussion.

Faculty: **Charles Wallshein, Esq.** (Macco & Stern, LLP // Academy Officer)

Time: 5:00 p.m.–8:00 p.m. (Sign-in from 4:30 p.m.) **Location:** Suffolk County Bar Center (Hauppauge) **Refreshments:** Snacks and sandwiches

MCLE: 3.0 credits (professional practice) - Transitional and Non-Transitional ***Instructional Level:*** **Basic/Intermediate**

Extended Lunch 'n Learn

THE NEW ARTICLE 83: The Uniform Adult Guardianship Act & Protective Proceedings Jurisdiction Act

Thursday, October 30, 2014

A new Uniform Guardianship Act was signed into law in New York in Fall 2013 and went into effect last April. The act addressed gaps in the Mental Hygiene Law and Surrogate's Procedure Act related to jurisdiction in multiple states. Because seniors often move or spend different parts of the year in different states and because their family members may live in widespread locations, the act represents a significant development in guardianship procedures. This program will cover the provisions of the new law and what they mean for guardianship matters you handle. The knowledgeable faculty will discuss, among other things:

- determining which state court has priority jurisdiction over a guardianship petition
- how an existing guardianship matter can be transferred to another state
- how guardians can enforce orders from one state in another state

Faculty: **Ronald A. Fatoullah, Esq.** (Ronald Fatoullah & Associates–Great Neck); **Hon. Patricia Filiberto** (Guardianship Part–Suffolk)

Coordinator: **George Tilschner, Esq.** (Academy Advisory Committee)

Time: 12:30 p.m.–2:35 p.m. (Sign-in from noon) **Location:** Suffolk County Bar Center (Hauppauge) **Refreshments:** Lunch

MCLE: 2.5 credits (2.0 professional practice; 0.5 ethics) - Transitional and Non-Transitional

Instructional Level: Intermediate

DISCOUNT PASS PROGRAMS: The Academy offers a number of ways to save money on CLE tuition, ranging from a simple 12-credit bundle through a pass that allows admission to virtually *all* programs. Choose the one that suits your needs. Some restrictions apply; see the CLE Pass link on the SCBA website (www.scba.org) for more detail than provided here.

CLE BUNDLE: New this year, the CLE Bundle covers 12 continuing legal education credits presented between June 1, 2014, and May 31, 2015. Most, but not all, live programs are covered. This pass is available to **SCBA members only**, and only one bundle may be purchased by an individual member during the 2014-2015 administrative year.

SEASON PASS: This pass is for the avid CLE devotee. It covers virtually *all* CLE offerings during the administrative year for one low price. **Only SCBA members** may purchase a Season Pass. Price is pro-rated according to years admitted.

MCLE PASS FOR VETERAN LAWYERS: Intended for lawyers admitted more than two years, this pass covers 27 hours of study – i.e., the MCLE biennial requirement (24 hours), plus three bonus hours. This pass may be purchased by SCBA members and non-members.

MCLE PASS FOR NEW LAWYERS: Intended for lawyers admitted less than two years, this pass covers 38 hours of study – i.e., the MCLE requirement of 16 hours during each of the first two years following admission, plus six bonus hours (which may be carried forward to the third year of admission). It is available to both SCBA members and non-members.

FIRM OR AGENCY PASS: This pass must be purchased by a SCBA member, but may be used by all members of a firm or agency (including non-member attorneys and support staff). It covers 12 programs (each of up to four hours in length). Additional passes may be purchased during the administrative year.

