THE SUFFOLK LAWYER

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INSIDE...

OCTOBER 2013
FOCUS ON
LAWYERS
HELPING LAWYERS

Stigmatization of Substance Abuse and Mental Illness

By Elaine Turley

Years ago I was a member of a committee responsible for recommending and approving educational and therapeutic interventions by the public school district for preschool children with developmental disabilities. All too frequently parents refused interventions critical to their child's progress because they could not accept the finding of a developmental disability by the professional evaluators. Knowing that the best opportunity for the child to reach her greatest potential was being sacrificed because of the parent's inability to accept that the intervention was necessary caused me much sadness and frustration. The stigma of acknowledging that one's child had a developmental disability, it seemed, was so powerful that it made it impossible for the parent to access the treatment that would help mitigate the symptoms of the condition. The same parent would likely think it absurd to avoid treatment for her child's strep throat or ear infection when such treatment is available to help her child.

FOCUS ON LAWYERS HELPING LAWYERS
SPECIAL EDITION

The stigma of acknowledging that one suffers from the disease of alcoholism, substance abuse or mental illness has that same effect of preventing those

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Photo by Kathy Stanley of K Stanley Photography

Hon. Sonia Sotomayor, left, was presented with a pair of bookends as a thank you for coming to Touro to speak by Dean Patty E. Salkin and Bruce K. Gould. United States Supreme Court Justice Sonia Sotomayor came to Touro College Jacob D. Fuchsberg Law Center in Central Islip, on Sept. 9. She was presented with the 2013 Bruce K. Gould Book Award for her recent memoir, *My Beloved World*. The Gould Award honors the best work of fiction or non-fiction of the past year on a law-related subject. Justice Sotomayor spoke to a packed audience of distinguished guests and took questions from Touro students following her address. (see story and more photos on page 16)

PRESIDENT'S MESSAGE

Who Reads the Bylaws?

Dennis R. Chase

By Dennis R. Chase

A by-law (sometimes also spelled bylaw, by law or byelaw) is a rule or law established by an organization or community to regulate itself, as allowed or provided for by some higher authority. The higher authority, generally a legislature or some other governmental body, establishes the degree of control that the by-laws may exercise. By-laws may be established by entities such as a business corporation, a neighborhood association, or depending on the jurisdiction, a municipality. Bylaws widely vary from organization to organization, but generally cover topics such as how directors are elected, how meetings of directors (and in the case of a business, shareholders) are conducted, and what officers the organization will have and a description of their duties. A common mnemonic device for remembering the typical articles in bylaws is NOMOMECPA, pronounced "No mommy, see pa!" It stands for Name, Object, Members, Officers, Meetings, Executive board, Committees, Parliamentary authority, Amendment.

Bylaws generally cannot be amended by an organization's Board of Directors; a super-majority vote of the membership, such as two-thirds present and voting or a majority of all the members, is usually required to amend bylaws.

How many of our members have actually read the bylaws of the Suffolk County Bar Association in their entirety . . . I'm guessing not very many. Did you know our bylaws specifically state that all meetings shall be governed in accordance with *Robert's Rules of Order* (Article VII Meetings of

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BAR EVENTS

Red Mass for Attorneys and Judges
Tuesday, Oct. 8, at 6 p.m.
Chapel St. Anthony's High School, So. Huntington
Most Rev. William F. Murphy, Bishop of Rockville Centre will preside. Dinner follows with a keynote address given by the Chief Administrative Judge, Hon. A. Gail Prudenti. Further information at www.scba.org/post/redmass13.pdf.

Pro Bono Recognition Luncheon
Tuesday, Oct. 22, noon
Great Hall
Law Services is joining with the Suffolk County Bar Association to salute our pro bono attorneys. For information, call the bar at (631) 234-5511.

Judiciary Night
Wednesday, Oct. 30, 6 p.m.
Lombardi's On the Bay, Patchogue
The bench meet the bar informally. $85 per person. Call the bar at (631) 234-5511.

SCBA honors veterans
Friday, Nov. 8, at noon
Great Hall
All SCBA members are invited to a special tribute luncheon for our veterans hosted by the military and veterans affairs committee. Registration required. Email marion@scba.org or call the bar.

Retirement dinner for the Hon. John J.J. Jones, Jr.
Thursday, Nov. 14, 6 p.m.
Watermill Restaurant, Smithtown
The SCBA's Supreme Court Committee will host the event. Information at www.scba.org/post/jones13.pdf

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Suffolk County Bar Association

560 Wheeler Road • Hauppauge NY 11788-4357
Phone (631) 234-5511 • Fax # (631) 234-5899
E-MAIL: SCBA@SCBA.ORG

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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.

OCTOBER 2013

2 Wednesday	Appellate Practice, 5:30 p.m., Board Room.
10 Thursday	Executive Committee, 5:30 p.m., Board Room
16 Wednesday	Elder Law & Estate Planning Committee, 12:15 p.m., Great Hall. Education Law, 12:30 p.m., Board Room.
18 Friday	Labor & Employment Law, 8:00 a.m., Board Room.
21 Monday	Board of Directors, 5:30 p.m., Board Room.
30 Wednesday	Judiciary Night, 6:00 p.m., Villa Lombardi's, Holbrook.

NOVEMBER 2013

4 Monday	Executive Committee, 5:30 p.m., Board Room.
6 Wednesday	Appellate Practice, 5:30 p.m., Board Room.
13 Wednesday	Education Law, 12:30 p.m., Board Room. Municipal Law, 5:30 p.m., E.B.T. Room.
14 Thursday	Retirement Dinner for the Justice John J.J. Jones, Jr., Watermill Restaurant, 711 Smithtown Bypass, Smithtown, 6: 00 p.m., $65 per person. Register on line or call Bar Center for reservation.
15 Friday	Labor & Employment Law, 8:00 a.m., Board Room.
18 Monday	Board of Directors, 5:30 p.m., Board Room.
20 Wednesday	Elder Law & Estate Planning Committee, 12:15 p.m., Great Hall.

DECEMBER

4 Wednesday	Appellate Practice, 5:30 p.m., Board Room.
6 Friday	SCBA's Annual Holiday Party, 4:00 p.m. to 7:00 p.m., Great Hall, Bar Center.
9 Monday	Executive Committee, 5:30 p.m., Board Room
16 December	Board of Directors, 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."

The SCBA Lawyer Assistance Foundation acknowledges with appreciation the contribution of:

Donor	In Memory of
Dawn L. Hargraves	Wende A. Doniger

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

THOMAS MORE GROUP TWELVE-STEP MEETING

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

LAWYERS COMMITTEE HELP-LINE: 631-697-2499

THE SUFFOLK LAWYER

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Editor-in-Chief

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Frequent Contributors

Publisher
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Send letters and editorial copy to:
The Suffolk Lawyer
560 Wheeler Road, Hauppauge, NY 11788-4357
Fax: 631-234-5899
Website: www.scba.org
E.Mail: scbanews@optonline.net
or for Academy news: Dorothy@scba.org

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Those Days, Those Nights, As A Bronx Assistant

Death of a Colleague

By William E. McSweeney

I can't say that I "knew" John F. Kennedy, Jr. I knew that he gave his name as "John Kennedy," with no intervening initial and no succeeding diminutive; knew that he was — hard to believe — handsomer in person than he was in his photos; knew that he enjoyed a decent enough reputation as a worker among the ADAs — myself included — who served in the crowded precincts of 80 and 100 Centre Street.

He was a New York County Assistant District Attorney during the years 1989 through 1993; I was a Bronx County Assistant District Attorney during the years 1987 through 1995, with the last 5 of those years having seen me assigned to the Special Narcotics Prosecutor for the City of New York. So it was, then, that our time at our respective offices had an intersection of 3 years.

Kennedy's trial record was good, actually perfect: six trials, six verdicts for the People. Certain among his colleagues stated that these were "lock and load" cases, "ground balls" — slang for sure wins. Even if true, what these colleagues ignored is that there is pressure on the assistant when he has the "easy" case; he can only — in DA parlance — screw things up. That is to say, with everyone expecting a win, the trier of such a case can look real bad, should he lose. One is actually "safer" with a "character-builder," the difficult case that the assistant isn't expected to win; if he wins, he looks real good.

William E. McSweeney

At all events, Kennedy the Prosecutor was appealing enough to have one of his wins profiled in a *New York Times* essay, whose author had served on the jury and who had found that Kennedy's competence matched his charisma. And charismatic he was! Not electric, not electrifying, those words correctly characterize properties of electricity, not qualities of humans. I never "sensed" he was in the same room as myself; I saw, on more than one occasion, that we, with others, shared the same room. But having spotted him, my eyes would go back to him. At Forlini's Restaurant, just behind Criminal Court, he would alternatively order a meal to go or sit quietly at a table, a beer and newspaper accompanying his food. The bartender spoke well of him as being a quiet, unpretentious guy, a good tipper; in short, the barkeep conferred upon him the city's highest accolade — he was a gentleman.

Similarly, at a going-away party for a colleague, he appeared, enjoyed the buffet, drank a beer or two, kibitzed with the honoree, and took his leave. All of this without any undue self-conscious drawing of attention to himself. But he was always noticed. Eyes — mine among them — wouldn't stare, but would keep returning to him. Thick, dark hair above a strong-featured face; deep-set eyes, set wide apart; a generous mouth, easily moving into a smile; 6' 1"; good shoulders accentuated by a trim build: He was Apollo come to earth.

His good looks once actually redounded indirectly, and however slightly, to my favor.

"Bill!" my Deputy Bureau Chief yelled into my office. "Part 70 was calling for you. You're supposed to be over there to stand up on a sentence on one of your cases. I sent Joan to cover for you a while ago — you owe her big-time!"

I charged over to 100 Centre, took the elevator to the 11th floor, and burst out of its doors, preparatory to running down the hall. I needn't have bothered. My office-mate, Joan, was talking near the elevators to John Kennedy; rather, he was saying something, and she was looking up at him, enraptured. He proceeded down the hall; she got aboard the elevator that I held for her.

"Thanks, Joan," I said.

"Pardon?" she said.

"Thanks for covering my case."

"Your case?"

"Yeah—my file is in your hand. You've endorsed it, 'Sentence imposed, 2-4, finished.' Thanks again."

"Oh yeah, sure...."

"I'm sorry you had to run for me."

"Oh...no problem...."

Thus was the Kennedy power to charm. Another example of this, and again touching on me, however tangentially, involved the time my eldest brother John and his wife met John Kennedy and Darryl Hannah at a dinner dance in Chicago. John reported to me shortly after this event that he had made conversation with Kennedy. Part of which had run:

"I've a brother who's an ADA in New York. His name's Bill McSweeney."

"I know Bill McSweeney," Kennedy had said, and according to John, had nodded approvingly.

Hearing this, I laughed, somewhat skeptically.

"Big brother," I said, "I think you've fallen victim to the Kennedy charm."

The trained lawyer, I then proceeded to marshal the evidence for my conclusion. "There are hundreds of ADAs in two buildings. He's at 100 Centre; I'm at 80. He's New York County, I'm Special Narcotics. I see him but rarely, we've never been introduced. I don't think he knows me."

Approaching 70 years, John had long since evolved away from skepticism. "I might have succumbed to the Kennedy charm," he said. "But I think he knows you."

Possibly he did. He was an egalitarian, no reason for him not to be in our environment. He might have been important, but others were also important. He was, after all, among trial attorneys, scarcely a breed lacking in ego, in self-esteem. He might well have taken an interest in some of the various faces he saw, some of the names he heard. There were hundreds of ADAs, but "hundreds" is a finite number. At all events, of all the times I saw him — dropping a file off in court, playing touch football in the playground on Baxter Street, locking his bike to a traffic sign on Hogan Place — I made up-close, eye-con-

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Meet Your SCBA Colleague

William J. McDonald, **a general litigator representing health care professionals and white collar criminal defense, was the first to go to college and the first attorney in his family. His strong interest in debating and public speaking from an early age helped him gravitate toward the law. It was a perfect fit.**

By Laura Lane

Did you always set your sights on becoming an attorney? I had thought of engineering because I always had an interest in the sciences. But then I didn't do well in physics. I was a government major when I was an undergraduate at Notre Dame and studied many different legal systems from other countries during my junior year abroad at the University of Innsbruck, Austria. I enjoyed constitutional law and political theory, and becoming a lawyer seemed like a good fit for these interests.

You were an Eagle Scout. Do you believe that helped shape you in any way? Being an Eagle Scout helps foster leadership skills and teaches a certain degree of self reliance. You also learn how to help others. In college I was also a leader.

How did you utilize leadership skills to make a difference? When I was at the Suffolk County District Attorneys Office I tried to mentor younger attorneys. I had done service work my entire life. But after I became an attorney I had a hard time finding opportunities. When I was at Shaub, Ahmuty, Citrin & Spratt as an associate, I found an opportunity to help. I became involved in the Law Firm Service Project and went to the Ronald McDonald House to cook and serve dinners for the families of children being treated at Schneider's Children's Hospital.

Prior to working at Shaub you had focused on organized crime and insurance crime. You shifted gears at Shaub. As an ADA I prosecuted murder for hire, insurance fraud and organized task forces that included the Suffolk County Police, the FBI, IRS and others. I had a great deal of trial experience as an ADA and then I also worked at the US Attorneys Office to expand state crime investigations on a federal level. Going over to Shaub was definitely different.

Is it typical for someone to go from the ADA's office to work on medical malpractice? Medical malpractice defense work is trial oriented and firms recruit heavily from district attorney offices because of the trial experience you receive working there. It was a whole different ball of wax for me at Shaub. I thought it would be interesting, because I was always interested in the medical field. I thought it would be an opportunity for me to learn about medicine and practice law at the same time.

What was the experience like? I'd have to say it was a steep learning curve in the beginning leaning CPLR and learning to read medical records. I did learn a lot about medicine.

Now you were representing doctors, nurses and self insured hospitals in medical malpractice cases in state and federal court. Did you miss "catching the bad guys?" I did enjoy working in crime, the feeling of being one of the good guys – working at the DA's office, you feel like you are helping people who are victimized and putting the bad guys away. I miss it sometimes. It is something I am definitely glad I did.

After working a Shaub you decided to go to Ruskin Moscou Faltischek to work in their health care and white collar crime departments as an associate, where you remained for six years. Why did you make the move? They offered opportunities to broaden my legal knowledge in health care. It was more interesting than doing medical malpractice alone. I had more freedom in managing representation with doctors and nurses and there was more variety at this job. The increased regulations over the health care industry in the past 15 years have made health care providers a target for investigation and prosecution.

In June you opened the offices of William J. McDonald, P.C. in Garden City. How are things going? I am enjoying myself. I like being the person where "the buck stops here" and getting the clients in the door, providing the service to them.

You are a Director at the SCBA and an Officer at the Academy. What brought you to the SCBA? I joined in 2005. When I was a DA John Buonora encouraged all of us to join the bar association. I wanted to get involved in the local bar to see who the other practitioners were and learn the legal community in Suffolk outside the criminal bar.

How did you end up getting more involved? I heard that the Academy was willing to have volunteers. Rick Stern, who was the dean, was so welcoming. Everyone was so enthusiastic about teaching other members about their specialties. I got hooked.

William McDonald

What was the extent of your involvement? I lectured a few times and remained active participating in the meetings. I tried to help coordinate other programs too.

Why would you recommend someone join the SCBA? They probably don't realize how many other talented attorneys are working here in Suffolk. It is a lot nicer to practice law with colleagues than strangers in the courthouse. Since I joined, I now probably know somebody who practices in every particular area of law that I might come across. Membership provides an informal way to meet judges too and to keep a pulse on what's going on in the legal community.

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:

Jennifer C.E. Ajah
Olajumoke A. Akingboye
Suzanne Christine Bean-Hicks
Timothy F. Daly
Fitzpatrick Neil St. Dodson
David Bober Kweller
Christopher Massaro
Gregory J. Miller
William Scott Psychoyos
Rufus V. Rhoades
Jonathan E. Rich
Julia Katherine Swisher

Attorney Reinstatements Granted

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

Attorney Resignations Granted/Disciplinary Proceeding Pending:

Michael Barry Raphan: By affidavit, respondent tendered his resignation on the grounds that he is the subject of pending charges of professional misconduct, including his conviction following a trial in the United States District Court for the Southern District of New York on conspiracy to commit bank and wire fraud. He stated that 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

Attorney Resignations Granted/Disciplinary Proceeding Pending:

Michael M. Lease: By affidavit, the respondent tendered his resignation. The record revealed that he was the subject of a disciplinary proceeding against him revealing violations of the Rules of Professional Conduct regarding commingling and misappropriation of client funds, and failing to maintain books and records. Respondent acknowledged that he would be unable to successfully defend himself on the merits against any charges predicated upon this misconduct under investigation. He stated that his resignation was freely and voluntary rendered, and acknowledged that it was subject to an order directing that she make restitution and reimburse the Lawyers' Fund for Client Protection. In view of the foregoing, the respondent's resignation was accepted and he was disbarred from the practice of law in the State of New York.

Attorneys Suspended:

Mitchell S. Drucker: The Grievance Committee instituted a disciplinary proceeding against the respondent based upon a petition containing charges of professional misconduct and factual issues that the respondent was estopped from relitigating and the matter was referred to a Special Referee solely on the issue of mitigation. The charges against the respondent were predicated upon conduct involving dishonesty and deceit based upon insider trading and a jury verdict rendered to that effect in December 2007. The jury verdict was affirmed by the United States Court of Appeals for the Second Circuit. In determining an appropriate measure of discipline to impose, the respondent asked the court to consider the financial loss suffered by him as a result of his disgorgement and civil penalties assessed against him, and his unblemished record. However, the court noted that the respondent had failed to cooperate with the SEC in its investigation, and failed to take any responsibility for what he did. Accordingly, under the totality of circumstances, the respondent was suspended from the practice of law for a period of three years.

Edward J. Owen: By decision and order the Grievance Committee was authorized to institute a disciplinary proceeding against the respondent based upon a petition alleging, *inter alia,* that the respondent was guilty of failing to file a biennial registration statement with OCA for five biennial registration periods and failing to cooperate with the lawful demands of the Grievance Committee in connection with an investigation into his conduct. The respondent failed to answer the petition, and the Grievance Committee moved to deem the charges against the respondent established. Accordingly, based upon respondent's default, the Grievance Committee's motion was granted, and the respondent was suspended for an indefinite period, until further order of the court.

Rony Princivil: Motion by the Grievance Committee to suspend the respondent from the practice of law upon a finding that he is guilty of professional misconduct immediately threatening the public interest based upon his admissions and other uncontroverted evidence, and to authorize the Grievance Committee to institute a disciplinary proceeding against the respondent granted pending further order of the court, without opposition or response by the respondent, and the matter referred to a special referee.

Neal Stuart Spector: Motion by the Grievance Committee to suspend the respondent from the practice of law upon a finding that he is guilty of professional misconduct immediately threatening the public interest based upon his failure to cooperate with the lawful demands of the Grievance Committee, and to authorize

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BENCH BRIEFS

By Elaine Colavito

SUFFOLK COUNTY SUPREME COURT

Honorable Paul J. Baisley, Jr.

Complaint dismissed; service of process ineffective.

In *Angelo Cataldo and Catherine Cataldo v. AMH Construction Mgmt, Inc., Andrew Herrman, Matthew Herrman and AMH Construction Mgmt,* Index No.: 23280/2011, decided on August 22, 2013, the court granted defendant's motion to dismiss on the ground that he was improperly served with the summons and complaint.

The court recited the facts as follows: it appeared from the affidavit of service that the service of the summons and complaint was effectuated on defendant Matthew Hermann by "nail and mail" service pursuant to CPLR §308(4) at 103 Syracuse Avenue, Medford, New York. It was undisputed that the defendant failed to appear or answer the complaint. By order dated January 7, 20134, plaintiffs' motion for leave to enter a default judgment against defendant was denied, as the court was unable to determine when service was complete. Defendant now moved, pre-answer, to dismiss the complaint. In support of his claim relative to improper service, defendant submitted an affidavit where he claimed that he never resided at 103 Syracuse Avenue in Medford. Instead, he provided proof that he resided in Central Islip and Mt. Sinai during the periods in question and that the summons and complaint were never affixed to the door of either residence. The court granted defendant's motion finding that plaintiffs did not contest that defendant never resided at the Medford address. The court also rejected plaintiffs' argument that jurisdiction was obtained by personal service on defendant on April 19, 2013 at his Mt. Sinai address as it was evident that such service was made more than 120 days after the commencement of the action. As such, the complaint was dismissed.


By Elaine Colavito

Honorable Arthur G. Pitts

Further deposition ordered; inconsistencies between affidavit and prior testimony.

In *Louis Bisignano v. Sunrise Leasing, Inc., "John Doe," being the fictitious and unknown operator of Sunrise Leasing, Inc.'s Commercial Vehicle and Curtis Patterson,* Index No.: 28414/2010, decided on April 2, 2013, the court granted plaintiff, Louis Bisignano and defendant, Curtis Patterson's cross motion each for an order striking the defendant, Sunrise Leasing, Inc.'s answer to the extent that the court ordered Sunrise to produce vice-president Richard DiNapoli for an additional examination before trial to answer specific inquiries regarding the circumstances surrounding the destruction of the business records of defendant Sunrise. The instant matter was one for personal injuries sounding in negligence, which arose from a motor vehicle accident. In response to a demand of the plaintiff, defendant, Sunrise provided an affidavit of its vice-president, Richard DiNapoli, which indicated that Sunrise Leasing, Inc., ceased operation and its records were kept in storage and were destroyed due to flooding, and as such, they no longer existed. Since there were inconsistencies between DiNapoli's affidavit and his prior testimony, the court found that this could only be resolved by a further deposition. Consequently, the court ordered same.