SEPTEMBER 2014 REGISTRATION FORM

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

Circle course choices & mail form with check or cash // 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	Non-Member Attorney	Law Students	Season Pass	12 Sess. Pass	MCLE Pass	CLE Bundle	DVD	Audio CD	Course Book
UPDATES										
Criminal Law Update	$115	$155	Free	Yes	Yes	3 cpn	3 cred	$120	$115	$25
N.Y. Civil Practice Update	$155	$180	$50	Yes	Yes	3 cpn	3 cred	TBA	TBA	TBA
DMV Update ☐ East End ☐ SCBA	$100	$125	$25	Yes	Yes	2 cpn	2 cred	$110	$100	$25
Real Property	$115	$150	$25	Yes	Yes	3 cpn	3 cred	$120	$115	$25
SEMINARS & CONFERENCES										
Social Hosting & Dram Shop Laws	$75	$100	Free	Yes	Yes	3 cpn	3 cred	N/A	N/A	N/A
Farmland Preservation Program	$50	$50	$15	Yes	Yes	2 cpn	2 cred	N/A	N/A	N/A
Expert Witnesses	$65	$75	Free	Yes	Yes	2 cpn	2 cred	$85	$80	$20
Law in Workplace Conf. ☐ First Registrant ☐ Additional Registrants–Same Firm	$175 $150	$175 $150	$65	Yes	Yes	6 cpn	7 cred	$185	$175	$35
Electronic Discovery – ☐ East End ☐ SCBA	Free	Free	Free	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Home Insurance	Free/$35 for MCLE	Free/$50 for MCLE	Free	Yes	Yes for MCLE	1 cpn for MCLE	1 cred for MCLE	N/A	N/A	N/A
Commercial & Corporate Conference	$175	$195	Free	Yes	Yes - 2 uses	7 cpn	7 cred	$180	$175	$35
Discretionary Trust Distributions	$65	$75	Free	Yes	Yes	2 cpns	2 cred	$75	$70	$25
Vacating Defaults in Foreclosures	$95	$100	Free	Yes	Yes	3 cpns	3 cred	$100	$95	$25
New Article 83	$65	$75	Free	Yes	Yes	2 cpns	2 cred	$75	$70	$25
DISCOUNT PASSES										
12-Credit Bundle	$199									
Season Pass: ☐ Adm 0-2 yrs. ☐ Adm 2-5 yrs. ☐ Adm. 5-10 yrs. ☐ Adm 10+ yrs.	$450 $650 $750 $850									
Veteran MCLE Pass	$540	$675								
New Lawyer MCLE Pass	$380	$475								
Firm or Agency Pass	$720									

Name: _____

Address: _____

Phone: _____ E-Mail _____

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

METHOD OF PAYMENT: _____Check **(payable to Suffolk Academy of Law)** _____ Cash

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

Account # _____ Exp. Date: _____ Signature: _____

Parenting Coordination: Controversial Areas *(Continued from page 32)*

report child, domestic abuse, and threats of abuse against another person irrespective to what is stated in the court order.)

The second type of confidentiality might be called, partial confidentiality. Here, the Court Order identifies an aspect of the parenting coordination process as not confidential. Most frequently, the aspect of the process that the Parenting Coordinator is given permission to communicate to the court is whether or not each parent is cooperating.

The third approach to confidentiality is to state that the parenting coordination process will not be confidential.

Will the Parenting Coordinator testify in court proceedings?

When there is confidentiality, the Parenting Coordinator will not testify in court unless the Court Order specifically allows such testimony. However, a future judge might order a Parenting Coordinator to testify even though the court order specifically excludes this. (It is always a possibility, although unlikely, when there is a role that does not involve attorney/client privilege.) Either the attorney for the parties or an attorney for a child could object to there being a change in confidentiality that requires or permits a Parenting Coordinator to testify in court.

Parenting Coordination creates extra work for the courts

Parenting coordination was developed to provide an alternative to the courts for minor disputes about specified issues, especially when the issue was already litigated. Thus, parenting coordination was developed to reduce the need for further court action. Initially, the use of parenting coordination may create more work until the public and attorneys understand parenting coordination, and how the court will address problems in the process. This partially depends on how the court uses parenting coordination. With simple problems, cases usually proceed easily once the parenting coordination process begins. At the other extreme are the highest-conflict cases where one or both parties try to subvert the judge's orders. These cases can be dealt with using parenting coordination and they will be discussed in the next section under the topic of levels of conflict. They may require additional work for the courts.

Levels of Conflict & How to Deal with Them

We may want to vary our approaches depending on the degree (and type) of high conflict present in each family.

Parenting Coordination was designed to assist families when there is high conflict during or after a divorce. Families may have to be worked with differently depending on the amount of high conflict that is present: 1) with the relatively smallest degree of high conflict (Level I), disagreements typically continue after a divorce and may take two years to subside. 2) When there is a moderate degree of high conflict (Level II), there is frequently ongoing litigation on multiple levels, e.g.., custody and criminal. Sometimes within this group a parent believes that an important issue(s) has not been heard by the court and attempts to prod the court to hearing this issue through complaints or not following the parenting coordination process. In the highest degree of conflict (Level III) the conflict and battle continue unabated and sometimes goes underground when judicial pressure is applied but then irrupts some place else. Here, the continuing conflict is more important than the welfare of their children. Frequently parent(s) actively attempt to undermine the court's interventions. It is believed that the amount and type of court involvement that is necessary will vary according to the level of conflict present. When the court stands by the order appointing the Parenting Coordinator the parents are more likely to use this process and not bring disputes back to court. The most high-conflict cases need the court to be actively involved since the parent(s) is attempting to undermine the court.

Families where Parenting Coordination will not work

Obviously there are families for whom parenting coordination will not work. Generally, we might say that families with conflict level III will not work successfully with parenting coordination and the task is distinguishing these families from those in conflict level II. For the families in conflict level II, the task is how to provide extra structure so parenting coordination is workable. We need to study these families, with the cooperation of Parenting Coordinators and the court, find additional structures that will increase the likelihood of success. When parents learn that judges, who have ordered parenting coordination, insist that the parents use this process and do not permit a parent to block the process, then families become more cooperative. Of course, if a Parenting Coordinator is not following the process appropriately, parents can always seek the assistance of the court.

Parenting Coordination creates another level of professionals parents have to deal with.

This point of view suggests that courts are creating another hoop for parents to jump through and this takes away from and makes the parent's job more difficult. A group of professionals has been created who specialize in assisting parents to implement their parenting plan. This group of professionals was created to provide services to a special population of clients: parents whose disputes dealt with psycho-legal problems, after a divorce that requires knowledge of high-conflict families, child development and family systems. It is believed that providing these specialized services will assist these families better than continuing litigation.

Co-Parenting therapy serves these families just as well

Co-parenting therapy is psychotherapy that focuses on helping parents to work together in regards to the children by improving their ability to communicate and cooperate. A professional who has the experience and training of a Parenting Coordinator could accomplish those goals. Parenting Coordination is much more involved in that it also may provide limits and structure. The Parenting Coordination Court Order specifies and focuses on the role of the professional.

The issue of insurance is a "red herring." Health insurance is used when people have a diagnosable psychiatric/psychological condition. The therapist must be working to alleviate these conditions. These requirements are specified in the contract therapists sign with insurance companies. Therapists who do not abide by their contract, with the insurance company, may be committing insurance fraud and risk the insurance companies reviewing their treatment and mandating that any fees paid to the therapist be returned. Most people have health insurance and it is understandable that they want to use it. Unfortunately, it is mandated that the insurance be used for diagnosable conditions and that this condition (ex. depression) is the focus of the treatment. Relationship problems are a diagnosable psychiatric/psychological condition.

Cost of Service

The services of a Parenting Coordinator cost money. However, the cost is much less than using two attorneys to re-litigate disputes that have already been settled. Parenting coordination as a fee-for-service is out of reach for many families. We need to have ways of obtaining these services at low cost for needy families.

When Parenting Coordination is used Incorrectly

One of the biggest problems is when the Parenting Coordinator exceeds the authority specified in the Court Order, e.g., changing child support because the financial circumstance of the parent has changed.

Note: Dr. Neil S. Grossman is a clinical and forensic psychologist. He is a past president of the Forensic Division of the New York State Psychological Association, and he chairs the Psychology and Law Committee of the Suffolk County Psychological Association. Dr. Grossman was the co-developer of the Parenting Coordination Program for Nassau County Supreme and Family Courts. He is president of the Parenting Coordination Association of New York.

1. Beutow, J., Cohen, R., Grossman, N. S., Massetti, J., & Schlissel, S. W. Managing High Conflict Families after a Divorce. Suffolk Academy of Law, Hauppauge, NY, February 1, 2013.

LEGAL SERVICE DIRECTORY

SERVICES

Don't Overlook State and Local Veterans' Benefits *(Continued from page 20)*

Customized license plates

Specialty passenger car and motorcycle plates are available for veterans and service-members in a wide range of categories, many at reduced rates. http://dmv.ny.gov/custom-plates/military-and-veterans.

Education and Training

Veterans tuition award

New York State provides awards for full-time and part-time study for eligible veterans matriculated at an undergraduate or graduate degree-granting institution or in an approved vocational training program in New York State.

For full-time study, the award is up to the full cost of undergraduate tuition for New York State residents at the State University of New York, or the actual tuition charged, whichever is less.

For part-time study (3-12 credits or 6-23 hours/week in a vocational training program), the award is prorated.

Eligibility: NY State residents discharged under honorable conditions who are Vietnam (1961-75), Persian Gulf (1990 and after), Iraq/Afghanistan (9/11/2001 or after) or who received an Expeditionary Medal (for Lebanon, Grenada, or Panama service after 2/28/1961). Application and info: http://www.hesc.ny.gov/content.nsf/SFC/Veterans_Tuition_Awards.