Motion to reargue denied; untimely.

In *Daniel Kehoe v. Island Motorcross of New York, Inc., and Joseph T. Merrill & Long Island Motorcross, Inc.,* Index No.: 49284/2009, decided on March 20, 2013, the court denied defendants' motion for leave to reargue as untimely. In rendering its decision, the court noted that by decision and order of this court dated July 30, 2012, defendants' motion for summary judgment was denied. On October 24, 2012, plaintiff served defendants by Notice of Entry, a true copy of the court's order and decision. The within motion seeking reargument was served on plaintiff on December 21, 2012. In denying the motion, the court stated that CPLR §2221 (d)(3) provides that a motion for leave to reargue shall be made within 30 days after service of a copy of the order determining the prior motion and written notice of its entry. Here, it was undisputed that the defendants' motion was not served within 30 days of the plaintiff's service of the subject decision and order with notice of entry. However, the defendants argued that plaintiff's notice of entry was defective because the order and decision was neither stamped with a date of entry by the clerk nor signed by the clerk and as such was void on its face. The defendants thereafter served the decision and order with notice of entry on November 21, 2012 and therefore, they submit that the motion was timely. In rendering its decision, the court rejected defendants' argument and found that defendants waived any defects within the plaintiff's notice of entry when they did not reject it within 15 days. As such, the motion to reargue was denied as untimely.

Plaintiffs' motion for an order compelling defendant Hospital to produce Cynthia Hendrickson, R.N. to appear for an examination before trial granted; representative already deposed had insufficient knowledge, or was otherwise inadequate, and there was a substantial likelihood that the person sought for deposition possessed the information material and necessary to the prosecution of the case.

In *Abby Martinez, as Mother and Natural Guardian of Haylie Day, an infant, and Abby Martinez, individually v. Gary Kasten, D.O., Francisco Martinez, M.D., Robert Lipri, M.D., and Southside Hospital,* Index No.: 35436/2008, decided on May 8, 2013, the court granted plaintiffs' motion for an order compelling defendant Hospital to produce Cynthia Hendrickson, R.N., a knowledgeable witness, to appear for an examination before trial. The matter at bar was one for personal injuries sounding in medical malpractice. By way of their complaint and bill of particulars, plaintiffs alleged that plaintiff sustained a right brachial plexus injury/Erb's palsy as a result of improper labor and delivery performed. A deposition was conducted of the labor and delivery nurse who testified that there was another nurse assigned to the unit at that time, Cynthia Hendrickson, who would have

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LOOKING BACK

75 Prospect Street

By Morton I. Willen

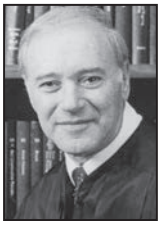
"McGraw-Hill does not take paper," the austere attorney representing the seller dryly intoned at the closing. Stiff-backed, bald, graying at the temples, wire rimmed glasses, this elderly gentleman looked down his nose at us imperiously.

We were a bunch of guys in our mid-thirties, children of immigrants, who grew up in the city, mostly attorneys, sharing office space in a large office building in Huntington. The year was 1965. We had come to Long Island along with the exodus from the Bronx, Brooklyn and Queens to dream our dreams. Our complaints to the landlord that winter about lack of heat went largely unheeded, so when a lovely, frame building on a residential street came on the market, we jumped on it.

It was owned by McGraw-Hill, a venerable publisher of educational text books and school training materials. They maintained an office and training facility in Huntington for about 10 years at 75 Prospect Street. It had not worked out. In mid-August, Sandy Brunswick, a realtor, wandered into our office on Green Street and asked me if I had any interest in buying a large home that had been converted to and rezoned for office space. The building was beautiful, he said, built in the 1920's, on an oversized lot, on a tree shaded residential street just a block away and could be had at a good price, $60,000.

"Sandy", I said, "My partner and I can't handle it alone, but I know Mal Tillim would be interested and I think we can form a group to buy it. Mal's in the Coast Guard Reserves and will be back next week from reserve duty. Can you hold it until then?"

When Mal came back from the reserves, our entire group discussed the possibilities of owning our own work place. It was intriguing, intoxicating. We called Sandy and we walked over to the building to check it out. It was nicer and better than it had been described to us. There was a large parking lot in the back and some of the rooms could be used as offices without any new construction. It would need lots of new construction inside, but some of us had contractors as clients and we could get a good job done at a really competitive price. We caucused among ourselves, Sandy standing off to the side, each of us excited and affirmative.



Morton Willen

Mal called Sandy over. "Look, we want to make a deal here, do you think there's a little flexibility on the price?"

"Don't even think about it. McGraw-Hill could get offended and you could lose it," Sandy said. "Don't you know who they are? They're an old-line, rock-ribbed, conservative dinosaur and once they set a price, that's it."

We returned to our office and called the Real Estate Department at McGraw Hill. Since Mal had more money to invest than the rest of us, he became our spokesman.

"Look," he said, "We'll pay your price, but we will need to get a mortgage. We will be forming a consortium, a group of us, a new corporation. Most of us are lawyers and we know lots of banks and should be able to get a 75% mortgage. Draw the contract, mail it to us and we'll put down $6,000 at the signing and pay the balance of $9,000 plus $45,000 from the mortgage proceeds at the closing in 60 days." The deal was made.

Our group was Mal, my law partner, Lenny and myself, Len Horn, another attorney, and John Hoar and his partner, insurance agents. We would issue 100 shares of stock; Mal would get 40 shares, 20 between my partner and me, 20 for Horn and 20 for the insurance firm. In essence there were five shares, with Mal getting two and the rest of us one each.

The closing took place at the McGraw-Hill Building in Manhattan. The six of us went in by train and took a cab to the Avenue of the Americas and 38th Street. McGraw-Hill occupied all 62 floors. We were directed to the Legal Department's law library, on the 45th floor, where the closing was to take place, a huge, high-ceilinged chamber with floor to ceiling bookshelves filled with law books from all over the country on all four walls. A fourteen foot mahogany table with straight-backed leather chairs and wooden arms lined each side of the table. An assortment of their lesser lawyers sat on one side, led by the gentleman who had reflected McGraw-Hill's views on "paper."

I weighed in, "Whaddyamean you don't take paper? There are some real problems here. Our construction guy tells us it will cost $10,000 and take six or seven weeks to take down some interior walls, build offices, a waiting room and a bullpen for our secretaries. That means we'll be paying a mortgage for two months while paying rent for two months where we are now, until your building is ready. We'll also need carpeting and furniture for the waiting room and general decorating. We're not asking you to lower your price, but we can't move in until we improve your building and it takes money we don't have. We need your money. You know we're for real because we have a certified check for you for the balance due you of $9,000. You need to lend us $5,000 and we'll give you back a second mortgage and we'll scuffle for the rest. Each of us will personally and separately guaranty the note at the highest legal rate of interest and pay it off in two years. You have no downside risk unless the building isn't worth what you asked us to pay for it. And it will be worth a lot more with the improvements we will be making first thing."

"Gentlemen, no offense," their lead counsel said, "But McGraw-Hill has a long standing policy and simply does not take paper"

Mal replied, "Look here, we have paid your price without quibbling. If you nix this deal, where does it leave you? I'll tell you where. We are bogged down in a war in Viet Nam that is dividing this country

(Continued on page 27)

PRO BONO

Pro Bono Lawyers To Be Recognized

By Maria Dosso

To highlight the role of pro bono service across America, lawyers will observe National Pro Bono Celebration Week, October 20-26, 2013. By designating this week, the ABA Standing Committee on Pro Bono and Public Service seeks to focus the nation's attention on the increased need for pro bono services during these challenging economic times and celebrates the outstanding work of pro bono lawyers. According to a study released by the American Bar Association, lawyers are doing pro bono work at nearly three times the rate that the general population does volunteer work. These figures demonstrate the concern that lawyers have for people and organizations in their communities.

Since 1981, Nassau Suffolk Law Services has collaborated with the Suffolk County Bar Association (SCBA) to provide pro bono services to our community. These partnerships include bankruptcy and matrimonial clinics and a Foreclosure Settlement Conference initiative. Thanks to these joint efforts, hundreds of low income clients receive free legal assistance from generous pro bono attorneys supplementing the free legal services to low income and disabled Long Islanders being provided by Law Services staff attorneys. As part of this ongoing effort, Law Services works cooperatively with the Suffolk County Bar's Pro Bono Foundation to study initiatives that will promote free and reduced fee legal services.

Volunteer lawyers will be recognized at a Suffolk Pro Bono Recognition Luncheon to be held at the bar center on October 22. Above, SCBA's 2012 honorees.

In gratitude for the dedication shown by our volunteers, Law Services is joining with the Suffolk County Bar Association to salute our pro bono attorneys at a Suffolk Pro Bono Recognition Luncheon to be held at the Great Hall of the Suffolk County Bar Association on October 22, 2013. For more information call (631) 234-5511.

To promote National Pro Bono Week, Nassau Suffolk Law Services is also sponsoring a community training event, General Advocacy Skills, at its offices in Islandia, N.Y. on October 23, 2013 from 9:30-12:30. Although this training is open to all community advocates, pro bono attorneys interested in learning how to work effectively with low income and disabled clients are encouraged to attend. Call (631) 232-2400 x 3357 for more information.

The legal community asks everyone to join with them in their efforts to serve the growing number of people in the state who have fallen on hard times. We welcome attorneys who are interested in volunteering their time, especially in the practice areas of bankruptcy, matrimonial and foreclosure. Please call Maria Dosso, Esq at (631) 232-2400 x 3369. Thank you!

"We are bound by a responsibility to use our unique skills and training - not just to advance cases, but to serve a cause; and to help our nation fulfill its founding promise of equal justice under law...The obligation of pro bono service must become a part of the DNA of both the legal profession and of every lawyer."

Eric Holder

Maria Dosso is Director of Communications and Volunteer Services Nassau Suffolk Law Services.

The Board of Directors wish to express our special appreciation for the continued support of SCBA Sustaining Members 2013-2014

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STATE OF NEW YORK UNIFIED COURT SYSTEM
SUFFOLK COUNTY DISTRICT COURT

To the Members of the Suffolk County Bar Association,

I would like to inform you about two new initiatives taking place in the District Court which are designed to make your practice more convenient and efficient.

First, electronic communication via email is now available for attorneys to contact the Courtroom Clerk in each of the Central Islip Criminal Parts. Every courtroom has its own email address. (The addresses were listed in September's edition of the *Suffolk Lawyer*. Please email SUFDCDP1@nycourts.gov if you would like a complete list of the addresses emailed to you.) You may now contact the Court from any computer or handheld mobile device, as you would have previously done by fax or telephone.

Our second initiative is *Expedited Motion Practice*. The Suffolk County District Attorney's Office has agreed to a process whereby written motions will generally not be required for the Court to schedule a criminal case for pre-trial hearings. In most instances, the DA's Office will consent to defense counsel's oral motion (with a defendant's affidavit) for various pre-trial hearings. The hope is that this procedure will eliminate the need for extensive written motion practice and expedite the hearing process, saving everyone's valuable time and resources. Please keep in mind that either side will always be afforded an opportunity to file written motions when they so desire.

It is my hope that these initiatives, which allow for the more efficient practice of law, will further promote the delivery of justice in the District Court.

I encourage any member of the Bar to relay to me their ideas for procedural improvements that will streamline and enhance the practice of law in the District Court.

Richard I. Horowitz
Supervising Judge
Suffolk County District Court

SIDNEY SIBEN'S AMONG US

Congratulations…

Richard K. Zuckerman, of Lamb & Barnosky, LLP, has been selected by his peers for inclusion in the 2014 edition of The Best Lawyers in America® in the practice areas of Education Law, Employment Law - Management, Labor Law - Management and Litigation - Labor and Employment.

Dan Bartoldus, Mike Colavecchio, Tom Dargan, Fred Johs, Bill Lewis and **Eileen Libutti** of Lewis Johs Avallone Aviles, LLP have all been named 2013 Super Lawyers. **Rebecca Devlin** and **Jennifer Frankola** have been selected as 2013 'Rising Stars.' Each year, no more than 2.5 percent of the lawyers in New York are selected by the research team at Super Lawyers to receive this honor.

Announcements, Achievements, & Accolades…

Scott M. Karson Esq., of Lamb & Barnosky, LLP, became the new Chair of the New York State Bar Association Audit Committee and assumed office as Vice President of the New York State Bar Association for the Tenth Judicial District on June 1. As Vice President, he is a member of the NYSBA Executive Committee.

Richard K. Zuckerman, Esq., of Lamb & Barnosky, LLP, was elected to serve as the Secretary to the NYSBA's Municipal Law Section's Executive Committee as of June 1.

Sharon N. Berlin, of Lamb & Barnosky, LLP, was reappointed as legislative affairs chair for the National Association of Women Business Owners - Long Island Chapter (NAWBO) as of July 1.

Mara N. Harvey, of Lamb & Barnosky, LLP, was reappointed as Treasurer for the National Association of Women Business Owners - Long Island Chapter (NAWBO) as of July 1.

Alyson Mathews, Esq., of Lamb & Barnosky, LLP, was featured in August 2-8's issue of *Long Island Business News'* section of Who's Who in Women in Professional Services on Long Island. She was one of the participants in a panel discussion on the topic "The Impact of the Affordable Care Act on Collective Bargaining: An Interactive Discussion" at the September 12, NYC-LERA Dinner Meeting and Panel Discussion sponsored by the Labor & Employment Relations Association New York Chapter at Arno Ristorante, 141 West 38th Street, New York, New York.

Eugene R. Barnosky, Esq., of Lamb & Barnosky, LLP, will be the moderator of a panel on the topic entitled "How Are the New Section 3020-a Expedited Hearing Rules Working?" on Oct. 24 at the 17th Annual Pre-Convention School Law Seminar co-sponsored by the NYS School Boards Association and NYS Association of School Attorneys at the Hyatt Regency, Rochester, New York.

Jacqueline Siben

Douglas E. Libby, Esq., of Lamb & Barnosky, LLP, will be co-presenting on the topic entitled "FOIL in the Digital Age" on Oct. 25, at the 94th Annual Convention and Education Expo sponsored by the NYSSBA at the Radisson Hotel, Rochester, New York.

Robert Cohen, Esq., of Lamb & Barnosky, LLP, will be speaking at the CLE seminar on Nov. 6 entitled "Special Education Law Update - 2013" sponsored by the NYS Bar Association at the Melville Marriott in Melville, New York.

The law firm of **Futterman, Lanza & Block, LLP** offered a free two-hour seminar, "Medicaid Planning & Asset Protection," on September 17 at the law office, located at 222 East Main Street, Suite 314, in Smithtown.

Lance R. Pomerantz has been appointed to the Law Committee of the New York State Land Title Association.

Congratulations…

Tom Maligno was the recipient of the Courage Award Recipient presented at the Nassau Women's Golf Outing and Dinner in September.

Condolences…

The Board of Directors is saddened to report the passing of former Supreme Court Justice **Lester E. Gerard**.

To the family of the Honorable **William G. Ford** on the passing of Corey Swinson, his brother-in-law and the brother of Suffolk County Probation Officer, **Mark Swinson**.

To **Laura Latman** and her family on the passing of her mother, Prudence Fierro on September 12.

To Past SCBA Director **Michael J. Miller** on the passing of his father.

New Members…

The Suffolk County Bar Association extends a warm welcome to its newest members: **John J. Dunn, Carolyn A. Hill, Bruce McBrien and Patrick J. Russell.**

The SCBA also welcomes its newest student member and wishes him success in his progress towards a career in the Law**: Krystyna Baumgartner, Jonathan Cantarero, Mitchell Markarian and Patrick J. Pumphrey.**

There is Help for Suffolk Attorneys

By Hon. Michael F. Mullen

For the past two years, I had the privilege of serving as a Board Member of the Suffolk Bar Association's Lawyers Assistance Foundation ("LAF"), under the guidance of its Managing Director, Barry L. Warren.

The Foundation tries to help Suffolk attorneys who are having "difficulties," be they financial, physical, mental or medical, etc. The purpose of the LAF is simple: to raise monies to give to attorneys (and their families) in their time of need. Not surprisingly, the Foundation is in constant contact with one of the Bar Association's Committees, aptly named the "Lawyers Helping Lawyers" Committee, which is co-chaired by Art Olmstead and Elaine Turley.

FOCUS ON LAWYERS HELPING LAWYERS SPECIAL EDITION

The committee's purpose is to do what its name implies - to help lawyers. That presents some interesting questions: Who needs help? How do I know if I need help? And what if I'm too ashamed or embarrassed to ask for help?

Michael F. Mullen

Very often, an attorney needs help because he/she has become "dependent" on drugs or alcohol. This dependency manifests itself in different ways - the lawyer is habitually late, disorganized, rude, or unprepared. The attorney, for whatever reason, either ignores the signs or chalks them up to the "stress" of practicing law.

There is broad consensus that alcoholism, substance abuse and even depression are chronic diseases. What does any intelligent person do when they have a disease – they get help in the form of treatment and advice.

That's where the "Lawyers Helping Lawyers" Committee comes in. If you are in need of treatment, contact one of their members – their names and phone numbers are in the Bar directory. The committee even has a "helpline" (631-697-2499). They will literally stop what they are doing to help you. Everything that is said and done is confidential. They are outstanding.

As a judge sitting in Riverhead, in a Major Crime Part, for 20 years, I saw firsthand how DWI has ruined people's lives, or worse, taken those lives away. We lawyers can do something about it.

We belong to a small number of callings which are seen as special, which require a commitment to certain ideals and a spirit of cooperation among its practitioners. That *spirit of cooperation* is alive and well in Suffolk County.

Being a lawyer is not what you do, but who you are. Call one of your colleagues for help. Your loved ones and our profession are counting on you.

Note: Hon. Michael F. Mullen is counsel to the firm of Lamb & Barnosky, LLP in Melville. He retired from the bench in 2007, after serving in Supreme Court, Suffolk County for 20 years.

An Interview with NYSBA Lawyer Assistance Program Director

By Patricia Spataro

The Lawyer Assistance Program of the New York State Bar Association and the Lawyers Helping Lawyers (LHL) Committee of the Suffolk County Bar Association serve primarily the same function and fulfill a similar mission. Here Patricia Spataro, Director of the New York State Bar Association Lawyer Assistance Program, answers the most commonly asked questions about the state bar's Lawyers Assistance Program (LAP) and in doing so, outlines the mostly parallel function of the LHL Committee.

What is LAP?

The Lawyer Assistance Program is a program of the New York State Bar Association established to help attorneys, judges, and law students in New York State (NYSBA members and non-members) who are affected by alcoholism, drug abuse, gambling, depression, other mental health issues, or debilitating stress.

FOCUS ON LAWYERS HELPING LAWYERS SPECIAL EDITION

What services does LAP provide?

Services are free and include:

- Early identification of mental health problems
- Intervention and motivation to seek help
- Assessment, evaluation and development of an appropriate treatment plan
- Referral to community resources, self-help groups, inpatient treatment, outpatient counseling, and rehabilitation services
- Referral to a trained peer assistant – attorneys and judges who have faced their own difficulties and volunteer to assist a struggling colleague by providing support, understanding, guidance, and good listening
- Information and consultation for those (family, firm, and judges) concerned about an attorney
- Training programs on recognizing, preventing, and dealing with addiction, stress, depression, and other mental health issues

Are LAP services confidential?

Absolutely, this wouldn't work any other way. In fact your confidentiality is guaranteed and protected under Section 499 of the Judiciary Law. Confidentiality is the hallmark of the program and the reason it has remained viable for almost 25 years.

Judiciary Law Section 499 Lawyer Assistance Committees Chapter 327 of the Laws of 1993

Confidential information privileged. The confidential relations and communications between a member or authorized agent of a lawyer assistance committee sponsored by a state or local bar association and any person, firm or corporation communicating with such a committee, its members or authorized agents shall be deemed to be privileged on the same basis as those provided by law between attorney and client. Such privileges may be waived only by the person, firm or corporation who has furnished information to the committee.

Patricia Spataro

How do I access LAP services?

LAP services are accessed voluntarily by calling the State Bar's helpline at (800) 255-0569 or the Suffolk County Bar's helpline at (631) 697-2499

What can I expect when I contact LAP?

You can expect to speak to a Lawyer Assistance professional who has extensive experience with the issues and with legal professionals. You can expect the undivided attention you deserve to share what's on your mind and to explore options for addressing your concerns. You will receive referrals, suggestions, and support. The LAP professional will ask your permission to check in with you in the weeks following your initial call to the LAP office.

Can I expect resolution of my problem?

LAP instills hope through the peer assistant volunteers, many of whom have triumphed over their own significant personal problems. Also there is evidence that appropriate treatment and support is effective in most cases of mental health problems. For example, a combination of medication and therapy effectively treats depression in 85 percent of the cases.

How do I know if I should contact LAP?

This is a decision you will have to make for yourself, but if you have to ask that question, you should give LAP a call and speak with a professional. Reviewing the following Personal Inventory questions is a good place to start.

Personal Inventory

Personal problems such as alcoholism, substance abuse, depression and stress affect one's ability to practice law. Take time to review the following questions and consider whether you or a colleague would benefit from the available Lawyer Assistance Program services. If you answer "yes" to any of these questions, you may need help.

1. Are my associates, clients or family saying that my behavior has changed or that I don't seem myself?
2. Is it difficult for me to maintain a routine and stay on top of responsibilities?
3. Have I experienced memory problems or an inability to concentrate?
4. Am I having difficulty managing emotions such as anger and sadness?
5. Have I missed appointments or appearances or failed to return phone calls? Am I keeping up with correspondence?

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Co-Chair's reflections from Lawyers Helping Lawyers Committee

By Arthur E. Olmstead

Arthur E. Olmstead

Our Suffolk County Bar Association Lawyers Helping Lawyers Committee, (formerly known as the Lawyers Committee on Alcohol and Drug Abuse) has served continuously for over 25 years. Active committee members, including ordinary lawyers, SCBA presidents & executives, judges, students, and other volunteers have selflessly and quietly offered their time, experience, strength and hope where appropriate. During this time we have helped hundreds of members of our legal community (both SCBA members and non-members) address issues of addiction and mental impairment.

Many lawyers remain unaware of our work, as each individual case is necessarily handled on a wholly confidential basis, respecting the privacy of everyone involved. However, while respect for the privacy of those we help is paramount, we nevertheless hope that all of the legal community may benefit knowing what we do, so that those in need may benefit from appropriate referrals from knowledgeable colleagues.

There are a variety of branches of our network involved in the general file of Lawyers Assistance, including the American, New York State, and Suffolk County Bar Associations, as well as parallel committees in most other states and many New York counties. The various roles of the national, state, and local Lawyers Assistance programs and committees are addressed elsewhere in this issue. functional approach is more useful when thinking of these various programs and committees. I am often reminded of the question, *What hat am I wearing today?* And the answer, akin to peeling the continuously growing onion, may best be, it depends. Our *Statement of Purpose*, reprinted here, broadly sets forth our purpose as helping those in need find solutions to problems of addiction, trauma, and other mental health issues. The appropriate assistance changes over the evolution each person's particular disease, their awareness and willingness to deal with their situation, and their immediate legal and social situation.

The first level of assistance is necessarily triage. An experienced person must evaluate what is the presenting problem and what must be done to stabilize the situation. This is often complicated when the person being referred may not recognize their illness. The members of our LHL committee have various personal experience and professional training. We are most fortunate in having the assistance of Peter Schweitzer a trained case manager with decades of experience in Employee Assistance Programs. Peter Schweitzer has been a consultant for the SCBA LHL for several years and also works with the Nassau County Bar Association Lawyers Assistance Committee and the New Jersey State Board of Law Examiners. (He can be reached at telephone 516-650-0653.) It is interesting to observe that while our various committees are organized on a regional basis, we, as lawyers, often live and work throughout the state and nearby areas. When problems arise, they may be anywhere, and state and

(Continued on page 23)

FOCUS ON
LAWYERS
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SPECIAL EDITION

Finding Hope and Recovery

By Rosemarie Bruno

Rosemarie Bruno

This past week I had the opportunity to spend a weekend with a group of over 18,000 men and women from all over the world who believe, based on their own experiences, that recovery from addiction is possible. These men and women, and others who follow their path, have collectively witnessed the process of recovery free hundreds of thousands of people around the globe from the hopeless and desperate existence they had come to know as a result of their addiction. Since the disease of addiction does not discriminate, the group I spent the weekend with ranged in age from teenagers to the elderly, they represented all races and religions, and they came from all walks of life – from the unemployed to the professional - from the homeless to the affluent – from the uneducated to the doctorate. Regardless of their differences, they all share one common bond – a commitment to recovery. At some point during their addiction they heard a message of hope and decided to listen. What followed was a profound change in their way of thinking and living.

Having been lifted from the depths of despair to a place of hope, joy and gratitude, these men and women came together to share their experiences and to better understand how to bring this message of hope and freedom to those who still suffer from the disease of addiction. A similar gathering of lawyers in recovery will take place in San Diego, California, on October 11-13.[1] Groups like this, albeit on a smaller scale, gather together on a regular basis to share their experience, strength and hope because they understand that, had they never heard the message of hope, they would have remained trapped in their own misery – if they survived at all. [2]

In that same spirit, the Suffolk County Bar Association Lawyers Helping Lawyers Committee ("LHL Committee"), and other similar committees and programs throughout the country, and indeed the world, aim to bring that same message of hope and freedom to members of the legal profession. But the LHL Committee is not limited to helping only members who are affected by addictive disorders (including drugs, alcohol and gambling), it also aims to bring the message of hope and freedom to members suffering as a result of mental illness. The goal of the LHL Committee is to help members of the legal profession who are suffering get the help

(Continued on page 23)

FOCUS ON
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SPECIAL EDITION

EDUCATION

Are School Lunch Mandates a Nutritional and Financial Flop?

By Candace J. Gomez

Over the past several decades, it has become almost a national past time for students to complain about the quality of school lunches and these complaints have largely resulted in nothing more than good humor and shrugged shoulders. However, for many students and school districts, it's no longer a laughing matter as some school districts have had to cut ties with the National School Lunch Program after losing thousands of dollars in cafeteria sales.

Ironically, with the implementation of the Healthy, Hunger-Free Kids Act of 2010 ("HHFKA"), students are complaining that they are hungrier than ever. The HHFKA is legislation which authorizes funding and sets policy for USDA's core child nutrition programs such as the National School Lunch Program. Among other goals, the HHFKA and the accompanying regulations seek to combat childhood obesity by limiting caloric intake. However, it seems that the plan may have backfired as students are either buying multiple lunches to compensate for smaller portion sizes or boycotting school lunches altogether.

Last year, I received what I thought was an unusual question regarding school lunches from one of our school district clients. The administrator said that they had a middle school student who was regularly purchasing three lunches each day. Given the newly imposed food guidelines which were meant to reduce the calorie content of the food and thus the sizes of the portions, the district was concerned that allowing the student to buy multiple lunches in one day may not be permissible. Although there is a limit to the portions of protein or carbohydrates that students receiving free or reduced priced lunch can receive, students are permitted to purchase additional lunches at their own expense. In fact, the USDA Food and Nutrition Service has acknowledged that the nutrient standard for energy is an average amount for the age/grade groups and genders but the nutrient needs for many growing students may be greater than the average.

Candace J. Gomez

It turns out that student dissatisfaction with new school lunches is not that unusual. Last year, in Parsippany, New Jersey, about 1,000 students boycotted government-mandated higher prices for smaller portions. In upstate New York, a few districts have quit the National School Lunch Program, including the Schnectady-area Burnt Hills Ballston Lake system, whose lunchrooms ended the year $100,000 in the red. Near Albany, the Voorheesville superintendent reported that her district lost $30,000 in the first three months. In Wisconsin, the Mukwonago School District experienced a student boycott that reduced the number of lunches sold in half.

Students and parents have stated that for some students, especially athletes who burn calories quickly, the new portion sizes are simply not sufficient to get them through the school day without feeling hungry. With the increase in school lunch costs, they find themselves paying more money for less food. In contrast, other students are throwing healthy foods away, resulting in significant waste for some schools, because students are dissatisfied with the taste of school lunch as more whole-wheat breads, fruits and vegetables are utilized.

In light of these complaints, is it fair to say that the new school lunch mandates are a nutritional and financial flop? No, that does not appear to be a fair assessment. Despite various complaints, a noteworthy number of student boycotts, and some school districts cutting ties with the National School Lunch Program, it is important to remember that the program provided nutritionally balanced, low-cost or free lunches to more than 31 million children each school day in 2011. http://www.fns.usda.gov/cnd/lunch/aboutlunch/nslpfactsheet.pdf. The program also provided cash reimbursements to school districts in the amount of roughly $2.46 to $2.86 for each reduced-price and free lunch served during the 2012-2013 school year. *Id.* In addition to cash reimbursements, schools can also get "bonus" USDA foods as they are available from surplus agricultural stocks. Furthermore, Team Nutrition USDA provides schools with technical training and assistance to help school food service staffs prepare healthful meals, and with nutrition education to help children understand the link between diet and health.

Over time, the new lunch standards may become more accepted, as society at large and students in particular become more educated about healthy eating habits. Perhaps along the way, adjustments to the federal nutrition standards will have to be made and portion sizes slightly increased to provide more satisfying meals.

It may make fiscal sense for some districts to withdraw from the National School Lunch Program. However, it appears that most districts, especially those with significant numbers of students who are living at or below the poverty line and rely on these meals to have the necessary fuel to learn, the benefits of the National School Lunch Program far outweigh the drawbacks.

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.

LANDLORD TENANT

Tenant Liability in Commercial Leases

By Patrick McCormick

This article will address two recent appellate court rulings involving commercial leases and the tenant's liability for certain damages incurred by the landlord. The first, from the Appellate Division, First Department, involves an action by a landlord against a tenant for damages resulting from a flood caused by a rusted gauge on tenant's supplemental HVAC system. The second case is from the Appellate Division, Second Department and involves tenant's liability for post-termination rent.

In *45 Broadway Owner, LLC v. NYSA-ILA Pension Trust Fund,*[1] the tenant's predecessor installed a supplemental HVAC system that connected to the building's water risers. The lease provided that the parties' respective insurance policies would each contain an endorsement by which their respective insurance companies would "waive subrogation or permit the insured, prior to any loss, to waive any claim it might have against the other." The lease also provided that "each party releases the other with respect to any claim (including a claim for negligence) which it might otherwise have against the other party for loss, damage or destruction with respect to its property by fire or other casualty . . . occurring during the terms of this lease." In April 2010, in connection with certain work to be performed, the landlord notified the tenants that they were required to shut down any supplemental HVAC systems. During the work, the lobby of the building flooded and it was determined that a rusted and corroded pressure gauge on defendant/tenant's supplemental HVAC system burst, allowing water to flow out. The landlord suffered total damages (exclusive of attorney's fees and costs) of $136,055.22. The landlord's motion for summary judgment was granted and the tenant's cross-motion for summary judgment was denied.

Patrick McCormick

The Appellate Division, First Department noted that the release language contained in the lease "constitutes an enforceable reflection of the parties' decision to allocate the risk of liability for these claims [resulting from negligence] to third parties through the device of insurance - a choice that contracting parties are permitted to make as long as their intent to do so is clear and unequivocal." The court then found that the concept of "casualty" as used in the parties' lease included "the flood resulting from the rusted gauge . . ." The court held that the lease "does not suggest that 'casualty' is an event resulting only from an 'act of God.'" The court confirmed that "'casualty' may be defined as an 'accident' or an 'unfortunate occurrence.'"

In *Patchogue Associates v. Sears, Roebuck and Co.,*[2] plaintiff/landlord commenced an action to recover damages sustained by landlord after the termination of the landlord/tenant relationship, which occurred before the end of the lease term. The trial court granted defendant/tenant's to dismiss the first cause of action to the extent it sought post-termination damages under the lease and declaring that defendant/tenant had no liability to plaintiff/landlord for breach of contract, holding that "a landlord may not recover such claimed post-termination damages in the absence of a lease provision that specifically makes a tenant responsible for the payment of rent to the landlord after the landlord-tenant relationship ends." In reversing, the Appellate Division held that the absence of a "survival-of-rent" or "acceleration" clause "does not foreclose a landlord from seeking, after mitigation, its actual contract damages resulting from the breach..." Thus, the Appellate Division concluded that "although the landlord has already recovered pre-termination rent from the tenant pursuant to a summary eviction proceeding, the terms of the lease did not limit the landlord to recovery only of pre-termination rent in the event it commenced a summary eviction in the District Court to regain possession of the subject premises."

The lesson to be learned from these cases is that disputes involving liability for various types of damages may be avoided with carefully negotiated and specific lease clauses addressing damages.

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

1. 107 A.D.3d 629, 2013 Slip Op. 04895 (1st Dep't 2013)
2. 108 A.D.3d 659, 2013 Slip Op. 05305 (2d Dep't 2013)

The Suffolk Lawyer wishes to thank Lawyers Helping Lawyers Special Section Editor Elaine Turley for contributing her time, effort and expertise to our October issue.

Elaine Turley

REAL ESTATE

Get Out Girlfriend – Evicting Your Significant Other

By Andrew Lieb

Guess what? If you are trying to evict a family member and you resort to a summary proceeding, it will likely be dismissed. Instead, you will end up in a prolonged ejectment proceeding in Supreme Court or in the appropriate matrimonial / family part depending on your precise circumstances. This jurisdictional result is because Family Member Evictions are typically not available in a summary proceeding. However, should an unrelated paramour be considered a family member after all? Moreover, at what point in a relationship does an unrelated paramour become a family member? Is simply allowing a hook-up into one's house enough to make them a family member? Do you have to put a ring on it first? Should you have to cohabitate? What about sharing bills? If a girlfriend invites her boyfriend to stay over, why should he not have to be subject to a summary eviction if he refuses to leave? What happens if a sugar daddy puts his sugar baby up in a penthouse, but never lives with her — must he resort to the Supreme Court to rid himself of her?

Andrew Lieb

The answer seems to depend on what judge is assigned to the case because we, as practitioners, are stuck with murky guidance without either an Appellate Ruling or an action by our legislature to clear up our understanding of this important field of law. You see, what is the definition of a family member in this day and age after all? Do you know?

One of the best analyses of Family Member Evictions was recently rendered in an opinion by the Honorable Eric Bjorneby, who sits in Nassau County District Court, in June of this year, in the matter of *Kakwani v. Kakwani*. In that case, the petitioner argued that the respondent was a licensee and that the District Court had jurisdiction pursuant to RPAPL §713(7). The respondent moved to dismiss by arguing that she was a family member, and consequently not subject to the court's jurisdiction, as the sister-in-law of the petitioner. The court framed the issue before it as whether the respondent's right to reside stemmed from permission from the property owner or instead "from a true family relationship."

In addressing this issue, the Kakwani Court looked to precedent and persuasive authority, which contains a split on the issue of the eviction of paramours, albeit not the precise issue before the court. The field seems to have two diverging lines of cases, to wit: the Co-Dependency Test and the Opt-Out Rule. The Co-Dependence Test asks whether the family members lived together under one roof, were financially and socially dependent and whether a legal duty of support existed such that the parties were co-dependent and hence family members. In contrast, the Opt-Out Rule looks to whether the respondent is included in a legislative vehicle, which grants them a greater right than that of a licensee as embodied in RPAPL §713(7).

So, we, as practitioners, require guidance as to which of these rules apply to our clients. However, we should always remember to first look to determine if the issue before the court is licensee versus family member in the first instance before engaging in both potential analyses. It is suggested that the practitioner should ascertain whether a landlord / tenant relationship exists instead of a license by way of the paramour having received the property for consideration with possession of an exclusive interest in the property. Then, it's submitted that a mere holdover or non-payment proceeding may be proper. Regardless, the legislature should clarify whether it is their intent to except unrelated paramours from summary proceedings and require an action in Supreme Court. More so, we as practitioners should educate our clients, and the public at large, about the peculiar nature of evicting your girlfriend or boyfriend. It's a bet, that the public has no idea.

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

TRUSTS AND ESTATES UPDATE

By Ilene Sherwyn Cooper

Ilene S. Cooper

The Legal Fees of a Beneficiary

Before the court in *In re Frey,* NYLJ, July 25, 2013, at 25 (Sur. Ct. New York County)(Sur. Mella) was an application brought by counsel for a beneficiary to have its legal fees fixed for services rendered to the beneficiary in connection with her interest in the estate of her late mother. The executor of the estate did not oppose the application provided that the fees were charged to the beneficiary's interest in the estate.

The record revealed that the services performed by counsel over a two year period resulted in its client receiving emergency and regular distributions from the estate, loans against her legacy, and personal property that she was unable to obtain previously. Since completing its work, counsel has not been able to contact its client and has not been paid.

The court noted that in a proceeding for the fixation of fees pursuant to SCPA 2110, the court is authorized to direct the source of payment either from the estate generally, or from the funds in the hands of the fiduciary belonging to the legatee. In examining this issue, the court relied on the factors outlined by the Court of Appeals in *Matter of Hyde,* 15 NY3d 186 (2010), that is (1) whether the objecting beneficiary acted solely in his or her own interest or in the common interest of the estate; (2) the possible benefits to the individual beneficiaries from the outcome of the underlying proceeding; (3) the extent of the individual beneficiary's participation in the proceeding; (4) the good or bad faith of the beneficiary; (5) whether there was justifiable doubt regarding the fiduciary's conduct; (6) the relative interest of the objecting beneficiary in the estate; and (7) the effect of allocating fees on the interest of the individual beneficiary.

Based on this criteria, the court concluded that in pursuing her claim against the fiduciary, the beneficiary was not seeking to benefit or enlarge the estate, but only to secure her legacy. The court determined that there was no possibility that the other beneficiaries of the estate would benefit from the legal services performed, and thus, that it would be unfair to assess the other beneficiaries with the fees incurred.

Accordingly, the court fixed the fees and disbursements of counsel and directed that they be paid from its client's share of the estate.

Removal of Trustee

In *In re Hammerschlag, the* Surrogate's Court, New York County (Anderson, S.) was confronted with a petition by the beneficiary of a testamentary trust to compel distributions from the trust and for removal of the trustee. The trustee moved for summary judgment dismissing the application.

The record revealed that the terms of the trust granted the trustee broad discretion to pay so much of the income and/or principal of the trust to the petitioner, after due regard of her other available resources, as the trustee deemed necessary or proper for her education, health, maintenance or support. The trust required mandated distributions of principal to the beneficiary at ages 30 and 35, when the trust terminates.

In support of her application, the petitioner, who was then 26, alleged that she had no assets, no means of support, was homeless, and was living on the generosity of third parties. She requested monthly rental payments for an apartment for herself and her son and monthly expenses for a period of two years, as well as a lump sum payment from the trust of $15,000. The petitioner further alleged that the trustee had made no independent investigation of her needs and had acted in bad faith in rejecting her requests for funds by

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2013-2014 Alexander Inns of Court Schedule

Tuesday, September 10
Tuesday, October 8
Thursday, November 7
Tuesday, February 4
Thursday, March 6
Monday, April 7

All programs are held at the Touro Law Center. Dinner service begins at 5:30 p.m. and each program begins at approximately 6:15 p.m. Two CLE credits will be given for those attending each of the programs.

FAMILY LAW

Children Fall Through the Gap Left by Rule 4.2

By Marina M. Martielli and Catherine C. DeSanto

Rule 4.2 of the Professional Rules of Conduct prohibits a lawyer from communicating with a person known to be represented by counsel. A criminal defense attorney, however, may interview a child represented in a concurrent Family Court matter without the knowledge or consent of the child's attorney.

We believe Rule 4.2 needs to be amended to provide that concurrent criminal and Family Court matters with identical parties and facts are the same matter, and all attorneys are to be prohibited from interviewing and/or contacting represented children without the knowledge and consent of the child's attorney. This is the only way the legal rights and best interests of the child client will be fully protected.

Presently, concurrent family and criminal court matters are not the same matter for the purposes of Rule 4.2, even though the Family Court matter brought pursuant to FCA Article 10 would not exist *but for* the underlying criminal act.

We do not advocate that Rule 4.2 be amended to include all criminal proceedings involving children. It is only those proceedings where the perpetrator of the abuse/neglect is the parent, custodian or guardian of the child pursuant to FCA Article 10. In such cases, the child may not have the love or support of any family member. Indeed, the mother or father may be emotionally, financially or otherwise dependent on the perpetrator of the abuse/neglect and seek to protect the accused rather than the child, going so far as to force the child into recanting prior accusations. Such parents or other family members cannot be trusted; they often have hidden agendas that place the best interest of the accused above the best interest of the child.

We also do not suggest that criminal defense attorneys are necessarily aware of familial coercion, but recantations are often obtained in this way and then interviews are held without the knowledge or consent of the child's attorney. Without the legal rights given on the family side, such children are, on the criminal side, mere victim/witnesses literally up for grabs. This creates an arbitrary and capricious application of Rule 4.2. It also undermines the mission of all attorneys for children, contradicts the provisions of Article 10, and most of all effectively erodes the legal rights of represented children.

In *Matter of Marvin Q., 45 A.D.3d 852, 846 N.Y.S.2d 356 (2nd Dept. 2007),* a child was sexually abused by her maternal uncle. Proceedings were brought in both Family and District Courts and the same firm represented the uncle in both courts. Thereafter, unbeknownst to the child's attorney in Family Court, defense counsel obtained affidavits from both the mother and child recanting the prior accusations. When the child's attorney learned of such conduct, he filed a motion to disqualify respondent's attorney, which was granted. However, when the ADA made the same application, it was denied. *See, The People of the State of New York v. Rafel Quiroz, 15 Misc.3d. 1128(A), 841 N.Y.S.2d 221 (Nassau Cnty. Dist. Crt. 2007).*

In *Quiroz,* Nassau County District Court acknowledged that different standards apply in family and criminal courts, and agreed that "neither [defense counsel] nor his associates should have communicated …with the alleged victim … without the consent of [her attorney]." The *Quiroz Court* also stated it knew of "no public policy or other consideration pertinent to [the criminal] action that warrant[ed] interfering with defendant's fundamental … right to counsel…"

Two recent Suffolk County matters illustrate how the absence of Rule 4.2 repercussions on the criminal side resulted in continuing abuse of represented children, and even circumvented Article 10 proceedings.

"R."* was living with her maternal uncle and then repeatedly sexually abused by him. After R. came forward, DSS filed a petition pursuant to Article 10 based on such criminal act and R. was appointed counsel. Unbeknownst to R.'s attorney, R. was brought, by her mother, to the uncle's criminal defense attorney and forced to recant. The same firm represented the uncle in both Family and District Courts. R.'s attorney brought a motion to disqualify the Family Court attorney, which was granted; on the criminal side, a similar motion was denied.

During a contested custody matter, "M."* confided to his attorney that his father regularly hit him. An investigation was ordered by the Family Court and the father was subsequently charged in criminal court for actions against the child. Circumventing an Article 10 petition, M.'s father brought M. to the office of the father's criminal defense attorney, where M. was forced to sign an affidavit that he had fabricated the accusations against his father. M.'s affidavit was presented to the ADA and all charges against the father were dismissed. Faced with a recanting witness, CPS could not file its petition in good faith.