Military Service Recognition Scholarship

Financial aid to veterans, children, spouses, and dependents of NYS residents who died or became severely and permanently disabled while engaged in hostilities or training for hostilities after 8/2/1990. This award covers up to four years of full-time undergraduate study (or five years in an approved five-year bachelor's degree program) and includes the following: at SUNY or CUNY — actual tuition and fees; room and board charged to the student (on campus) or an allowance for room and board for commuter students; and allowances for books, supplies, and transportation. At a private institution — an allowance equal to SUNY four-year college tuition and mandatory educational fees, and allowance for room and board, books, supplies and transportation. Application and info: http://www.hesc.ny.gov/content.nsf/SFC/New_York_State_Programs.

NYS Regents Awards for children of deceased and disabled veterans

Grants of $450/year to students whose parent was a NYS resident who either died, suffered a 40 percent or more disability, was classified as missing in action, or was a prisoner of war. Application and info: http://www.hesc.ny.gov/content.nsf/SFC/NYS_Regents_Awards_for_Children_of_Deceased_and_Disabled_Veterans.

Disability and survivor benefits

Gold Star Parent Annuity

It includes an annual payment of up to $500 to the NYS resident parent of a deceased veteran. Eligibility: must be a Gold Star Parent (as defined in 10 USC 1126, i.e., lost a child in a designated conflict, including virtually all hostilities post-1973) whose income is at or below 200 percent of the Federal Poverty Level, based on latest federal income tax return, or an affirmation that that the parent is not required to file a federal tax return. Application at http://veterans.ny.gov/sites/default/files/GoldStarAnnuityApplication_0.pdf.

Supplemental burial allowance

A supplemental burial allowance of up to $6,000 to New York State resident military personnel killed in combat, or while on active duty in hostile or imminent danger locations on or after Sept. 29, 2003. http://www.veterans.ny.gov/sites/default/files/SupplementalBurialApplication_3.pdf.

Blind Annuity

It provides for an annual grant to NYS resident legally blind wartime veterans or their surviving un-remarried spouses. Blindness need not be service-connected. Eligibility: NYS resident who is legally blind (20/200 vision in the better eye with best correction, or 20-degree limitation of field of vision), who served on active duty during specified wartime periods. Generally, the veteran must have served at least 90 days active duty, unless discharged for a service-connected disability. Application, available at: http://www.veterans.ny.gov/sites/default/files/ApplicationforBlindAnnuity_0_0.pdf.

It should be completed and mailed to the Division of Veterans Affairs (address in the application form), along with official discharge record (Form DD214) and Report of Legal Blindness (available at http://ocfs.ny.gov/main/Forms/CBVH/OCFS-4599%20Report%20of%20Legal%20Blindness-Request%20for%20information.html). The 2013 rate is $1,299.12/year.

Next month: County and local veterans benefits, including the new local option veterans school tax exemption.

Note: Ken Rosenblum is the Associate Dean for Administration and Director of the Veterans' & Servicemembers' Rights Clinic at Touro Law Center in Central Islip, NY. He is a former active duty US Army JAG officer who served a tour in Vietnam. The Veterans' & Servicemembers' Rights Clinic represents veterans, servicemembers and their families in civil, criminal and administrative matters with a priority to preventing or ameliorating veteran homelessness. (631) 761-7001, vetsclinic@tourolaw.edu.

Integrated Mortgage Disclosure Forms *(Continued from page 9)*

Note: Yuliya Viola is an associate attorney at Sinnreich Kosakoff & Messina LLP, where she concentrates her practice in the areas of real property, municipal law, and commercial litigation. Ms. Viola is a former Executive Managing Editor of the New York Real Property Law Journal and a member of the SCBA's Real Property Law Committee.