R. and M. are only two examples that underscore the need to amend 4.2 to provide that concurrent criminal and family matters are the same matter and that all attorneys, including criminal defense attorneys, are to be strictly prohibited from communicating with such children without the knowledge and consent of their attorneys.

The different and conflicting standard applied in criminal and family courts, and the lack of public policy regarding Rule 4.2, creates a gap that needs to be closed in order to protect our represented children.

*To protect confidentiality, R. and M. are fictitious initials.

Note: Marina M. Martielli and Catherine C. DeSanto are both attorneys in solo private practices and serve as attorneys for children. Ms. Martielli is on the appeals panel for family law issues. Ms. DeSanto is formerly a Suffolk County ADA.

COMMERCIAL LITIGATION

Facts Sufficient to Obtain Summary Judgment on a Veil Piercing Claim

By Leo K. Barnes Jr.

Leo K. Barnes Jr.

Whether during law school studying New York practice and procedure, or as a first year associate tasked with drafting opposition to a summary judgment motion, aspiring or practicing lawyers learn the oft-recited summary judgment standard – that the same is a drastic remedy and reserved for those rare instances when there is no genuine issue of fact sufficient to warrant a trial.

Equally challenging is a plaintiff's effort to hold a business owner personally liable for a corporate debt. The law permits incorporation of a business for the very purpose of escaping personal liability. *Bartle v. Homeowners Co-op*., 309 N.Y. 103 (1955). Generally, the owners of a corporation are not personally liable for the corporation's debts, as it is a separate legal entity existing independently of its owners or shareholders. *Morris v. New York State Dept. of Taxation & Fin.*, 82 N.Y.2d 135, 140 (1993). However, in certain circumstances, New York courts will apply the doctrine of piercing the corporate veil, an exception to the general rule, to impose personal liability on the owners for the corporate debt. *Id*., at 140-141.

The party seeking to pierce the corporate veil must show that the owners, through their domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party such that a court in equity will intervene and that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury. See, *Morris*, 82 N.Y.2d at 141-142. Alternatively, "the corporate veil will be pierced to achieve equity, even absent fraud, '[w]hen a corporation has been so dominated by an individual or another corporation and its separate entity so ignored that it primarily transacts the dominator's business instead of its own and can be called the other's alter ego.'" See *Island Seafood Co. v. Golub Corp.*, 303 A.D.2d 892, 893 (3rd Dep't 2003), quoting *Austin Powder Co. v. McCullough*, 216 A.D.2d 825, 827 (3rd Dep't 1995).

But the burden of establishing that piercing is warranted is a tall one as veil piercing is a "highly disfavored" remedy (see *Triemer v. Bobsan Corp*., 70 F.Supp.2d 375, 377 (S.D.N.Y.1999) dismissing veil-piercing claim and noting that "disregard of the corporate form is highly disfavored under New York law"). Indeed, the Second Department regularly affirms trial court dismissals when plaintiffs fail to meet the "heavy" burden required to establish piercing. *Carp v. Dunn*, 53 A.D. 467 (2nd Dep't 2008).

In this light, mindful that summary judgment is a "drastic" remedy and that piercing the corporate veil is "highly disfavored" remedy, those instances where a plaintiff successfully pierces the corporate veil on summary judgment are exceedingly rare.

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TAX LAW

Splitting Up the Family Corporation

By Lou Vlahos

Lou Vlahos

Many of us encounter family-owned corporations in which the founder's children are engaged in the business to varying degrees. They may even own shares in the corporation. These situations present difficult estate and succession planning considerations for the family and the business.

It may be that two sibling actively participate in the business. They are capable and each aspires to lead the corporation. Eventually, their competing goals, personalities, or divergent management styles may generate enough friction between them, and within the business, so as to jeopardize the continued wellbeing of the business.

Alternatively, the siblings are interested in different parts of the corporation's business. Each sibling may be responsible for a different line of business; for example, a different product, service, or geographic region. Their differing interests may lead to disagreements as to the allocation of resources.

In other situations, the founder and his children may not see eye-to-eye. For example, the parent wants to emphasize the corporation's traditional line of business, while his children seek to develop an offshoot of that business.

It may be difficult, using traditional estate planning techniques, to accommodate the varying interests of family members involved in a single corporation. For example, assume that corporation is owned 80 percent by parent, 10 percent by daughter and 10 percent by son; it operates two lines of business; one line is managed by son and the other by daughter; neither has any interest in the other's line of business; how should parent transfer his shares of the corporation?

Equal gifts or bequests to each child would leave them as equal shareholders, with the potential for disagreement. Moreover, to the extent daughter's efforts increase the value of her business while son's business remains unchanged, will son be unfairly benefitted? Alternatively, what if parent operates an older line of business, while son and daughter operate a newer line? There is little growth potential for the older line, but the newer line is poised to take off. What estate planning can parent implement to shift the future appreciation of the new business line to the children and out of his estate?

A solution may be found in a transaction that is associated with corporate tax planning, but which may yield estate planning benefits: the tax-free corporate separation.

When a corporation distributes appreciated property to its shareholders as a dividend or liquidating distribution, the corporation is treated as having sold that property for an amount equal to the property's fair market value, and it is taxed accordingly. The shareholders are taxed on their receipt of the property, either as a dividend or as payment in exchange for their shares.

There is an exception to this recognition rule, however, for certain distributions. In general, no gain will be recognized by either the distributing corporation ("Distributing"), or its shareholders if the following requirements are satisfied:

- Distributing distributes to some or all of its shareholders all of the stock of a subsidiary corporation controlled by Distributing ("Controlled");
- The distribution is not used principally as a device to distribute the earnings and profits of either corporation;
- Each of Distributing and Controlled is engaged, immediately after the distribution, in the active conduct of a trade or business, which has been actively conducted (by Distributing or Controlled) throughout the five-year period ending on the date of the distribution;
- There is a real and substantial business purpose for the distribution that cannot be accomplished by another non-taxable alternative, which is neither impractical, or unduly expensive;
- The distributee shareholders did not acquire their shares in Distributing by purchase during the five-year period ending on the date of distribution;
- Neither active trade or business was acquired in a taxable transaction during that period; and
- The distribution is not made pursuant to a plan by which at least 50 percent of Distributing or Controlled is acquired by third parties.

The determination of whether a trade or business is actively conducted is based on all the facts and circumstances. Generally, the corporation is required itself to perform active and substantial management and operational functions, though some of its activities may be performed by others. The holding of property for investment does not constitute the active conduct of a trade business; generally, neither does the ownership and operation of real estate.

Historically, the IRS has accepted a number of valid business purposes, including the following: (1) To provide equity in a business of Distributing or Controlled to a key employee; (2) To enhance the success of a line of Distributing's business by enabling the corporation to resolve management and other problems that arise in (or are exacerbated by) Distributing's operation of different businesses within a single corporation; (3) To resolve shareholder disputes in the management of a business.

These business purposes may be accomplished by contributing business assets to a new subsidiary (Controlled). These assets may represent a fraction of the assets used by Distributing in a single business; or they may represent a distinct business, separate from that retained by Distributing. After this asset transfer, Distributing distributes Controlled to some of Distributing's shareholders, in respect of or in exchange for some or all of their Distributing stock.

Assuming these requirements are satisfied, the three scenarios described above may be addressed as follows:

- Distributing creates Controlled, to which it contributes one-half of the business conducted by Distributing; Distributing then distributes Controlled to Parent and Son, in exchange for all of Son's shares in Distributing; this leaves Parent and Son as the owners of Controlled, while Parent and Daughter own Distributing; Parent may now transfer

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LAND TITLE LAW

Settling a Title Dispute at the Ballot Box

By Lance R. Pomerantz

This Election Day voters will have a rare opportunity to weight in on the terms of a settlement in a long-running land ownership dispute. Proposition 4 is a legislatively-referred constitutional amendment that would allow the legislature to authorize a sweeping settlement of disputes with numerous private landowners over property within the boundary of the Adirondack Park Forest Preserve.

Dubbed "the queen of all property title disputes" in an editorial in the *Adirondack Daily Enterprise* (June 22, 2013), all of the land involved in the proposed settlement is located within "Township 40," surrounding Raquette Lake in the Town of Long Lake, Hamilton County. The disputes involve more than 200 different parcels encompassing more than 1000 acres.

What's the fight about?

In 1772, with the approval of the Royal Governor, Joseph Totten, Stephen Crossfield and their associates purchased a vast amount of land[1] in central New York from the indigenous tribes. This area became known as Totten & Crossfield's Purchase. Soon thereafter, Totten & Crossfield's Purchase was divided into numbered "townships" and allotted to various "proprietors."

By 1848, all of Township 40 was owned by one man, Farand Benedict. After that, things get crazy.

Benedict and his successors subsequently sold much of Township 40. Many of the deeds contained erroneous, incomplete, overlapping or vague descriptions. Larger parcels (some comprised of a thousand or more acres) were commonly sold in fractionalized shares. Many deeds went unrecorded for decades and some were not recorded at all.

As a result, local real estate tax rolls were incomplete or inconsistent. Frequently, taxes were paid by someone other than the "record" owner; sometimes payments were credited against a different parcel than the payor believed they would be; or descriptions on the tax roll were dramatically larger or smaller than the local populace believed them to be "on the ground."

Lance R. Pomerantz

At the same time, there was plenty of "off record" ownership activity in the township. Many individuals and families had braved the rugged terrain between the Colonial and Civil War eras and "homesteaded" in the area. Precisely because of the remote location and difficult access, investors who held record title often did not visit or protect their holdings. This confluence of events often gave rise to viable claims of adverse possession.

In 1883, the state legislature enacted a law forbidding any further sale of state owned lands in the Adirondacks. In 1885, the legislature created the Forest Preserve, which placed all state owned land in the region under the control of the simultaneously created Forest Commission.[2] The Adirondack Park, comprised of almost three million acres of state and privately owned land, was created in 1892. Township 40 lies entirely within the Adirondack Park. Most significantly, the State Constitution was amended in 1894 to add Article VII, Section 7, declaring that the "lands of the state … constituting the forest preserve … shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged…"[3]

The tax sales and state acquisitions

Many of the modern-day disputes have their origin in several tax sales of Township 40 parcels that were conducted in the mid-1800's. Local tax enforcement at that time was provided by the state. Due to the uncertainties surrounding many of the Township 40 land titles, jurisdictional defects arose from failures to comply with statutory tax collection mandates.

There was a spate of litigation in the early twentieth century wherein tax titles were struck down by the courts.[4] In addition, several thousand acres were deeded directly to the State using vague descriptions. There are numerous titles that remain in limbo to this day, due either to the parties' lack of resources to quiet them through litigation, or to the political climate.[5]

The hard part

For decades, the affected owners, their elected representatives, local and state officials tried to reach a negotiated settlement, but were unsuccessful. A large obstacle is Article XIV of the state constitution. Because the state claims title to the contested parcels and all state land within Township 40 is deemed to be "forest preserve," the state cannot reach any settlement that involves relinquishing an interest in the disputed lands without a constitutional amendment. Such an amendment requires the resolution pass both houses of the legislature in two successive sessions and then be approved by the electorate at the next succeeding general election.[6]

In the early 2000's the Town of Long Lake offered to cede to the state lands "at least equal in value" to the disputed Township 40 lands, in exchange for the private landowners' receiving the state's claimed interests. The constitutional amendment authorizing the swap was passed in 2008, but failed to get enough support in 2009.[7]

It ain't over 'til it's over

The current proposal includes provisions that seek to accommodate the competing interests of many different interest groups. In addition to the constitutional amendment resolution, the legislature also passed a concurrent statute setting out the details of implementing the settlement. The "Township Forty Settlement Act" ("TFSA") would become Title 19 of the Environmental Conservation Law.

The essence of the process is the payment by the private owner of each parcel of "an amount that approximates the state's administrative costs in resolving the disputed parcels situated within township forty." The payment will be made to the Town of Long Lake and will be the sum of (A) a flat fee of $2000 per parcel plus (B) a local tax assessment factor multiplied by $200,000.[8] The private owners will have the ability to reduce the assessment factor by 1) making a "gift" to the state of a portion of the disputed parcel for inclusion in the Forest Preserve, or 2) granting a conservation easement to the town restricting development on all or part of the disputed parcel. Private owners will also be able to opt out of the process altogether.

Should they choose the latter (or fail to perform after opting in), the TFSA requires the New York State Attorney General to "commence an action in a court of competent jurisdiction pur-

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BOOK REVIEW

A Joint Venture - a Grand Outcome

By William E. McSweeney

William E. McSweeney

It was an unlikely pairing. One was born Dubose Heyward, descendant of a signer of the Declaration of Independence; a man securely placed within Charleston society — that which existed "South of Broad"; a congregant of St. Philip's Episcopal Church; initially an insurance agent; ultimately a writer of poetry, short stories, essays, novels, and plays.

The other was Brooklyn-born Jacob Gershvin — the world would later know him as George Gershwin, a first-generation Jewish American, whose father had fled Russia; who learned the piano by ear; who, as a teen-ager, entertained at the dinner show at Fox's City Theater on 14th Street, Manhattan; initially a "song-plugger" for others; ultimately a composer in his own right whose work would immensely enrich American music. That the trajectories of Heyward and Gershwin would one day intersect would at first have been adjudged as being — in Sportin' Life's words, "not necessarily so."

Dubose Heyward: A Charleston Gentleman and the World of Porgy and Bess.
By James M. Hutchisson.
University Press of Mississippi/Jackson, New York, NY.
ISBN: 1-57806-250-0.

As its title, "Dubose Heyward," would suggest, this eloquently written biography by James M. Hutchisson focuses principally on the Southern dreamer that was Heyward; as it should for the thoughtful writer, Hutchisson's subtitle—"A Charleston Gentleman and the World of Porgy and Bess" telegraphs meaning. Heyward was a gentleman. In the Charleston of his time that term spoke of a genteel person, one loyal to his "class," one who believed in preserving the status quo, that which kept apart whites and blacks, save for the latter's servitude as "domestics" and field hands. Such was the world Heyward was born into.

Yet, as a young man, Heyward discovered another world — one not subsumable by his own, one rather which was distinct, one which ran parallel to his own: both worlds shared the peninsula formed by the Ashley and Cooper Rivers, but nonetheless existed independently of each other.

From a family impoverished by the Civil War, Heyward supported himself by selling life-insurance policies door-to-door. It's perhaps worth noting that John D. MacArthur, later a philanthropist, founder of the "genius awards," at roughly the same time did the same work, becoming a millionaire by dint of his selling life-insurance policies at a cost of $1 the policy. MacArthur's gains then were measured in the millions of dollars; Heyward's gains were to be immeasurable.

His door-to-door visits brought him into contact with the "Gullahs," descendants of African slaves from Angola (Ann-gullah), who, unlike other slaves brought over to the new world and thereafter dispersed, had been settled near-exclusively in the low country area of South Carolina, their

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Photo credit: Jacqueline Shantell McSweeney

In nearby Mt. Pleasant, South Carolina, a family gathers in a retro establishment—a pharmacy-cum-soda shop. They include from left, Lawton McSweeney, the author's grandnephew; David McSweeney, Lawton's father, the author's nephew; William McSweeney, Spiros Aspiotis, the author's grandson; Kelly, David's spouse; and two lads (he boasted) named after the author: grandson Vasilios (translates as William) Aspiotis; and grand-nephew William McSweeney.

TRUSTS AND ESTATES

Expansion of EPTL § 3-3.5 and SCPA § 1404's Safe Harbor Provisions

By Robert M. Harper

In terrorem clauses, or so-called "no contest" provisions, are conditions on dispositions in testamentary instruments, which are intended to discourage frivolous disputes concerning the validity of the instruments;[1] to settle estates quickly and smoothly; and to prevent waste of estate assets.[2] Under certain circumstances, in terrorem clauses provide for beneficiaries to forfeit their interests in estates, to the extent that the beneficiaries trigger the conditions contained in the governing instruments.[3] Though disfavored and strictly construed, in terrorem clauses generally are enforceable under New York law.[4]

In order to balance the competing interests of testators to prevent contests to their testamentary wishes and of beneficiaries to make informed decisions as to the merits of any probate objections they might file, Estates, Powers and Trusts Law ("EPTL") § 3-3.5 sets forth a non-exhaustive list of "safe harbor" provisions which protect beneficiaries from triggering in terrorem clauses in wills and codicils. The list includes "[t]he preliminary examination, under [Surrogate's Court Procedure Act ("SCPA") §] 1404, of a proponent's witnesses, the person who prepared the [propounded] will, the nominated executors and the proponents in a probate proceeding."[5]

In recent amendments to EPTL § 3-3.5 and SCPA § 1404, the New York Legislature expanded the scope of the safe harbor provisions relative to pre-objection examinations under SCPA § 1404. This article discusses the amended statutes and Nassau County Surrogate Edward W. McCarty's recent application of the amendments in *Matter of Weintraub*.

Robert M. Harper

The Statutory Amendments

As explained above, the New York Legislature recently amended EPTL § 3-3.5 and SCPA § 1404 to provide safe harbor to a beneficiary who seeks, "upon application to the court based upon special circumstances, [the pre-objection examination of] any person whose examination the court determines may provide information with respect to the validity of the will that is of substantial importance or relevance to a decision to file objections to the will".[6] The Legislature did so in the wake of *Matter of Singer* and *Matter of Baugher*, which collectively provided as follows: while the safe harbor provisions enumerated in EPTL § 3-3.5 were "non-exhaustive," prior to probate, Surrogate's Courts were powerless to construe in terrorem provisions contained in testamentary instruments to determine whether the taking of pre-objection examinations of individuals not listed in EPTL § 3-3.5 would trigger in terrorem clauses.

The amendments to EPTL § 3-3.5 and SCPA § 1404 "expand[] the safe harbor at the discretion of the Surrogate so long as special circumstances exist which indicate that the examination of a person not expressly included in the statutory safe harbor may produce information of relevance to a decision to file objections." Moreover, the "special circumstances" standard set forth in the amended EPTL § 3-3.5 and SCPA § 1404 is analogous to the "special circumstances" standard contained in Surrogate's Court Rule 207.27. Accordingly, where the requisite "special circumstances" exist, a potential objectant can obtain court approval to take the pre-objection examination of a witness not listed in EPTL § 3-3.5 or SCPA § 1404 without triggering an in terrorem clause.

Matter of Weintraub

In *Matter of Weintraub* (where the propounded instrument contained a broad in terrorem provision), Surrogate McCarty was called upon to decide whether "special circumstances" existed to justify the pre-objection examination of a witness not specifically identified in EPTL 3-3.5 and SCPA § 1404's amended safe harbor provisions.[7] In particular, the respondent sought a pre-objection examination of the attorney-draftsperson's associate, who met with the decedent on February 7, 2011 for the purpose of having her sign the propounded instrument two days before the decedent allegedly executed it on February 9, 2011. The attorney-draftsperson's associate decided not to have the decedent sign the instrument during the February 7, 2011 meeting, writing in her notes that the decedent: (a) was not comfortable signing any documents on that date; (b) was confused as to what she wanted; and (c) did not remember speaking with the attorney-draftsperson earlier that day.

Based upon the foregoing facts and the decedent's medical records (which reflected that the decedent had Alzheimer's Disease and was "confused" and "disoriented" in the days up to and including the propounded instrument's execution), Surrogate McCarty held that "special circumstances" existed to justify a pre-objection of the attorney-draftsperson's associate. As a result, the respondent was authorized to take the pre-objection examination of the attorney-draftsperson's associate, without triggering the instrument's in terrorem provision.

Conclusion

In preparing for and ultimately taking pre-objection, SCPA § 1404 examinations in probate proceedings concerning testamentary instruments containing in terrorem clauses, practitioners should be mindful of the foregoing amendments to EPTL § 3-3.5 and SCPA § 1404. As amended, the statutes may provide counsel and their clients with the opportunity to obtain broader discovery before filing probate objections and, thus, triggering the governing instruments' in terrorem clauses.

Note: Robert M. Harper is an associate at Farrell Fritz, P.C., concentrating in the field of estate and trust litigation. Mr. Harper is also an Officer of the Suffolk Academy of Law, Special Professor of Law at Hofstra University's Law School, and Co-Chair of the New York State Bar Association's Trusts and Estates Law Section's Legislation and Governmental Relations Committee.

1. Peter C. Valente & Joann T. Palumbo, "In Terrorem", N.Y.L.J., Apr. 29, 1999, at 32, col. 6.
2. *Matter of Muller*, 138 Misc.2d 966 (Sur. Ct., Nassau County 1988).
3. *Matter of Ellis*, 252 A.D.2d 118 (2d Dep't 1998).
4. *Matter of Singer*, 13 N.Y.3d 447 (2009).
5. EPTL § 3-3.5; SCPA § 1404.
6. N.Y.S. Ass. Memo. in Sup. of A.6838 (2011).
7. *Matter of Weintraub*, 40 Misc3d 1207(A) (Sur Ct, Nassau County 2013).

WHO'S YOUR EXPERT

"Weight vs. Admissibility"

By Hillary A. Frommer

An expert witness may lack the particular expertise, knowledge or qualifications that one would argue is necessary to offer an "expert" opinion. That does not mean, however, that the expert will be precluded from testifying to a jury. If a witness qualifies as an expert and if the *Frye* standard is satisfied (where necessary), then the expert should be permitted to testify. A lack of knowledge or qualifications goes to the weight of the expert's testimony and not its admissibility.

The New York Court of Appeals articulated this principle in *Adamy v Ziriakus*.[1] There, it held that because the defendant failed to challenge the qualifications of the plaintiff's forensic pathology expert during the trial, he could not argue on appeal that the expert testimony was inadmissible as a matter of law. This was, essentially, a preservation issue. The court then went on to state, however, that the challenges made to the expert's testimony and qualifications during cross-examination went to the weight of the expert's testimony and not the admissibility.[2] The appellate courts and trial courts have adhered to this rule. For example, In *Rojas v Palese*,[3] a medical malpractice case, the defendant objected to the qualifications of the plaintiff's vascular surgery expert, and sought to preclude his testimony at trial. The court denied that motion, finding that the qualifications "go to the weight and not the admissibility of the expert's testimony."[4] Similarly, in *Stanley Tuchin Assoc., Inc. v Grossman*,[5] an employer sued former employees for breach of a restrictive covenant and the misappropriation of trade secrets. The defendant employees sought to preclude the report and testimony by the employer's expert on the grounds that his opinion was contradicted by that of their own expert. The court held that the employer's report and testimony were admissible because the *Frye* standard was satisfied. The fact that there were competing expert opinions went to the weight of the opinions, and did not render one opinion inadmissible as a matter of law.

Hillary A. Frommer

In fact, trial courts are reversed when they preclude an expert from testifying due solely to a lack of knowledge, experience or qualifications. For example, in *Ariola v Long*,[6] a medical malpractice case, the trial court precluded the plaintiff's expert from testifying because he lacked personal experience in performing a particular test. The Appellate Division reversed and ordered a new trial, finding that the trial court erred in barring the expert testimony because the lack of the expert's personal experience went to the weight of his testimony, and not to its admissibility. By precluding the expert from testifying, the Appellate Court found, the trial court prevented the plaintiff from proving his *prima facie* case that the defendant deviated from the standard of care. Similarly, in *Ochoa v Jacobsen Div. of Textron, Inc.*,[7] the plaintiff alleged that he was injured while operating the defendant's commercial riding lawnmower. The trial court precluded the plaintiff's expert from testifying because he had no experience, knowledge or education regarding the commercial lawnmower. The Appellate Division reversed, finding that the expert's proffered testimony regarding mechanical safety and interlock systems generally was relevant to the plaintiff's design defect theory, and his lack of particular knowledge or experience went to the weight of his testimony, and not its admissibility.[8]

How then can a party objecting to an inexperienced or less-than-qualified expert soften the impact of that expert's testimony at trial? One solution is to ask for a limiting instruction to the jury. Section 4410-b of the CPLR provides that "at the close of the evidence, or such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests." There is no set limiting instruction that a court will give. As CPLR § 4410-b states, the party requesting the instruction must craft what it wants given. In the case of expert testimony, a party may ask for an instruction that the jury is free to consider the expert's lack of experience in weighing his testimony; or that jury may reject the expert's testimony altogether. While the latter may appear to be a severe limiting instruction, it is not inconsistent with the New York Pattern Jury Instructions, which state that a jury "may reject the expert's opinion if [it] find[s] the facts to be different from those which formed the basis for the opinion … [and] may also reject the opinion if, after careful consideration of all the evidence in the case, expert and other, [it] disagree[s] with the opinion."[9]

Limiting instructions are routinely given in criminal cases, particularly in prosecutions for drug-related offenses. In *People v Brown*,[10] the Court of Appeals held that the testimony by the prosecution's expert concerning the methods and terminology used in street-level drug transactions must be paired with appropriate limiting instructions that the jury is free to reject the testimony offered, and that the expert's opinion is not proof that the defendant was engaged in the sale of narcotics. The case law suggests that the proper course of action in civil cases is for the trial court to issue a limiting instruction, rather than preclude the expert testimony. For example, in

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Supreme Court Justice Sonia Sotomayor Visits Touro Law Center

On September 9, United States Supreme Court Justice Sonia Sotomayor came to Touro College Jacob D. Fuchsberg Law Center in Central Islip where she received the Bruce K. Gould Book Award for her critically praised memoir, *My Beloved World*.

Justice Sotomayor was greeted by Patricia Salkin, Dean and Professor of Law at the Law Center, and was joined by Dr. Alan Kadish, President and CEO of Touro College and University System, and Dean Emeritus Howard A. Glickstein.

She accepted the award for her book — which recounts her life from a Bronx housing project to the federal bench - in front of more than 700 students, alumni, faculty, staff and the public assembled in an auditorium and also in nearby overflow rooms. After the award presentation, Justice Sotomayor delivered comments and answered questions from students.

Earlier in the day, Justice Sotomayor - the first Hispanic and the third woman to serve on the Supreme Court - met with more than 150 students in three small-group sessions. She also visited Touro Law's Disaster Relief Clinic, meeting with students and attorneys to discuss the impact of their work on the people of Long Island.

Photo by Kathy Stanley of K Stanley Photography

"Meeting Supreme Court Justice Sonia Sotomayor was fantastic," said Touro Law student Catherine Romano. "She was so approachable and down to earth which makes her all the more inspiring. I am a member of Phi Alpha Delta Law Fraternity, as is Justice Sotomayor who inspires us all to achieve greatness."

As a jurist of Hispanic origin, Justice Sotomayor's visit held special meaning for the Law Center, where about 38 percent of the incoming class is minority. At 17 percent, Hispanics comprise the largest proportion of the class.

"Justice Sotomayor's life and career is a story that inspires those who are drawn to the legal profession," said Dean Salkin. "Her presence at Touro Law Center resonates in a special way, because our school has an impressive and long-time commitment to diversity and service to the underprivileged."

Now in its 21st year, the Bruce K. Gould Book Award is presented annually to the author of an outstanding publication related to the law, legal profession or legal system. Previous winners include Justice Sandra Day O'Connor, the late Senator Daniel Patrick Moynihan, Senator Christopher Dodd and Harvard Law Professor Alan Dershowitz.

KIDS CORNER

SCBA staff member Joy Ferrari has not one, but two adorable granddaughters to enjoy. Caitlin, 4, loves her baby sister Emma who just turned 1.

Raful Honored at Touro

Touro Law Center honored the tenure of Dean Lawrence Raful on Sept. 16 with a special Portrait Unveiling Ceremony. Dean Raful, accompanied by his wife and parents, was on hand as Dean Salkin, Dean Emeritus Howard Glickstein, Chair of the Touro Law Board of Governors Howard M. Stein, Esq. and Associate Dean for Academic Affairs Deborah Post spoke about the impact Dean Raful has made on Touro Law during his tenure as dean from 2004-2012.

A portrait of Dean Raful was revealed, which will hang in the dean's hallway alongside Dean Emeritus Howard Glickstein and former Dean John Bainbridge. Dean Raful was remembered for his support of students and faculty, his leadership in moving the school to its current location across the street from both Federal and State Courthouses in Central Islip as well as his positive influence, management and leadership over the years.

Dean Lawrence Raful and his wife Dinah at the ceremony.

Photo by Kathy Stanley of K. Stanley Photography

Dean Patricia Salkin, left, Bob and Susy Raful, the parents of Lawrence Raful joined Dean Raful and his wife Dinah at the portrait unveiling at Touro.

ESTATE PLANNING

Family Limited Partnerships

By Alison Arden Besunder

This is part one of a series.

A family limited partnership ("FLP") is a sophisticated estate and financial planning technique that resembles any other limited partnership but has family members (spouses, children, grandchildren and/or siblings) as its partners. For some of the reasons discussed below, the FLP is a tool that should be recommended sparingly and implemented with care and continued attention. This article addresses some of the basic points of an FLP and provides a brief primer for practitioners who may encounter it in various contexts.

As with other limited partnerships, there is one or more general partner responsible for managing the FLP and its assets. Limited partners have an economic interest in the partnership but lack control and marketability of their shares. They cannot influence FLP operations and lack authority to act on the FLP's behalf. Essentially, it is a limited partnership limited to family members. In many respects, the FLP is a holding company that holds property contributed by the members.

When implemented in accordance with the requisite formalities, the FLP can allow family members to cumulatively manage their assets. The goal is to minimize potential disputes, provide for tax-efficient transfer of wealth to the next generation, and minimize legal, accounting, and financial management costs by pooling assets.

Alison Besunder

An FLP allows the senior family members to transfer their assets at a discounted rate while retaining management control of those assets. The valuation discount can be as much as 30 percent because the interests are not marketable to non-family members. The senior members can gift their limited partnership shares to their children and grandchildren by using the annual gift tax exclusion (currently $14,000 per person, $28,000 for spouses who "split" their gifts). Those shares are also gifted at a discount. The interests of the limited partners are protected from creditors and from ex- or soon-to-be-ex spouses. The partnership itself is not taxed; instead, the partners report the income and deductions on their personal returns proportionate to their interest in the partnership.

The FLP can be a receptacle for most any assets, although a primary residence, retirement plans, or life insurance should not be contributed to an FLP.

The FLP is appropriate for a narrow class of people, which (at least in the opinion of the author) fluctuates with the federal estate tax exemption (currently $5.25 million indexed for inflation). It can also be a useful tool in succession planning for family businesses. The investment of cost and time to properly operate an FLP may not make the exercise worthwhile for individuals with assets less than the federal exemption or who are not seeking to ensure continuity of a business.

An FLP requires at least two members: a general partner, who accepts responsibility and personal liability for partnership debts and creditors, and who generally retains operating direction or control of the FLP; and a limited partner, who has ownership interests in the FLP but lacks management control.

The FLP members must observe corporate formalities such as appropriately documented annual and regular meetings, file partnership returns and issue K-1s to all partners, and obtain appraisals every time property is transferred in or out of the partnership, or shares are gifted. The IRS has increasingly scrutinized FLP's when a discounted valuation is claimed on a gift or estate tax return. Consider two examples that illustrate the hazard.

The Mr. and Mrs. Addams are engaged in buying and selling commercial real estate as investment properties. Their son, Cousin Itt, is the property manager. The Addams want to ensure their three children inherit equally from their estate, but want Cousin Itt to be compensated for his efforts. They create an FLP and fund it with their real estate interests worth $15 million. The Addams and each limited partner duly conduct annual and more regular partnership meetings, file partnership returns and issue K-1's to the partners, and Cousin Itt is paid a salary as property manager. The partnership pays *only* partnership-related expenses. The senior Addamses retain sufficient assets outside of the FLP to pay their own personal

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INSURANCE

Insurers Beware - New York Court of Appeals Adopts Draconian Penalty for Wrongfully Refusing to Defend

By Dan D. Kohane and Elizabeth A. Fitzpatrick

On June 11, 2013, the New York Court of Appeals fundamentally altered the liability insurance coverage landscape in one of the most significant and far-reaching decisions in recent memory. In sum and substance, the court held that an insurer who wrongfully declines to defend an insured will lose its right to rely upon policy exclusions when litigating indemnity obligations.

It is well established that an insurer's duty to defend arises whenever the allegations in a complaint against the insured bring the claim within the scope of the coverage afforded by the policy, regardless of how false or groundless those allegations might be (*Goldberg v. Lumber Mut. Cas. Ins. Co.,* 297 N.Y. 148, 154, 77 N.E.2d 131). Stated otherwise, the duty of the insurer to defend the insured rests solely on whether the complaint alleges any facts or grounds which bring the action within the protection purchased. *Seaboard Sur. Co. v. Gillette Co.*, 64 N.Y.2d 304, 310 [1984].

However, where the claim may fall within the embrace of the policy, but a policy exclusion exists which precludes coverage, what penalty will an insurer face if it does not provide a defense, while litigating, in a separate declaratory judgment action, its contractual obligations under the policy? Well after *K2*, the answer is clear. An insurer who does not afford a defense, where the claim as pled falls within the policy provisions, will face the ultimate penalty of losing the right to rely on that very policy exclusion in subsequent coverage litigation.

For example, the insurer receives a tender of a summons and complaint against its insured that alleges claims of negligence in the supervision, maintenance and control of a construction site with the result that a worker falls on the site sustaining injuries. The insurer conducts an investigation and learns that the worker is an employee of the insured. The commercial general liability policy (CGL) includes a worker's compensation/employer's liability exclusion. That claim is within the province of a worker's compensation policy, not a CGL policy. However, applying the court's reasoning in K2, since the complaint does not allege that the plaintiff is an employee, the insurer is obligated to afford the insured a defense, while litigating in a separate declaratory judgment action, their rights and obligations under the policy.

But how can this be, we say, in light of the Court of Appeals' pronouncement in *Servidone Const. Corp. v. Sec. Ins. Co. of Hartford* (64 N.Y.2d 419, 423-25 [1985])? It has remained the standard for 28 years of insurance jurisprudence that the duty to indemnify requires a covered loss. That was, until June 11. A unanimous Court of Appeals, without even a passing nod of farewell to *Servidone¸ decided K2 Investment Group, LLC v. American Guar. & Liab. Ins. Co.* (2013 NY Slip Op 04270 and altered the well-worn paradigm. It also places in jeopardy a long line of cases which held that a carrier does not have an obligation to defend a case if the insurer is able to demonstrate that it can never be charged with an obligation to indemnify. (*City of New York v. Ins. Corp*., 305 A.D.2d 443 [2d Dept., 2003]; *see also, Pagano v. Allstate Ins. Co.*, 5 A.D.3d 576 [2d Dept., 2004]; *Dumblewski v. ITT Hartford Ins. Co.*, 213 A.D.2d 823[3d Dept., 1995]).

The ruling, simply stated, takes a judicial eraser to policy exclusions and eschews its words in *Servidone: The duty to indemnify requires a covered loss.* In support of its position, the high court noted that in *Lang v. Hanover* (3 N.Y.3d 350 [2005]) it stated:

> "[A]n insurance company that disclaims in a situation where coverage may be arguable is well advised to seek a declaratory judgment concerning the duty to defend or indemnify the purported insured. If it disclaims and declines to defend in the underlying lawsuit without doing so, it takes the risk that the injured party will obtain a judgment against the purported insured and then seek payment... Under those circumstances, having chosen not to participate in the underlying lawsuit, *the insurance carrier may litigate only the validity of its disclaimer* and cannot challenge the liability or damages determination underlying the judgment."

Dan D. Kohane

Elizabeth Fitzpatrick

The court then went on to hold here, that if the disclaimer is *found bad*, the insurance company must indemnify its insured for the resulting judgment, even if policy exclusions would otherwise have negated the duty to indemnify.

However, the court in *Lang* never suggested that exclusions would be written out of the policy. Notably, that decision specifically recognized that the insurer *may litigate the validity of its disclaimer*. While the court's ruling appeared to hold that it would disallow a subsequent challenge to the underlying liability or damage determination, it did not prevent an insurer from standing on policy exclusions or breaches of policy conditions to preclude its obligation to indemnify.

The court summarized and further justified its decision with these words:

> This rule will give insurers an incentive to defend the cases they are bound by law to defend, and thus to give insureds the full benefit of their bargain. It would be unfair to insureds, and would promote unnecessary and wasteful litigation, if an insurer, having wrongfully abandoned its insured's defense, could then require the insured to litigate the effect of policy exclusions on the duty to indemnify.

So what, if anything, does all of this mean going forward?

In the future, insurers will have to think very differently about denying a defense to an insured. As discussed below, the consequences may be very, very expensive. Given the breadth of the duty to defend in New York, should a carrier now err, almost invariably, on the side of caution to protect against the potential loss of coverage defenses and immediately commence a declaratory judgment action to seek exculpation?

As noted above, the carrier who gambles on its duty to defend and loses may very well face costly consequences. A final note-on September 3, 2013, the Court of Appeals granted American Guarantee's motion for reargument, a rare occurrence, setting the matter down for a future, as yet undetermined, term. Thus, is appears that the final chapter has yet to be written.

Note: Dan D. Kohane, a Senior Member of the New York law firm of Hurwitz & Fine, P.C., is a nationally recognized insurance coverage counselor who serves as an expert witness, conducts extensive training, consultation and in-house seminars on this highly specialized practice and heads the firm's Insurance Coverage practice group.

Note: Elizabeth A. Fitzpatrick is the Resident Partner at Hurwitz & Fine, P.C.'s Long Island office serving the New York City metropolitan area, where she concentrates her practice on insurance coverage disputes and civil appeals. She is a frequent lecturer and author on insurance coverage topics for a wide range of professional groups and regularly provides insurance coverage training for insurers throughout the country.

CONSUMER BANKRUPTCY

Bankruptcy Attorney Pays Price for Vexatious Litigation

Litigation must have a proper purpose

By Craig D. Robins

A recent court decision brought back a memory of an odd discussion I had with an attorney in the hallway of the bankruptcy court a good number of years ago. He was there to defend a Chapter 13 trustee's motion to dismiss and boasted to me that he was not worried about losing, as he planned to "paper the trustee to death" with an extraordinary amount of litigation.

I found his comments most peculiar as they were illogical and smacked of bad faith. The attorney didn't plan to litigate the merits, he instead sought to essentially harass the trustee with excessive motions practice, believing that the trustee would eventually give in. This attorney apparently had a few loose screws in his head as such a frivolous litigation tactic would certainly not succeed and could only cause the attorney additional problems.

I don't know how that attorney ultimately fared with his Chapter 13 case, but I read a few years later that he had been sanctioned by the bankruptcy court in several other cases and ultimately disbarred from practicing any law in New York.

As Chief Judge Irving Kaufman said 30 years ago, "advocacy is an art in which the unrelenting pursuit of truth and the most thorough self-control must be delicately balanced," and "zealous advocacy on behalf of a client can never excuse contumacious or disrespectful conduct."

Judge Elizabeth S. Stong, sitting in the Brooklyn Bankruptcy Court, recently cited these quotes from Judge Kaufman in a case involving an attorney who thought he could engage in vexatious litigation as a strategy for thwarting a Chapter 7 trustee's adversary proceeding.

In *Debra Kramer, Trustee of the Estate of Shahara Khan v. Mahia*, No. 10-46901-ess, (Bankr. E.D.N.Y. March 11, 2013), Judge Stong addressed a situation in which an attorney acted in bad faith to multiply proceedings unreasonably and vexatiously. The judge sanctioned the attorney $15,000.

Craig D. Robins

In that Chapter 7 case it appeared that the debtor transferred her home to her son for no consideration. The trustee, through her counsel, Avrum J. Rosen, of Huntington, then brought an adversary proceeding against the son in December 2011, seeking to set aside the transfer as a fraudulent conveyance.

At the pre-trial conference six weeks later, an attorney, Karamvir Dahiya of New York City, appeared. The court directed him to respond to the complaint within a week, which was already past due. Dahiya filed his answer a week after the court directed him to. In it, he included counterclaims against the trustee and he also demanded a jury trial.

The answer contained allegations that were bizarre and outlandish. The counterclaims sought a permanent injunction against the trustee to bar her from bringing actions against the defendant without first showing that there was "probable cause." Dahiya also brought a counterclaim seeking to compel the court to amend its Local Rules to impose a similar requirement on all trustees.

In the first counterclaim, which was for "abuse of process," Dahiya alleged that the trustee brought the adversary proceeding without a basis in fact or law, to intimidate the family to extract a settlement. He characterized the conduct of the trustee and her counsel as "contemptible from all aspects" and claimed that they "acted deliberately, maliciously, oppressively and with callous and intentional disregard of their duties..." Dahiya further sought an award of punitive damages, attorneys' fees and costs.

In the second counterclaim, which was for "constitutional torts," he charged the trustee with deliberately hurting the family composition. He stated that the defendant's "spiritual duty to maintain his family has been negatively impacted" by the proceeding. He alleged that the trustee did not "do her homework" and that she had abused her powers.

Dahiya further sought an injunction permanently enjoining the trustee from instituting any proceedings unless the trustee filed an independent sheet along with the summons and complaint delineating the steps the trustee had undertaken to ascertain the facts alleged in the complaint, and a minimum one-page summary of arguments as to why there is probable cause.

Finally, the attorney asked the court to direct the United States Trustee to investigate the assertion of intra-family claims by Chapter 7 trustees.

The trustee then brought a motion for sanctions pursuant to 28 U.S.C. § 1927, which allows sanctions to be imposed against an attorney who engages in unreasonable and vexatious litigation, and Bankruptcy Code § 105, which permits bankruptcy judges to essentially grant any relief necessary to carry out the mandates of the Bankruptcy Code.

In her motion, the trustee, after describing her investigation and due diligence, argued that Dahiya brought the counterclaims in bad faith, making meritless allegations in order to harass, intimidate, and disparage the trustee, and to frustrate the purpose of the bankruptcy process and prevent the court from reaching the merits of the adversary proceeding. The trustee also pointed out that Dahiya had brought similar abuse of process counterclaims against trustees in at least five other cases.

A month after the trustee brought the sanctions motion the defendant fired Dahiya and hired new counsel who immediately withdrew the counterclaims. Oddly, seven months later, the defendant discharged the new attorney and rehired Dahiya.

Dahiya's response to the sanctions motion was marked by many requests for adjournments, missed deadlines, and significant and unnecessary delay. Dahiya agreed to a settlement, but then refused to go forward with it. Dahiya also retained an attorney, dismissed him, then retained a second. All of this resulted in a delay of six months before the sanctions motion was ultimately heard. Dahiya argued that the court did not have the authority to sanction him.

In her 31-page decision, Judge Stong confirmed after a lengthy discussion that the court did indeed have the authority to sanction attorneys pursuant to § 1927, stating the court has the ability to protect the integrity of the bankruptcy process by an award of sanctions as well as the court's inherent authority.

The judge stated that sanctions are designed primarily to punish the offending attorney and to deter the repetition of the sanctionable conduct. "Sanctions are appropriate under § 1927 where an attorney's actions are so completely without merit as to require the conclusion that they must have been undertaken for some improper purpose such as delay."