1. Published at 78 FR 79730 (Dec. 31, 2013), available at https://federalregister.gov/a/2013-28210.
2. The final rule and the new model disclosure forms are available at http://files.consumerfinance.gov/f/201311_cfpb_final-rule_integrated-mortgage-disclosures.pdf.
3. Dodd-Frank Wall Street Reform and Consumer Protection Act §§ 1098 and 1100A (12 U.S.C. § 2603(a) & 15 U.S.C. § 1604(b), respectively).
4. The old and new disclosure forms can be compared on the CFPB's website at http://www.consumerfinance.gov/knowbeforeyouowe/compare/. *See* CFPB release, "*Know Before You Owe,*" available at http://www.consumerfinance.gov/knowbeforeyouowe/.
5. *See* CFPB release, Detailed Summary of the Rule, *Final Rule on Simplified and Improved Mortgage Disclosures* (November 20, 2013), at http://files.consumerfinance.gov/f/201311_cfpb_tila-respa_detailed-summary.pdf.
6. *See id.*
7. *See* 12 C.F.R. § 1026.19(e)(1)(iii) (eff. Aug. 1, 2015).
8. *See* 12 C.F.R. § 1026.19(a)(2) & 12 C.F.R. § 1026.19(e)(1)(iii)(2) (eff. Aug. 1, 2015).
9. *See* 12 C.F.R. § 1026.19(e)(1)(ii) (eff. Aug. 1, 2015).
10 *See* 12 C.F.R. § 1026.19(f)(1)(ii)(A) (eff. Aug.1, 2015).
11. *See* 12 C.F.R. § 1026.19(f)(1)(v) (eff. Aug.1, 2015).
12. A number of the disclosure requirements applicable to the Loan Estimate and the Closing Disclosure set forth in 12 C.F.R. § 1026.37 and 12 C.F.R. § 1026.38, respectively.

ACADEMY OF LAW NEWS

CLE Course Listings on pages 28-29

Keeping Up with What's New and Trending

Helping lawyers keep up to date with legal changes and trends is one of the most important goals of continuing legal education. All practitioners – from the highly experienced lawyers who serve as instructors for CLEs through just-admitted, novice attorneys – need to be proactive in determining what is new, what has changed, and what evolving developments mean for the advocacy strategies they employ.

The Suffolk Academy of Law runs discrete annual updates in most practice areas and also incorporates update material into most of its full-day conferences. The following is an overview of update programs planned for the Academy's 2014-2015 administrative year.

During the Academy's fall semester, practitioners can look forward to **the Annual Criminal Law Update** (featuring Hon. Mark Cohen and Kent Moston) on October 24 at the Supreme Court Building in Mineola; **Annual New York Civil Practice Update** (featuring Professor Patrick Connors) on October 29 at the SCBA Center; **Annual DMV Update** (featuring David Mansfield) on October 5 in Southampton and on October 12 at the SCBA Center; and the **Annual Real Property Update** (featuring Scott Mollen) on November 20 at the SCBA Center.

The **Annual Law in the Workplace Conference,** scheduled for September 19 at the SCBA Center, will incorporate two important updates: Private Sector Employment Law (Michael C. Schmidt) and Public Sector Labor Law (Richard K. Zuckerman). Similarly, the **Annual School Law Conference,** to be held at the Regency Hyatt Wind Watch on December 8, will cover developments affecting education law. And, finally, the **Annual Family Law Update,** usually presented as a discrete program in the late fall, will be incorporated, this year, into a full-day **Conference on Matrimonial and Family Law** to be held at the SCBA Center on November 7.

As the academic year progresses, other important updates will be scheduled. George Roach's **Annual Elder Law "Matinee"** will take place, as always, around Valentine's Day. A **Landlord-Tenant Update** organized by Hon. Stephen Ukeiley is usually part of the Academy's winter syllabus. Past Academy Dean Richard Stern usually organizes a late winter or early spring **Bankruptcy Law Update.** A **Matrimonial Update** by Vincent Stempel will once again be part of the March Matrimonial Mondays Series. The Academy's **Annual Auto Liability Update** by Professor Michael Hutter and Jonathan Dachs will be scheduled for late May or early June. And, of course, updates in other substantive areas may be added as the need arises.

This publication, emailed announcements, and the on-line SCBA calendar (www.scba.org) will supply specifics about all update topics, dates, times, and presenters.

– Dorothy Ceparano

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

12 Friday — Meeting of Academy Officers & Volunteers. 7:30–9:00 a.m. Breakfast buffet. All SCBA members welcome.

12 Friday — **Academy Welcome Social & CLE on Social Hosting & Dram Shop Laws.** 4:00 p.m.–7:50 p.m. at SCBA Center. Sign-in from 3:30 p.m. Complimentary "Happy Hour" refreshments.

16 Tuesday — **Suffolk County Farmland Preservation Program.** 5:00–7:00 p.m. at Cornell Cooperative Extension Office in Riverhead. Light Supper. Bonus Credit for observing Suffolk County Farmland Committee meeting after the seminar.