The court held that Dihiya did not have colorable claims against the trustee, and acted in bad faith by filing the counterclaims. The judge stated that he "acted for an improper purpose, and the counterclaims were without merit." Perhaps Dihiya learned a $15,000 lesson that litigation must have a proper purpose.

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

VEHICLE AND TRAFFIC

DMV Repeat Alcohol Offender High-Point Driving Offense

By David A. Mansfield

This article will be a case study of the impact of the recent Department of Motor Vehicle Regulations in particular,15 NYCRR Part §132 for repeat alcohol or drug offenders, which created lifetime driving record review and can result in a lifetime revocation for a conviction of a six point speeding offense.

The basis of this article is a set of facts not intended to represent any one individual. If the client is in possession of a valid license, but has more than five previous DWI convictions in their lifetime, they will be subject to a lifetime review of their driving record upon the receipt of a high-point driving violation within the meaning of Part §132.1(b)(2)(c). Five previous DWI/drugged driving related convictions or incidents is the threshold.

High-point driving violation is defined as more than five or more points with point values for such offenses listed in 15 NYCRR Part §131.3.

Five or more points are given now when using portable electronic devices while operating a motor vehicle §1225-d, improper cell phone use 1225(c)(2)(a), passing a stopped school bus, §1174(a), reckless driving §1212 and speeding violations of six or more points which is 21- 30 miles per hour over the speed limit. Eight points is 31- 40 miles per hour over the limit. Eleven points are assessed for more than 41 miles per hours over the speed limit.

David A. Mansfield

Your client can enter a guilty plea by mail to a six point speeding offense in New York City, returnable in a Traffic Violations Bureau, which is subject to the Rules and Regulations to accept pleas of guilty under 15 NYCRR Part §123.5.

A motorist may not plead guilty by mail with a plea that would result in a mandatory suspension or revocation. A personal appearance is required.

A guilty plea is accepted by mail by the Traffic Violations Bureau Plea Unit. The regulations do not specifically address high-point driving violations for those individuals falling under lifetime review or 25-year review.

The client who is unaware they are on "double secret probation" by the Department of Motor Vehicles receives a notice of proposed revocation or the right to request a hearing. Now, it would seem unlikely that someone would agree to a revocation without a hearing. The notice of proposed revocation specifically states that the client is not eligible for a conditional (§1196) or a restricted-license use license (§530).

The client may submit a driver's license application 30 days after the revocation takes effect, but would be subject to a lifetime revocation.

A revocation for a non-alcohol/drugged driving offense for a client with three or four such incidents within 25 years would be subject to an additional two year revocation after the expiration of a minimum statutory revocation period. Clients in this status would then be relicensed for two years with a restricted-use license without an ignition interlock device. This is contingent upon no "serious driving offenses" as defined in15 NYCRR Part §136.5 (2) within the last 25 years.

So what should be done in this particular situation? First of all, there should be an application to vacate the plea of guilty by way of an administrative appeal §228 within 30 days of the date of conviction on DMV Form AA-33 that the guilty plea was accepted by mail in violation of the Rules and Regulations performed. The thrust of the appeal is that this case should have required an appearance before the Administrative Law Judge.

Your client is entitled to an administrative hearing which is governed by 15 NYCRR §127, which are the same rules as for a fatal accident or a chemical test refusal hearing.

Part §132.3 states that the sole purpose of the hearing would be to determine whether unusual, extenuating and compelling circumstances exist to warrant a finding that the revocation proposed by

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Stigma of Substance Abuse and Mental Illness (Continued from page 1)

affected from accessing the treatment and assistance available to achieve recovery and overcoming the symptoms of these devastating disorders. Stigma, embarrassment or concern of offending prevents others from recommending intervention to the person who appears to need help. The tragedy of this reluctance to seek or recommend treatment because of the stigma involved is that the opportunity for the health, wellbeing and happiness that can be found in recovery may be lost.

The stakes of continuing the denial of alcoholism, substance abuse or mental illness are just too high, for the individual suffering from the illness, those close to the individual, society - and for the legal community. Thus the need for increased awareness and open dialogue on the incidence of these disorders and the treatments available for those affected - primary goals of the Suffolk County Bar Association Lawyers Helping Lawyers Committee and New York State Bar Association Lawyer's Assistance Program.

Alcoholism, substance abuse and depression are chronic diseases that untreated can have devastating effects on the individual sufferer, her family, friends and colleagues. When the individual suffering from alcohol or substance abuse is an attorney, her clients may well be added to the list of those harmed. Of the awards made by the Lawyers' Fund for Client Protection to compensate for thefts by lawyers, the misconduct often relates to alcohol or drug abuse by the lawyer. [1]

Studies have found that attorneys are affected by substance abuse, depression and suicide at rates significantly higher than the general population. The percentage of attorneys who have a drinking problem is 18 percent compared to 10 percent of the general population, according to a study published in the International Journal of Law and Psychiatry.[2] The American Bar Association estimates that one in five lawyers is a problem drinker, twice the national rate. [3] It is reported that of 100 occupations studied, lawyers lead the nation with the highest incidence of depression and that lawyers are three times more likely to suffer from depression than any other profession.[4] The rate of death by suicide for lawyers is nearly six times the suicide rate for the general population, suicide being the third leading cause of death among attorneys.[5]

The stigmatization of alcoholism, substance abuse, depression and other addictions like gambling, eating, or spending arises from the misunderstanding of the nature of such conditions. Individuals suffering from these conditions are judged by themselves and others as immoral, weak willed or having a flawed character. Often the addicted person is admonished to have the willpower to refrain from her addictive behavior and made to feel, or herself believes, that

continuing the addictive behavior is a matter of choice. The depressed person is viewed and treated similarly and the message is conveyed that she can just "snap out of it" if an effort to do so is made. If only the addicted or depressed person made an effort to live a better life, she would be cured of her addiction or depression.

The Centers for Disease Control and Prevention defines alcoholism as "a chronic disease." [6] The Mayo Clinic defines alcoholism as "a chronic and often progressive disease" and advises that the person suffering from this disease may not be able to refrain from drinking without help and that denial of the problem is a symptom of the disease.[8] The American Society of Addiction Medicine defines alcoholism as a "primary, chronic disease with genetic, psychosocial, and environmental factors influencing its development and manifestations" and further defines disease as used in this definition as an "involuntary disability." [8] The American Medical Association has defined alcoholism as a disease since 1966. [9] Addiction to substances other than alcohol is similarly defined as a disease.

Unless we begin to understand the true nature of addiction disorders, depression and other mental illnesses as diseases for which treatment is available and must be sought, we will continue to sacrifice the opportunities that recovery from these conditions offers. Attorneys, judges and law students who believe they may have a problem with alcohol, substance abuse or depression are encouraged to contact the Lawyers Helping Lawyers Committee confidential[10] helpline to discuss their concerns with a supportive and non-judgmental individual who will provide support, referrals and information about treatment and recovery options.

Note: Elaine Turley is a sole practitioner in the areas of Elder Law, Estate Planning, Estate Administration and Real Property transactions and is Co-Chair of the Lawyers Helping Lawyers Committee with Art Omstead, Esq.

1. The Lawyers' Fund for Client Protection of the State of New York, *Highlights from the 2010 Annual Report of the Board of Trustees.*

2. Butler Center for Research, September 2012, *Attorneys and Substance Abuse*, *citing*, Benjamin, G.A.H., Darling, E.J., Sales, B. (1990). The prevalence of depression, alcohol abuse, and cocaine abuse among United States lawyers' *International Journal of Law and Psychiatry, 13,* 233-246.

3. Alcohol Abuse & Dependence, w*ww.americanbar.org/groups/lawyer_assistance/resources/alcohol_abuse_dependence.html*

4. Ted David, *Can Lawyers Learn to be Happy? 57 No. 4 Prac. Law 29 (2011).*

5. C. Stuart Mauney, *The Lawyers' Epidemic: Depression, Suicide and Substance Abuse at www.scbar.org/LinkClick*

6. CDC Frequently Asked Questions *at www.cdc.gov/alcohol/faqs.htm*

7. Mayo Clinic *Alcoholism at www.mayoclinic.com/health/alcoholism*

8. American Society of Addiction Medicine *The Definition of Alcoholism, Public Policy Statement on the Definition of Alcoholism,* Adoption date September 1, 1976, rev. February 1, 1990, at *www.asam.org/advocacy/find-a-policy-statement/public-policy*

9. Martha D. Burkett, *The Burden of Stigma, Barrier to Treatment, Bane of Recovery,* Michigan Bar Journal, May 2008, 34-36 *at www.michbar.org/journal/pdf/pdf4article1352.pdf*

10. Judiciary Law 499 Lawyer Assistance Committees Chapter 327 of the Laws of 1993:

> Confidential information privileged. The confidential relations and communications between a member or authorized agent of a lawyer assistance committee sponsored by a state or local bar association an any person, firm or corporation communicating with such a committee, its members or authorized agents shall be deemed to be privileged on the same basis as those provided by law between attorney and client. Such privileges may be waived only by the person, firm or corporation who has furnished information to the committee.

President's Mesage (Continued from page 1)

the Association-Sec. 4 Rules of Order)? Why even care about all of this?

Our bylaws have been amended *nineteen times* (including last year) since they were adopted in 1982. Coincidentally, for the second straight month in his President's Message published in the Nassau Lawyer, NCBA President, Peter J. Mancuso specifically addressed at least two major changes to their bylaws including eliminating the position of Second Vice-President from their Executive Committee and specifically addressing the duties and responsibilities of the Executive Director. I applaud Mr. Mancuso for realizing bylaws need to be an ever evolving and living document to ensure the continued successful existence of the Association. The opportunity to amend bylaws should be welcomed by members *when the need arises*.

Our current bylaws specifically address the means by which our bylaws can be amended:

ARTICLE XII
AMENDMENT OF BYLAWS

SEC. 1. These bylaws may **be** amended at any regular or special meeting in the following manner:

A. Any active member may propose an amendment in writing, subscribed by thirty-five (35) active members, by submitting same to the Secretary of the **Association**.

B. The Board of Directors may propose an amendment without the requirement of **subscription of** thirty-five (**35) active members**.

A copy of the proposed amendment together with the names of the thirty-five (35) subscribing members **or** the **proposal** of the Board of Directors shall **be personally delivered or** sent **by mail, telefax or** electronic means by the Secretary of the Association to the active members of the Association together with notice of the next regular or special meeting of the membership.

Action thereon may then be taken at such membership meeting or any **subsequent meeting provided** notice is again sent pursuant to SEC. 1-C.

A **proposed** amendment must **be approved** by the vote **of** two-thirds **of** the **active members** present constituting a **quorum** as established **by ARTICLE** VII, SEC. 3., of these **bylaws**.

Amendments so adopted shall take effect immediately.

SEC. 2. Upon consideration of any **proposed amendments, pursuant** to SEC. 1., any **amendments** thereto directly **related to the same subject matter, may be offered and voted upon at the same meeting. However, substitute amendments may not be considered unless submitted as a separate proposal in accordance:** with SEC. 1.

Amending the bylaws *when necessary* keeps an association not only vital and relevant; moreover *inclusive*... a necessary component to increase both the sheer number of members, moreover, diversity within its ranks. *We need to give each other the space to grow, to be ourselves, to exercise our diversity. We need to give each other space so that we may both give and receive such beautiful things as ideas, openness, dignity, joy, healing, and inclusion* (Max de Pree).

NYSBA Lawyer Assistance Program (Continued from page 8)

6. Have my sleeping and eating habits changed?

7. Am I experiencing a pattern of relationship problems with significant people in my life? (spouse/parent, children, partners/associates)?

8. Does my family have a history of alcoholism, substance abuse or depression?

9. Do I drink or take drugs to deal with my problems?

10. In the last few months, have I had more drinks or drugs than I intended, or felt that I should cut back or quit, but could not?

11. Is gambling making me careless of my financial responsibilities?

12. Do I feel so stressed, burned out and depressed that I have thoughts of suicide?

There is hope. Contact LAP today for free confidential assistance and support at (800) 255-0569.

Note: Patricia Spataro is Director of the New York State Bar Association's confidential Lawyer Assistance Program (LAP). The purpose of the LAP is to provide educational outreach and confidential assistance to attorneys, judges, law school students who are affected by addiction or mental health concerns. Ms. Spataro is a licensed Mental Health Counselor and a certified Employee Assistance Professional with more than 20 years experience in the mental health field. As the LAP Director, Patricia works closely with the State Bar's lawyer Assistance Committee and the numerous local bars' Lawyers Helping lawyers Committees statewide. In addition, she collaborates with LAP Directors throughout New York State to develop and deliver outreach efforts, educational programs, and comprehensive assistance services to the legal community.

ANIMAL LAW

Purrrr-secuted for Being a Good Samaritan

Legal issues surrounding those that care for feral cats

By Amy Chaitoff

Homeless cats - they are everywhere. We have all seen them, the streak of fur running across the road, the neighborhood tom cat, the cats hanging around the dumpster in the back of the supermarkets we frequent, or by the dumpsters of our favorite restaurants and shops. As the human population has grown on Long Island, so has the number of free roaming cats. Many times these cats are typically "stray" or "feral" cats, terms of definition that although are often mistakenly used interchangeably, have two very distinct meanings.

The term "stray" refers to a free roaming cat that was previously owned and has been sadly lost, or many times simply abandoned. "Stray" cats have been raised with humans and/or have had some sort of socialization with humans.

The term "feral" refers to a cat that has been born and raised in the wild without human contact and are thus fearful of humans. These cats often form what are known as "colonies" and live short lives, falling victim to starvation, disease, freezing, cruelty, being poisoned with antifreeze and are commonly found hit by cars leaving a litter behind.

Is there a legal definition for a feral cat?

Under New York State Public Health Law, Public Health Law § 2140(13), a "Feral animal" is defined as "[A]ny cat…born in the wild and is not socialized; is the offspring of an owned or feral cat … and is not socialized; or is a formerly owned cat … that has been abandoned and is no longer socialized. *See, New York State Public Health Law § 2140(13).* Although a cat may be "feral" and born in the wild, they are still classified as "domesticated animals" and maintain all the legal protections of domesticated companion animals. This means that cats whether "stray" or "feral" cannot be legally treated the same as "wildlife." In fact, cats are specifically excluded from the definition of "wildlife" pursuant to New York State Environmental Conservation Law, Article 11, Title 1, Section § 11-0103(6)(e) which states that:

> e. "Wild animal" shall not include "companion animal" as defined in section three hundred fifty of the agriculture and markets law. Wild animal includes, and is limited to, any or all of the following orders and families:
> (1) Nonhuman primates and prosimians,
> (2) Felidae and all hybrids thereof, with the exception of the species Felis catus ***(domesticated and feral cats, which shall mean domesticated cats that were formerly owned and that have been abandoned and that are no longer socialized, as well as offspring of such cats)*** and hybrids of Felis catus that are registered by the American Cat Fanciers Association or the International Cat Association provided that such cats be without any wild felid parentage for a minimum of five generations...*See, New York State Environmental Conservation Law, Article 11, Title 1, Section § 11-0103(6)(e).*

Thus as section 11-0103 (6)(e) and (6)(e)(2) of the Environmental Conservation Law makes it clear that "companion animals" and "feral cats" are not "wild animals" the methods of trapping and taking "wild animals" are not applicable to "feral" cats and therefore *no* New York State Licensed Nuisance Wildlife Control Operator is legally licensed to trap or otherwise take them. *See, Best Practices Guide for Nuisance Wildlife Control Operators in New York State, Provided by the Department of Environmental Conservation. See also, Environmental Conservation Law, Article 11, Title 1, Section § 11-0103(6)(e).*

Amy Chaitoff

Unlike dogs, which are regulated by the government with licensing requirements, New York animal care and control and municipal animal shelters, are not required by law to take in cats whether they be domestic or otherwise. Shelters that do accept cats are often overrun with them and have waiting lists of hundreds of people waiting to surrender their pet cats or cats and kittens they have found outside. People are left with no option but to try and find a no kill shelter which are also always inundated with cats and commonly have no room, or in a worse case scenario, abandon their cats outside to fend for themselves, often without spaying and neutering them first which leads to even more homeless cats. Abandoning an animal is a misdemeanor pursuant to New York State Agriculture and Markets Law §355. But many people are unaware that abandoning a cat is a crime.

What is Trap/Neuter/Release ("TNR")?

Whether owned, "stray" or "feral," an unspayed or unneutered cat means more cats. It is estimated that a free roaming unspayed female cat can have an average of three litters per year, with an average of five kittens per litter. Once surviving kittens reach maturity, this cycle is then multiplied exponentially when her kittens breed and give birth to their own litters and on and on. The Human Society of the United States ("HSUS") estimates that an unspayed female cat and her progeny can have over thirteen thousand offspring in just a five year period. This problem becomes even more apparent every spring from about March through September known as "kitten season" when Long Island cat rescue groups and shelters are inundated with requests from the public to take in nursing mothers and kittens or many times just the kittens found under a bush or in a windowsill after the mother has failed to return for a period of time. In response to the overwhelming demand for assistance, many animal rescue organizations have initiated what are known as trap-neuter-release or ("TNR") programs. Trap-Neuter-Release ("TNR") has proven to be a most effective way of humanely reducing feral cat populations. Through TNR programs, "stray" and "feral" cats are humanly trapped and transported to veterinarians, where under anesthesia, they are spayed or neutered and ear tipped for future identification. Cats are often accessed to see whether they are social enough to be adopted, if not, they are transported back to their original location under the care of a cooperating neighborhood resident who will continue to provide a food source. Through TNR feral cat populations are slowly decreased through attrition.

Similar to an almost underground society, those that feed feral cats belong to a sort of brotherhood, they come from all walks of life from judges to nuns, and are often those that you would least expect. When one finds through conversation that someone else whom you casually know also feeds "ferals," there is an immediate kinship and understanding, a sense of "thank goodness I am not the only one" on many levels. It is unfortunate that due to many local municipal codes that attempt to ban or restrain the feeding of both "stray" and "feral" cats (and again I would argue illegally so), and our litigious society, that people doing a "good deed" by assisting animals in need, must keep a low profile in doing so, for fear of being persecuted by their neighbors and their local government. Society's image of the "crazy cat lady" still has a firm grip on the general public's imagination when one talks about feeding "stray" or "feral" cats.

Some arguments to be made when representing clients that feed feral or stray cats

Due to the nature of ordinance violations etc., there are few cases that actually go to trial and thus have published opinions in New York on the legal issues surrounding the feeding of feral cats. So if you are representing a client that has been issued a summons for violating a local ordinance that bans or puts some type of restraint on the feeding of "feral" or "stray" cats, you are essentially arguing a case of first impression. However, there are several legally supported arguments that can and should be raised. One argument is simply that, any attempt by local government to re-classify cats as "wild" should be void, as any local ordinance is preempted by the existing State Law definition.

Another argument to raise, is that regardless of whether the cats that your clients are feeding started out as "stray" or "feral," that due to the essence of the relationship that has developed between your client and the cats they feed, that your client has now for all legal tense and purposes under common law standards of ownership, (such as feeding, housing, harboring, providing sustenance, medical care and affection) become the "owner" of the cats and the cats are now pets or "companion animals." Under New York State Agriculture and Markets Law, Article 26, §350(5), a companion animal is defined as;

> "Companion animal" or "pet" means any dog or cat, and shall also mean any other domesticated animal normally maintained in or near the household of the owner or person who cares for such other domesticated animal. "Pet" or "companion animal" shall not include a "farm animal" as defined in this section. See, New York State Department of Agriculture, Article 26, §350 (5).

In addition, under New York State Public Health Law, Article 21, Title 4, Section §2140(6), "owner" is defined by the Public Health Law as;

> 6. "Owner" shall mean any person keeping, harboring, or having charge or control of, or permitting any dog, cat or domesticated ferret to remain on or be lodged or fed within such person's house, yard, or premises. This term shall not apply to veterinarians or other facilities temporarily maintaining on their premises dogs, cats or domesticated ferrets owned by others for periods of no more than four months or to the owner or occupant of property inhabited by a feral animal. See, New York State Public Health Law, Article 21, Title 4, Section §2140(6)

Indeed, harboring, providing sustenance by feeding and providing medical care, sheltering, and how the animal is treated by the caretaker, are all factors that the common law and indeed society, references when determining the ownership of an animal. Moreover, the factors listed above not only satisfy the standards of "ownership" under common law, but also satisfy the definition of an "owner" under all the available definitions of "ownership" under New York State Law. Whether originally "stray" or "feral" all cats are legally considered "companion animals" under New York State Law, and as such, are given all the protections of "companion animals." Moreover, there is no law in New York State, that prohibits the keeping of outdoor cats.

One of the most common calls I receive are from "feral" and "stray" cat caretakers who call in a panic after receiving a summons or other notification warning them to "stop feeding the cats." Withholding food can also subject the "caretaker" to potential criminal liability. If the relationship between the cats and the "caretaker" has now become one of "ownership" the caretaker could be held accountable for failing to provide their now "companion animals" with proper sustenance i.e., food, water and medical care, and could theoretically be in violation of New York State Animal Cruelty Law, contained in Article 26 of the Agriculture and Markets Law, §353 which states;

> § 353. Overdriving, torturing and injuring animals; failure to provide proper sustenance. A person who overdrives, overloads, tortures or cruelly beats or unjustifiably injures, maims, mutilates or kills any animal, whether wild or tame, and whether belonging to himself or to another, or deprives any animal of necessary sustenance, food or drink, or neglects or refuses to furnish it such sustenance or drink, or Causes, procures or permits any animal to be overdriven, overloaded, tortured, cruelly beaten, or unjustifiably injured, maimed, mutilated or killed, or to be deprived of necessary food or drink, or who willfully sets on foot, instigates, engages in, or in any way furthers any act of cruelty to any animal, or any act tending to produce such cruelty, is guilty of a class a misdemeanor and for purposes of paragraph (b) of subdivision one of section 160.10 of the criminal procedure law, shall Be treated as a misdemeanor defined in the penal law. *New York State Department of Agriculture, Article 26, §353.*

Other than ordinance violations, the

(Continued on page 29)

Court Notes (Continued from page 4)

the Grievance Committee to institute a disciplinary proceeding against the respondent granted pending further order of the court, without opposition or response by the respondent, and the matter referred to a special referee.

Attorneys Disbarred

Joseph Marijan Barisic: On December 1, 2006, the respondent pled guilty in the Circuit Court for the Eleventh Judicial Circuit, Miami Dade County Florida to two counts of grand theft in the first degree, a felony. On March 1, 2012, he pled guilty in that court to five counts of uttering a forged instrument, also a felony. The felonies committed by the respondent in Florida were found to be felonies within the meaning of the Judiciary Law §90. The Grievance Committee moved to strike the respondent's name from the roll of attorneys based upon his felony conviction. The respondent failed to oppose the relief. By virtue of his conviction of a felony, the respondent ceased to be an attorney and was automatically disbarred from the practice of law in the State of New York.

Karen Ann Bily: On April 19, 2010, the respondent pled guilty in the Supreme Court, Suffolk County to one count of grand larceny in the second degree, a class C felony. The Grievance Committee moved to strike the respondent's name from the roll of attorneys based upon his felony conviction. The respondent failed to oppose the relief. By virtue of his conviction of a felony, the respondent ceased to be an attorney and was automatically disbarred from the practice of law in the State of New York.

Henry Morris: In or about March, 2009, the respondent was charged with 24 counts of violating the Martin Act, a Class E felony. On November 22, 2010, the respondent agreed to plead guilty to one count of the indictment, and was sentenced to a period of 1 ½ to 4 years. The respondent failed to inform the court of his conviction. The Grievance Committee moved to strike the respondent's name from the roll of attorneys based upon his felony conviction. The respondent failed to oppose the relief. By virtue of his conviction of a felony, the respondent ceased to be an attorney and was automatically disbarred from the practice of law in the State of New York.

Ruth M. Pollack: By decision and order dated June 23, 2009, the court, on its own motion, immediately suspended the respondent from the practice of law as a result of her conviction of criminal contempt, and authorized the Grievance Committee to institute a disciplinary proceeding against her. The matter was referred to a special referee. In determining an appropriate measure of discipline to impose, the court considered the record of respondent's behavior before the United States District Court for the Eastern District, in which the judge described her conduct as "bizarre" and "contumacious," and in such "blatant" disregard of the Court's orders that dismissal of the proceedings was warranted. Following the court's order, a subsequent order issued from the District Court finding the respondent guilty of criminal contempt based upon a finding that her conduct "violated the standards of proper courtroom decorum" and obstructed the administration of justice. The special referee also determined that the respondent demonstrated a fundamental disrespect for the judicial process. The record revealed that the respondent had a substantial disciplinary history, including *inter alia,* conduct warranting her disbarment by the United States District Court for the Southern and Eastern Districts as well as the United States Court of Appeals for the Second Circuit. Based on the foregoing, the court found that the respondent has engaged in a pattern of behavior that went to the heart of the judicial system, and demonstrated a flagrant disregard for the authority of the courts. Accordingly, she was disbarred from the practice of law in the State of New York.

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

Bench Briefs (Continued from page 4)

been brought in to tend to the needs of the baby. Plaintiff now moved for an order compelling the hospital to produce Ms. Hendrickson for deposition. The court noted that in order to establish that an additional deposition was necessary, the moving party must show that the representative already deposed had insufficient knowledge, or was otherwise inadequate, and there was a substantial likelihood that the person sought for deposition possesses the information, which is material and necessary to the prosecution of the case. The court found that plaintiffs met such a burden. The court further stated that the testimony of Ms. Hendrickson, who was responsible for the infant's needs after her birth, would be material and necessary in preparation for the trial, as well as possibly adding information as to the circumstances of the child's birth.

Motion for summary judgment denied; the documents were inadmissible and thus insufficient to support the granting of summary judgment.

In *Magda Pylarinos v. Town of Huntington, Huntington Township Chamber of Commerce, Spice Village Grill and MNM Realty, LLC,* Index No.: 6631/2012, decided on April 2, 2013, defendant, MNM Realty, LLC's motion for summary judgment was denied. The instant action was a personal injury action arising out of an accident, which allegedly occurred on October 21, 2011 when plaintiff tripped and fell over a dismantled wood sawhorse left on the sidewalk in front of the Spice Village Grill located at 281 Main Street in Huntington, New York. In deciding the motion, the court pointed out that the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form. Failure to make such a showing requires denial of the motion regardless of the sufficiency of the opposing papers. Here, the court found that the proffered lease in support of the motion was not acknowledged and the Rider was not executed by any party. As such, the documents were inadmissible and thus insufficient to support the granting of summary judgment in MNM's favor. Further, the court held that the motion for summary judgment was premature.

Motion to strike cause of action for fraud; plaintiff did not allege any misrepresentations on the part of the defendants, nor that the true value of the property was information within the defendants' exclusive knowledge.

In *Tammie Trotman, as Administrator of the Estate of George Banks v. 7 Old Sag Harbor, LLC, Christopher Reinhardt and John Doe "One" through John Doe "Ten," the last ten names being fictitious and known to plaintiff, consisting of persons or parties having a claim or interest upon the premises described in the complaint,* Index No.: 26306/2011, decided on November 1, 2012, the court granted defendants motion dismissing plaintiff's cause of action as to fraud. In granting the motion, the court noted that to plead a viable cause of action for fraud, the plaintiff must allege a misrepresentation or an omission of material fact which was false and known to be false when made, for the purpose of inducing the plaintiff to rely upon it, justifiable reliance of the plaintiff on the misrepresentation or material omission, and injury. Here, the plaintiff did not allege any misrepresentations on the part of the defendants, nor that the true value of the property-a fact allegedly concealed by the defendants-was information within the defendants' exclusive knowledge, but only that the decedent was unable, by reason of his mental impairment, to understand the value of the property and the financial implications of the transaction. As such, plaintiff did not state an independent cause of action for fraud, but rather one that was merely duplicative of the plaintiff's second cause of action, which was for rescission based upon decedent's incapacity. Accordingly, the motion to dismiss the fraud cause of action was granted.

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.

Those Days, Those Nights (Continued from page 3)

tact with him but once. We were walking in opposite directions on Baxter Street, across the street from each other, and he kept looking at me. I'm not in love with being stared at, so, with a miffed expression, I looked away, to catch him in that very second raising his eyebrows in a nonverbal 'Hi!" But it was too late. I hadn't responded. The moment had passed...

In the long televised vigil of those days in 1999 embraced by 16 July, the disappearance, and 19 July, the confirmation of death, interviews of John Kennedy were continually re-played. During one of them, he said that he was invariably touched when someone spoke to him of the influence his father had exerted over the speaker. I wish I had known he was open to that.

No one can bear stronger witness than I to the power of JFK's influence. I carried the mail during my time as a student in Oneonta, my impressionable young back stiffened by his exhortation on the plaque adorning the front wall of the Post Office: "Let all take pride who, in whatever capacity, serve their nation." In the early '60s my spouse Jacqueline and I listened, and listened, and listened still again, to a phonograph record of his Inaugural, with its Biblical intonations — "Let the word go forth...ask not what your country can do for you..." — delivered in a strong voice that resounded throughout our tiny apartment on East Street; years later, his were the cadences and intonations I used when attempting an essay, when arguing to a jury. If a career in public service was good enough for JFK, a career in public service, however humble, was good enough for me.

These, then, were the things I might have said to John Kennedy. But, in a sense, to have exalted the father might have been to diminish the son. Probably just as well I kept silent. He was under no one's shadow, but had grown Sunward into his own person. As an ADA he was a soldier, a grunt, a line assistant. He was also an educator — many of the sentences on his cases called for Community Service as a fit punishment. (Which led to some wags' corruption of the old legal saw, "If you do the crime, you gotta do the time" into "If you do the crime, you gotta do the Community Service.") He was a dignified, reserved person, with a light touch. When the microphones were jammed into his face upon his second bar failure — if this is celebrity, who needs it? — he smiled and said, "I'm clearly not a major legal genius." He was gritty; he took the exam for a third time, and cleared it.

He had various talents. When he had fulfilled his commitment after four years he didn't "quit" the office, as tabloids would have it, he left prosecution and, after a while, entered publishing. His profiles of the famous in *George* magazine ran smoothly, their style fluent and intelligent.'

In short, what he did, he did well. He didn't attempt to amass money, to augment his fortune. Instead, he served, quietly, competently. Would that all us could merit such an epitaph! Who knows what might have lay ahead for John Kennedy? All speculation is profitless. But what is recorded is impressive: a son who entwined the interests and pursuits of both parents, namely government and literature; a worker who enjoyed the respect of his peers; a young man of varied abilities, with an unlimited potential for growth. No more growth, alas, would be achieved.

In July of '99 John Kennedy joined those brave souls whom poet A.E. Housman celebrated, "...the lads that will die in their glory and never be old."

Note: William E. McSweeney, a member of the SCBA, lives in Sayville. This essay is part of a larger work that recounts his days as an Assistant in Bronx County.

Finding Hope and Recovery (Continued from page 9)

and resources they need to start on the road to recovery.

So why should this matter to you? Consider this:

• According to the 2012 National Survey on Drug Use and Health (SAMHSA), an estimated 22.2 million people (8.5 percent of the population) age 12 or older were classified with a substance dependence or abuse problem in 2012. Of that number, 2.8 million involved drugs and alcohol, 4.5 million involved only drugs, and 14.9 million involved only alcohol.

• A number of studies have indicated that attorneys are at greater risk for developing substance abuse problems. *See* Laura Rothstein, "Law Students and Lawyers with Mental Health and Substance Abuse Problems: Protecting the Public and the Individual," University of Pittsburgh Law Review 69 (2011)(citing additional sources).

• Indeed, the incidence of chemical dependency is estimated to be between 15-18 percent in the legal profession, twice as high as the general population. *See* Rothstein, *Id.* (citing additional sources).

One study has indicated that the rate of problem drinking among attorneys in practice for 2-20 years is estimated to be approximately 18 percent, while this same study indicated that the rate of problem drinking among attorneys in practice more than 20 years is estimated to be approximately 25 percent. *See* G.A. H. Benjamin, , E.J. Darling, , and B. Sales, "The Prevalence of Depression, Alcohol Abuse, and Cocaine Abuse Among United States Lawyers," International Journal of Law and Psychiatry 13 (1990).

Research suggests that substance abuse problems increase among those in the legal profession over time. One study has indicated that concerns about problem drinking are expressed by 8 percent of pre-law students, 15 percent of first year law students, 24 percent of third year law students, and 26 percent of alumni. *Id.*

The longer an attorney with a substance abuse problem remains untreated, the more likely it is that the individual affected will be the defendant in a malpractice suit. *Id.*

At least one study has indicated that approximately 60 percent of legal malpractice suits involve problem drinking. *Id.*

It is estimated that 50-70 percent of lawyer disciplinary cases involve alcoholism or substance abuse. *See* Rothstein, *Id.*

As for the effect of mental illness:

• According to the 2011 National Survey on Drug Use and Health (SAMHSA), the percentage of the adult population over the age of 18 with a diagnosed mental illness is approximately 19.6 percent, with 6.6 percent having had a major depressive episode in any given year.

• At least one study has indicated that lawyers are 3.6 times more likely to suffer from depression than any other profession. *See* W.W. Eaton *et al*., "Occupations and the Prevalence of Major Depressive Disorder," Journal of Occupational Medicine 32 (1990):

• A study of 801 lawyers in Washington State found that 19 percent of the lawyers studied suffered from depression. *See* G.A.H. Benjamin, *Id.*

• It has been estimated by some studies that of the one million lawyers in this country, approximately 250,000 suffer from depression. *See* Daniel Lukasik, *Depression is the Law's Occupational Hazard*, The Complete Lawyer, (March 1, 2008).

• It is estimated that one out of every four lawyers suffers from increased psychological distress, including feelings of inadequacy, inferiority, anxiety, social alienation, isolation and depression. *See* Benjamin Sells, *Facing the Facts About Depression in the Profession*, Florida Bar News (March 1995).

• According to the 2011 National Survey on Drug Use and Health: Mental Health, women are more likely than men to suffer from any mental illness in a given year (23 percent vs. 15.9 percent for men).

• Suicide is the third leading cause of death among attorneys, after cancer and heart disease. This is six times as high as the general population. *See* Don Carroll, "Lawyer Suicide and Resources for Managing Stress," North Carolina Lawyer Assistance Program, http://www.nclap.org/article.asp?articleid=143 (accessed 9/5/2013).

• According to the Centers for Disease Control and Prevention, alcohol is a factor in over 30 percent of all completed suicides.

• According to the Centers for Disease Control and Prevention, substance use is a factor in over 20 percent of all completed suicides. (23% for antidepressants and 20.8% for opiates, including heroin and prescription pain killers).

• Depressive Disorders, Anxiety Disorders, and Substance-Related and Addictive Disorders are all classified under the Diagnostic and Statistical Manual (DSM-5) of the American Psychiatric Association as mental disorders.

Given these statistics, it is not hard to imagine that, even if you are not suffering from an addictive disorder or mental illness, there is a likelihood you are or will be affected by the suffering of others, either in or out of the profession. Indeed, one of the groups that often gets overlooked in all of this research is the group of spouses, parents, children and other significant others who are impacted by the addicted or mentally ill person. Yet the impact on the family members, friends, business partners and others who are close to the person suffering from the disorder can be significant. These family members and significant others often suffer mentally, sometimes physically, and, very often, financially as a result of the affected person's disease. As with the alcoholic, addict or mentally ill person, there are a number of local groups for family members and significant others of those affected by addictive disorders or mental illness who gather together regularly to help each other recover from the effects of the disease on the family. These groups carry a message of hope and freedom that simply cannot be obtained in isolation.[3]

If you are struggling with alcohol, drugs, gambling, depression, anxiety, or any other mental illness, or if you are suffering from the effects of a loved one's disease, the LHL Committee can assist you in finding the resources you need to get help and start on the road to recovery. In most cases, the LHL Committee can also put you in touch with another member of the profession who has in the past struggled with the same or similar issues that you are facing. If you are currently struggling I hope you take one thing away from this article – you are not alone. You do not need to suffer in silence. There are people in the profession who have been through what you are going through and are willing to help guide you to a path that can take you to a place of hope and freedom, if you are willing to let them.[4]

Note: Rosemarie Bruno is a local attorney whose office is located at 4250 Veterans Memorial Hwy, Ste. 165E, Holbrook, NY 11741. Ms. Bruno focuses her practice on bankruptcy, income tax, estate planning and divorce mediation matters. Ms. Bruno is a member of the SCBA LHL Committee and the NYSBA Lawyer Assistance Committee and can be reached at: rbruno@rosemariebruno.com.

1. Information about the International Lawyers in Alcoholics Anonymous conference can be found at: http://www.ilaa.org/conference-information/.
2. The following organizations have groups that meet locally every day of the week: Alcoholics Anonymous: http://www.suffolkny-aa.org/, Narcotics Anonymous: http://newyorkna.org/meetings/, Gamblers Anonymous: http://www.gamblersanonymous.org/ga/locations. There is also a 12-Step support group meeting for members of the legal profession that is held every Wednesday evening at 6:00 pm at St. Thomas More Parish Outreach House, Kings Road – Hauppauge.
3. The following organizations run support groups for family members and significant others: Al-Anon: http://www.al-anon.alateen.org/al-anon-in-new-york, Nar-Anon: http://www.nar-anon.org/naranon/Meetings, National Alliance on Mental Illness (NAMI): http://www.naminys.org/ (local chapters have groups for both individuals suffering from mental illness and family members).
4. The LHL Committee Helpline Number is (631) 697-2499.

Reflections on Lawyers Helping Lawyers (Continued from page 9)

county lines are irrelevant. Thus, we also work with Pat Spataro, of the New York State Bar Association (tel. 518-487-5685) and others in the downstate metropolitan area, upstate, and in surrounding states as needed. (Likewise, our services are available to anyone affiliated with the legal profession, without regard to whether they may be a member of the Suffolk County or New York State Bar Association.)

The diseases are varied. It is common for a person to be afflicted by more than one addiction, and often concurrent mental issues such as anxiety, or depression. For some, the mental issues may present alone, without other addictions, but can be just as debilitating.

Another factor is the types of problems the disease may be causing a person. (See self-evaluation checklist with accompanying article.) The type of help which may be appropriate will depend in part on the extent to which a person may be having trouble getting along with family, colleagues and clients, meeting day-to-day responsibilities, etc. After evaluation, referral and some progress towards overcoming the underlying problem, the goals and attention will shift to dealing with issues like relations with specific people, client or court problems, and perhaps questions which may be raised by Character and Fitness or Disciplinary Committees.

These diseases are chronic and progressive. If untreated, they can be fatal. Therefore, the goal of our Lawyers Helping Lawyers committee is to help each person identify and receive the appropriate help as early as possible. The sooner someone calls for themselves, or may be referred, the earlier they can benefit from identifying and follow through to most appropriately resolve their dilemma.

In summary, the Lawyers Helping Lawyers committee primarily offers an initial contact to obtain assistance with addiction and mental issues, and also ongoing personal guidance through the process.

Further information, referrals, and assistance are available from any member of the SCBA Lawyers Helping Lawyers Committee, as listed in the front of the SCBA Directory, or Peter Schweitzer (516-650-0653), or Pat Spataro (518-487-5685).

Note: Arthur E. Olmstead, Esq. is Co-Chair of the SCBA Lawyers Helping Lawyers committee, and also a member of the New York State Bar Association Lawyers Assistance Committee. He practices estate and elder law, primarily in Suffolk and Westchester counties.

Settling Title Dispute at the Ballot Box (Continued from page 14)

suant to the real property actions and proceedings law to determine title to such parcel" within 24 months. Moreover, "[f]ailure by the attorney general to commence such action within such time frame shall not subsequently prevent the attorney general from commencing such an action or create a presumption against the state's claim of title." [9]

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

1. Originally thought to contain 800,000 acres, more advanced surveying techniques eventually demonstrated that the area was in excess of 1.1 million acres.
2. The functions of the Forest Commission (and much more) are now administered by the Department of Environmental Conservation and the Adirondack Park Agency.
3. This provision was renumbered by the Constitutional Convention of 1938 as Article XIV, Section 1, its present-day designation.
4. See, e.g., *People v. Ladew,* 189 N. Y. 355 (1907), *reh'g. denied with opn.* 190 N. Y. 543 (1907); *People v. Inman*, 197 N. Y. 200 (1910); *People v. Ladew,* 237 N. Y. 413 (1924); *People v. Golding,* 55 Misc. 425 (Sup. Ct., Hamilton Cty., 1907).
5. One noteworthy exception is *State of New York v. Moore,* 298 A. D. 2d 814 (3rd Dept. 2002).
6. New York State Constitution Article XIX, §1.
7. Consensus could not be reached amongst environmentalists, the governor's office, the DEC and local representatives. The political dynamics caused by the resignation of former Governor Spitzer also affected the process. "RL land bill could be voted on soon," [*sic*] by Cristine Meixner, Hamilton County Express, April 11, 2012, <http://www.hamiltoncountyexpress.com/News/04112012_land.>.
8. This factor will be determined by dividing the total assessed value of each disputed parcel by the total assessed value of all disputed parcels.
9. The full text of the Township Forty Settlement Act can be found in 2013 bill numbers A07869/S04809.

New York's James Silkenat next ABA President

By Scott M. Karson

The 135th Annual Meeting of the American Bar Association was held August 7-13, 2013 in San Francisco. For New Yorkers, the meeting was highlighted by the installation of James R. Silkenat of New York as the ABA's 137th President. Mr. Silkenat, a partner at Sullivan & Worcester LLP in New York City, became the first ABA President from New York since Robert MacCrate of Sullivan & Cromwell LLP held that office in 1987-88. Mr. Silkenat succeeds Laurel G. Bellows of Illinois as President of the Association.

Opening Assembly & President's Reception

The Opening Assembly of the Annual Meeting, held at San Francisco's iconic Davies Symphony Hall, featured remarks by Associate Justice Anthony Kennedy of the United States Supreme Court. The Opening Assembly was immediately followed by the President's Reception, which was held in San Francisco's historic City Hall.

The House of Delegates

The 560-member House of Delegates, the ABA's governing and policy-making body, met on Monday, August 12, and Tuesday, August 13, 2013 at San Francisco's Moscone Center West. Robert M. Carlson of Montana presided as Chair of the House.

Passing of the Gavel

In what is known as the "Passing of the Gavel," outgoing President Bellows introduced President-Elect Silkenat to the House. The Association's Constitution provides that the President-Elect automatically becomes the President at the conclusion of the Annual Meeting. Therefore, President-Elect Silkenat assumed the presidency at the conclusion of the Annual Meeting, and William C. Hubbard of South Carolina succeeded Mr. Silkenat as President-Elect. .

In his remarks to the delegates, Mr. Silkenat outlined the priorities for his presidency, including court funding, election law reform, immigration, gun violence and legal aid.

Mr. Silkenat stated that the nation is suffering from an access to justice paradox — too few good jobs for graduates and, on the other hand, vast unmet civil legal needs across the country. He indicated that according to the World Justice Project, the U.S. ranks 66 out of 98 nations in access to and the affordability of civil legal services. He announced that the new ABA Legal Access Job Corps Task Force will focus on finding solutions to these problems by matching young lawyers who need practical job experience with low income clients who need legal assistance.