17 Wednesday — **Using Expert Witnesses in Litigation.** 6:00–8:00 p.m. at SCBA Center. Sign-in and light supper from 5:30 p.m.

19 Friday — **Law in the Workplace Conference.** 8:30 a.m–4:00 p.m. at SCBA Center. Lunch and continental breakfast.

October

1 Wednesday — *East End:* **Electronic Discovery: Managing, Collecting & Producing Digital Evidence and ESI.**. 6:00-7:00 p.m. at Seasons of Southampton in Southampton. Sign-in and light supper from 5:30. Complimentary program; pre-registration required.

6 Monday — ***Public Education Program:*** **Homeowner's Insurance.** 6:30-8:00 p.m. at SCBA Center. Coffee & cookies.

7 Tuesday — **Electronic Discovery: Managing, Collecting & Producing Digital Evidence and ESI.**. 6:00-7:00 p.m. at SCBA Center. Sign-in and light supper from 5:30. Complimentary program; pre-registration required.

10 Friday — Meeting of Academy Officers & Volunteers. 7:30–9:00 a.m. Breakfast buffet. All SCBA members welcome

17 Friday — **Issues in Commercial & Corporate Law**: **A Full Day Conference.** 9:00 a.m.–4:00 p.m. at SCBA Center. Sign-in from 8:30 a.m. Lunch and continental breakfast.

21 Tuesday — **Discretionary Trust Distributions.** 5:00–7:00 p.m. at SCBA Center. Sign-in and snacks from 4:30 p.m.

22 Wednesday — Academy Curriculum Planning Meeting. 5:30 p.m. All SCBA members invited.

23 Thursday — **Vacating Defaults in Foreclosures.** 5:00–8:00 p.m. at SCBA Center. Sign-in and snacks from 4:30 p.m.

24 Friday — **Annual Criminal Law Update featuring Hon. Mark Cohen and Kent Moston.** 1:00–4:00 p.m. at Nassau County Supreme Court. Sign-in from 12:30.

29 Wednesday — **New York Civil Practice Update featuring Professor Patrick Connors.** 6:30–9:30 p.m. at SCBA Center. Sign-in and deli buffet from 5:45 p.m..

30 Thursday — *Extended Lunch 'n Learn:* **The Uniform Guardianship Act.** Sign-in and lunch from noon; at SCBA Center.

Parenting Coordination: Controversial Areas

By Neil S. Grossman

This is the second of two articles about Parenting Coordination. Basic concepts were introduced in the first article. Many of the concepts raised in the present article come from a workshop sponsored by the Suffolk Academy of Law in May of 2013,

Managing High-Conflict Families after a Divorce[1]. Parenting coordination has been defined as a child-focused, dispute-resolution process where mental health or family law professionals, with mediation training and experience, assist high-conflict parents to implement their parenting plan.

The main point we would like to make regarding controversial areas is that everything will depend on the specific wording of the order appointing a Parenting Coordinator. Therefore, it is inherent that the parties and their attorneys understand the Court Order.

Legal rights of parties

A major concern is whether, or to what extent, parents give up their legal rights by agreeing to a Parenting Coordinator. Parents typically agree that they will attempt to resolve disputes about implementing the parenting plan; they agreed to what was court ordered, using the services of a trained professional. The Parenting Coordinator is not permitted to make major changes to the parenting plan. By the appointment of a Parenting Coordinator, the parents are expected to work with the Parenting Coordinator instead of using litigation to settle these disputes.

Confidentiality

There are three types of confidentiality that should be considered. The first is what we will call full confidentiality. Here nothing that is said in the parenting coordination process can be disclosed. While parenting coordination in other jurisdictions is usually considered not confidential, the Model Court Order typically used in Nassau and Suffolk counties states that parenting coordination is confidential. In these counties, parenting coordination is considered to be similar to a mediation process where preliminary proposals to reach a settlement are not disclosed outside of the mediation process.

Even when there is full confidentiality there are some exceptions. While communications between the parents and the Parenting Coordinator are confidential, the Parenting Coordinator may discuss information with other professionals. During these communications, the Parenting Coordinator at his/her discretion may use information learned from the parties to ask questions and elicit information from another professional. When the Parenting Coordinator has a case management role he/she may be coordinating between various professionals and may discuss additional information disclosed in the parenting coordination process. (Parenting Coordinators who are mental health professionals may be required to

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