Mr. Silkenat then focused his remarks on a broader national context. He stated the most immediate issue is the impact of sequestration of funds for our courts, which is particularly damaging to the delivery of effective legal representation to poor people accused of federal crimes. The $350 million reduction to the federal judiciary budget has resulted in a significant cut this year to the network of high quality federal defenders' offices around the country and has forced the layoffs of many experienced lawyers who have devoted their professional careers to representing indigent federal defendants. He stated this is a deep embarrassment to a nation grounded in the rule of law and is contrary to what our national and state Constitutions require.

Scott M. Karson

Mr. Silkenat also called for the ABA to speak out on important national issues such as gun violence. He called on Congress to pass common sense laws to make our communities safer, provide more comprehensive background checks, and better tools to prosecute straw purchasers of guns. The voices of the children who died from gun violence have been silenced, and we must speak for them and have the courage to take action.

Mr. Silkenat concluded by stating the ABA should act on issues of injustice relating to immigration reform and voting rights. The ABA has a unique interest in ensuring fairness and due process in the immigration enforcement and adjudication system. The ABA has also had a long interest in election law and fair and open elections. He noted that this year's Law Day theme will focus on voting rights.

Remarks of United States Attorney General Eric Holder

The Honorable Eric H. Holder, Jr., Attorney General of the United States, addressed the House. He opined that our system of criminal justice is broken in many ways. A vicious cycle of poverty, criminality, and incarceration traps too many Americans and weakens too many communities. He stated that too many Americans are sent away to prisons for far too long, and that incarceration must be more than merely "warehousing." He said that it is time for the criminal justice system to address these inequities and disparities rather than exacerbate them.

Attorney General Holder said that these justice issues have been important to him and President Barack Obama for many years. Striking the balance between protecting our communities and preserving values of fairness and equality is the focus of the Obama Administration's policy. He said that the President will continue to reach out to Congress and state leaders to reduce violent crime and reform the criminal justice system.

Attorney General Holder said that the Justice Department's review of the criminal justice system over the last several months has found a range of obstacles and inequities in the federal system. As the "so called war on drugs" enters its fifth decade, new approaches and common sense solutions must be implemented. He announced to the House a range of new policy initiatives that the federal government would now accordingly undertake.

Some of these new initiatives involve efforts to focus on crime hotspots and encourage more local policing. Other initiatives relate to youth violence and the need to confront the school to prison pipeline. At 50 years, the promise of *Gideon* is not being met and indigent defense systems remain in a state of crisis. Attorney General Holder focused on the need for increased funding for federal public defender offices and increased pro bono service.

Attorney General Holder focused on the need to reduce incarceration rates in America and announced new Department of Justice policies related to mandatory minimum sentences, the prosecution of certain drug-related offenders, creating best practices for alternative programs such as drug treatment and community service programs, and the early release of elderly inmates. Attorney General Holder called on the ABA to support these efforts.

Presentation of the ABA Medal to Hillary Clinton

Another highlight of the meeting was the presentation of the ABA Medal, the Association's highest honor, to former Secretary of State, United States Senator and First Lady Hillary Clinton.

Secretary Clinton expressed her thanks for the award, particularly because of her long involvement with the ABA, including the first Commission on Women in the Profession which she chaired 25 years ago. Secretary Clinton stated that the ABA helped start the movement for gender equality in the legal profession and continues to be at the forefront today to ensure equal work for equal pay. She said the ABA is also leading the way to combat human trafficking, and she appreciates the critical work the ABA ROLI and the World Justice Project are doing to advance the rule of law.

Secretary Clinton focused her remarks on the important role attorneys play in addressing societal problems, resolving disputes, promoting the rule of law, and protecting human rights. She stated that the law should continue to serve and belong to the people of the United States. She also focused on the issue of voting rights and why they are so foundational to our democracy and future.

Ms. Clinton stated that the protection of the Voting Rights Act is necessary to give the nation standing to defend human rights, democracy, and freedom abroad. She referenced the many people around the world who are risking their lives for the right to vote. She then focused on the fact that many Americans remain unregistered to vote and unable to participate in our electoral system. She stated that in the wake of the Supreme Court's 2013 decision in *Shelby County v Holder*, there has been a sweeping effort, including 80 bills introduced in 31 states, to restrict voting rights and make it harder for millions of citizens to be able to vote.

To address voting rights problems, Secretary Clinton called for increased Department of Justice enforcement, new legislation from Congress, and grassroots action by citizens and lawyers across the country. She highlighted the power and reach of the ABA and House of Delegates, and our unique ability to drive progress and right wrongs. She concluded by stating the United States has a rich tradition of lawyer citizens, and our focus now should be how the law can be brought into people's lives to help it serve and empower them.

Remarks by Legal Services Corporation Board Chairman John G. Levi

John G. Levi, Chairman of the Legal Services Corporation, also addressed the House. Mr. Levi expressed gratitude to the ABA on the eve of LSC's 40th anniversary and urged continued support for the unmet legal needs of the poor. He highlighted that the ABA has been an indispensable ally and champion for the LSC. The LSC has worked closely with the ABA over the years and benefited greatly through this partnership and from the advocacy of ABA Day.

He stated that the number of people eligible for civil legal assistance is at an all-time high, nearly 20 percent of Americans, while funding is at all-time low, cut to just $341 million after sequestration this year. This decline in funding has had grim results nationwide, with more than 1,000 positions eliminated, 30 mostly rural legal service offices closed, and programs forced to turn away half or more of eligible clients due to lack of resources. These chronic cuts and underfunding of legal aid have resulted in civil legal aid lawyers being paid among the lowest in the nation and a growing number of *pro se* litigants in family courts.

Mr. Levi opined that lawyers must ensure that our justice system remains true to our country's founding values. Equal access to legal representation is a fundamental right, the single right that makes every other right viable.

Panel presentation regarding legal education

The House was also treated to a provocative panel discussion regarding legal education, which focused on the rising cost of law school and decreasing number of law school applicants. Robert E. Hirshon of Maine, former ABA President, moderated the discussion by Professor Brian Tamanaha of Washington University School of Law and former Dean Bryant Garth of Southwestern Law School.

The panel discussed law school costs, debt, salaries and job prospects for graduates. Specifically, the panelists discussed how the high debt load, coupled with a low national median salary of $60,000, has created an economic model that is unsustainable. The panel opined that the rising cost of law school must change, especially in light of decreasing applications. The deterioration in quality of law school applicants is the likely future of legal education as more schools are forced to accept an increasingly greater percentage of applicants.

Resolutions considered by the House

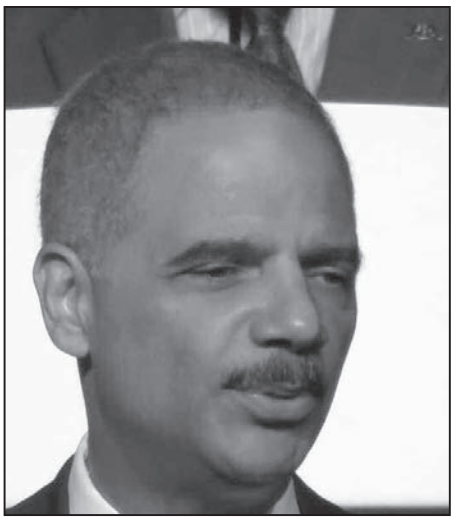
In addition to the foregoing speeches and presentations, the House debated and voted on many important resolutions. Here are brief summaries of some of the more significant actions taken:

Access to Justice

The House approved a resolution supporting the establishment of access to justice commissions in all states and territories and urging ABA members to support efforts to create access to justice commissions and to promote access to justice.

Animal Rights

The Section of Individual Rights and Responsibilities withdrew a resolution urging Congress to repeal Section 43 of Title 18 of the United States Code (The Animal Enterprise Terrorism Act), and urging the Department of Justice to forbear from any further prosecutions under the Section.



United States Attorney General Eric Holder, Jr. speaking before the House of Delegates.

Former Secretary of State, United States Senator and First Lady Hillary Clinton who spoke at the meeting, received the ABA Medal, the Association's highest honor.

The new ABA President James Silkenat is an attorney in NYC.

Photos courtesy of Scott Karson

Attorney-Client Privilege

The House approved a revised resolution adopting principles that should be applied in determining the availability of attorney-client privilege for law firm consultations with in-house counsel.

Courts & Judges

The Indiana State Bar Association withdrew a resolution urging states and territories to review their judicial disqualification procedures to assure the fair and impartial administration of justice and to conduct such reviews periodically, and the Standing Committee on Ethics and Professional Responsibility withdrew a related resolution which would have amended the terminology section, and the black letter and comment of Rule 2.11 of the *ABA Model Code of Judicial Conduct* dated August 2013, to address ethical issues relating to disqualification of judges in the election and retention election context.

The House approved a resolution urging legislative bodies and governmental agencies to adopt laws and policies that ensure full and adequate court funding and adopting the *Principles for Judicial Administration,* dated August 2013, as appropriate guidance for those states desiring to establish principles for judicial administration in their efforts to restructure court services and secure adequate court funding.

The House also approved a resolution supporting enactment of comprehensive legislation to authorize needed permanent and temporary judgeships, with particular focus on the federal districts with identified judicial emergencies so that affected courts may adjudicate all cases in a fair, just and timely manner.

Criminal Justice

The House approved a resolution urging governments to take legislative action to curtail the availability and effectiveness of the "gay panic" and "trans panic" defenses, which seek to partially or completely excuse crimes on the grounds that the victim's sexual orientation or gender identity is to blame for the defendant's violent reaction.

The House also gave its approval to a resolution urging governments to review their mandatory reporting laws for instances of child abuse or neglect to determine what changes, if any, are appropriate to better protect children and to provide appropriate sanctions for failure to report abuse and neglect.

The House approved a resolution urging governments to re-examine strict liability criminal offenses to determine whether the absence of a *mens rea* element results in imposition of unwarranted punishment on defendants who lacked any culpable state of mind in performing acts that were not *malum in se*.

The House approved a revised resolution opposing plea or sentencing agreements that waive a criminal defendant's post-conviction claims addressing ineffective assistance of counsel, prosecutorial misconduct or destruction of evidence unless based upon past conduct that is specifically identified in the plea or sentencing agreement or transcript of the proceedings.

Finally, the House approved a resolution adopting the black letter of the *ABA Criminal Justice Standards on Fair Trial and Public Discourse*, dated August 2013, to supplant the *ABA Criminal Justice Standards on Fair Trial and Free Press*.

Cybersecurity

The House approved a revised resolution condemning unauthorized, illegal governmental, organizational and individual intrusions into the computer systems and networks of lawyers and law firms and urging governmental bodies to examine, and if necessary, amend or supplement, existing laws to promote deterrence and provide appropriate sanctions.

Health Law

The House approved a resolution supporting the rights of all Americans, particularly our nation's veterans, to access adequate mental health and substance use disorder treatment services and coverage, and urging States, in implementing the essential health benefits provisions of the Patient Protection and Affordable Care Act, to fully and adequately provide for mental health and substance use disorder coverage.

Homelessness & Poverty

The House approved a resolution urging governments to promote the human right to adequate housing for all through increased funding, development and implementation of affordable housing strategies and to prevent infringement of that right.

Intellectual Property

The House voted to postpone indefinitely consideration of a resolution proposed by the Section of Intellectual Property Law, which would have urged the U.S. Supreme Court to resolve a split among the circuit courts of appeals on the requirements for establishing standing to bring an action for false advertising under the Lanham Act.

The House did, however, approve a resolution supporting the authority of the U.S. Patent and Trademark Office to cancel a patent claim in congressionally established administrative proceedings, and supporting the authority of a court to dismiss a suit based on such a claim, notwithstanding an earlier conflicting non-final court judgment relating to the claim.

International Law

The House adopted a resolution urging all countries not to apply statutes of limitation with respect to 1) genocide, 2) crimes against humanity, and 3) serious war crimes.

The House also adopted a resolution affirming that the U.S. common law doctrine of *forum non conveniens* is not an appropriate basis for refusing to confirm or enforce arbitral awards that are subject to the provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards or the Inter-American Convention on International Commercial Arbitration.

Law & Aging

The House approved a resolution urging courts with jurisdiction over adult guardianship and governmental agencies that administer representative payment programs for benefits to collaborate with respect to information sharing, training and education in order to protect vulnerable individuals with fiduciaries who make financial decisions on their behalf.

Pro Bono

The House approved a resolution adopting the black letter *Standards for Programs Providing Civil Pro Bono Legal Services to Persons of Limited Means,* dated August 2013, to supplant the Standards adopted August 1996, and recommends appropriate implementation of these Standards by entities providing civil pro bono legal services to persons of limited means.

Uniform Acts

The House approved the Uniform Prevention of and Remedies for Human Trafficking Act, promulgated by the National Conference of Commissioners on Uniform State Laws, as an appropriate act for those states desiring to adopt the specific substantive law suggested therein.

Voting Rights

The House approved a resolution urging Congress to act expeditiously to preserve and protect voting rights by legislating a coverage formula setting forth the criteria by which jurisdictions shall or shall not be subject to Section 5 preclearance, and/or by enacting other remedial amendments to the Voting Rights Act of 1965, in response to the United States Supreme Court's 2013 decision in *Shelby County v. Holder*.

The House also approved a resolution urging states, localities and territories to analyze their election systems and recent experiences of election delays if any, in light of available data and scholarship, and encouraging the enactment of legislation or administrative rules to address the causes and potential remedies for election delays.

Closing Business

At the conclusion of the meeting on Tuesday, August 13, 2013, the House adjourned *sine die*, and will next meet at the February 2014 ABA Midyear Meeting in Chicago.

Note: Scott M. Karson is a former president of the Suffolk County Bar Association (2004-05), and currently serves as Vice President of the New York State Bar Association for the 10th Judicial District and as the SCBA's Delegate to the ABA.

A Joint Venture, A Grand Outcome (Continued from page 14)

heritage and culture thus remaining intact. Heyward canvassed black slums, "Cabbage Row," occupied largely by stevedores, fishermen, and their extended families, and therein collected "burial money." To the insured, this payment served, prudently, as an investment and, superstitiously, as a talisman against harm. "Give the boy a quarter!" residents would shout, convinced that their generosity would further buttress them against misfortune.

Their superstitiousness, Heyward noted, was of a piece with their spirituality; he further noted their sense of community, reinforced by their culture, one grounded in story and song. He was entranced by their physical strength and vitality, amazed at their independence, their distinctiveness from the "domestics" and field hands he had previously known.

Heyward was compelled to cast in print a narrative that captured the "self-contained environment" and the rich, memorable characters that populated it. His novel *Porgy* tells of "Catfish Row" and its principal inhabitants: Bess, a good person, but under the thrall of both "happy dust" (cocaine) and the brutal Crown, alcoholic, murderous, opportunistically quick to abandon her; Sportin' Life, purveyor of cocaine and enthusiastically available to transport Bess to New York and there lead her into prostitution; in needed contrast are the nurturing Clara and the religious Serena.

And then there is the brave, open-hearted Porgy himself. Crippled, confined largely to a goat cart, Porgy takes in the abandoned Bess at a time when others refuse to do so, enables her rehabilitation, and serves as her protector when Crown returns to claim her. The men fight, and soon Crown lies dead. Thereafter, Porgy isn't suspected, but is nonetheless taken into custody by the police to identify Crown's body. Porgy refuses to do so, convinced that corpses bleed when viewed by the culpable. After serving a week in jail for contempt, he returns to Catfish Row to learn that Bess has relapsed into addiction and gone with Sportin' Life to New York. The story's arc nonetheless ascends toward hope: Porgy boards his cart and travels north, to both reunite with Bess and begin a new life, one unfettered by the past.

Published in 1925, the novel was a national best-seller. In the "Virginia Quarterly Review" James Southall Wilson wrote that for the first time in America, a white writer had created "a real negro, not a black-faced white man…with all the sympathy of a poet, (Heyward) gave freedom to the negro's soul in the region of art."

No one read "Porgy" more attentively than George Gershwin. A stylist — one who works in many styles, or forms, or "voices" — Gershwin had already bridged popular and classical genres, and had long been in search of material suitable for a projected "folk opera," something that would be uniquely American. In "Porgy," he found it. Years later he contacted Heyward, the men met, each found the other likeable and equally enthusiastic about the project, and in the spring of 1935 a grand alliance was forged.

Much of their collaboration was accomplished via mail. Ideas were exchanged regarding how best to stage the opera; what revisions should be made to the original story; which characters should be further developed, which should be merged into composites. But correspondence regarding script and stagecraft could go just so far; quite obviously a composer and a librettist had to now and again share the same studio. Heyward had it much the better when it came to reciprocal sojourns; his northern visits saw him enjoy Gershwin's commodious 14 room duplex on the upper east side of Manhattan, their workdays taken up with the opera, their evenings brightened by celebrity guests.

Gershwin's southern visits were quite another story. He made due in a rented cottage on Folly Beach, just outside Charleston. The quarters he shared with Heyward were Spartan, consisting of four rooms and a sleeping porch. He slept on an iron bed; an upright piano stood in another room. Water was imported from the city in five-gallon jugs. Gershwin liked the island for its telephone-free isolation, finding it conducive to creativity, but soon discovered that, in the semi-tropical low country of South Carolina, with its rustling Palmettos and its sweet scent of honeysuckle, the paradisiacal regularly merges with the pestilential.

"Our first three days," he wrote to his mother, "have been cool, the place being swept by an ocean breeze. Yesterday was the first hot day and it brought out the flies and gnats and mosquitoes. There are so many swamps in the district that when the breeze comes in from the land there's nothing to do but scratch."

In the coolness of evenings across a span of five weeks both men, with Heyward serving as Gershwin's guide, drove to various churches and meeting houses in the nearby sea islands, there to observe customs and hear songs in authentic settings; on James Island they found within its large Gullah population a rich source of folk material. Gershwin was especially impressed by what the Gullahs referred to as 'shouting,' "a complicated rhythmic pattern beaten out by feet and hands as an accompaniment to the spirituals, and…indubitably an African survival."

Toward the end of spring they had wrought "Porgy," and the production would be mounted in the fall of 1935. Its eclectic cast was headed by the Julliard School's Anne Wiggins Brown (Bess), the vaudevillian John Bubbles (Sportin' Life), and its principal star, Todd Duncan (Porgy).

Duncan initially had reservations about the project. A music professor at Howard University, possessed of an operatic baritone, "an angel's baritone, and a superb actor," according to Heyward, Duncan felt that any of Gershwin's work, with its origins in Tin Pan Alley, would be beneath him. His pre-judgment and snobbery aside, Duncan was concerned substantively about the projected opera's depiction of blacks: "I knew it would cause controversy among my people because of its representation of black life and music." But after singing selections from "Porgy," Duncan reversed course.

On October 1, 1935 the opera opened in Boston, and at the curtain call, Gershwin, Heyward, and the ensemble walked downstage to receive a 15-minute ovation. Within two weeks "Porgy" enjoyed an equally enthusiastic reception at the Alvin Theater in New York, where it would run for 124 performances, a relatively short run for a Broadway musical, a long run for an opera.

First comes the art, then follows its detractors. Thus was it ever. At its premiere, "Porgy" was attacked on two fronts: the artistic front, holding speciousness; the "political" front, holding legitimacy. Artistically, "Porgy" was seen in some quarters as not truly being an opera, notwithstanding that it was a production marked by an elaborateness of costuming, choreography, and scenery, and had as well all of an opera's other features, a play whose text was set to music, complete with recitatives, arias, duets, trios, and choruses, and all of these accompanied by an orchestra. Distinctly an American creation, "Porgy" was necessarily not in the European tradition.

Ruben Mamoulian, the opera's director, wryly noted, "You give someone something delicious to eat and they complain because they have no name for it."

Probably the opera's "status" was best summarized by Duke Ellington, himself not bothered by quibbles over the work's form; "Porgy," he said, was "beyond category."

An artistic complaint lodged by some black critics charged that "Porgy," a production mounted by white men, one a southerner, one a New Yorker, perforce lacked "authenticity." Writing in the magazine *Opportunity*, Hall Johnson somewhat inconsistently granted that he liked "Porgy," but asserted that any white composer and any white librettist by definition lacked the 'requisite knowledge and experience' needed as preconditions to writing in 'an authentic Negro musical language.' This 'authenticity' issue would be revived and applied to another medium in the 1960s, with the publication of William Styron's "Confessions of Nat Turner": no white novelist ran the reasoning among some critics, could understand or accurately depict a black slave rebellion.

The work of artists entails the imaginative; an artist chooses his subject and vivifies it with his viewpoint. Artistic freedom presupposes that jurist Oliver Wendell Holmes's "marketplace of ideas" will be at work: a "bad" idea should be met with a competing idea, not be met with boycott, or suppression, or any impotent outrage over "inauthenticity." In exploring a chosen world as his subject, the artist necessarily excludes any other world. Just so, with "Porgy," which arguably held a truth but clearly not the whole truth.

As to the "political" front, Todd Duncan's words —"…it would cause controversy among my people"— were to prove prophetic. "Porgy" depicted in large part a world of poverty, promiscuity, alcoholism, drug-addiction, crap-games, knife fights, homicide and retributive homicide. Small wonder it was met with outrage among some contemporary critics, white and black, the latter of whom no longer felt that "plenty of nothing" was good enough for their people. "Political" criticism would reach its flood stage with the civil-rights movement embraced by the 1950s and 1970s.

Many, however, held an opposing view; prominent African-American political figures including Mary McLeod Bethune and Ralph Bunche thought the opera a classic, not demeaning at all. J. Rosamund Johnson, both the assistant conductor of the chorus and a cast member ("Lawyer Frazier"), considered Heyward and Gershwin as jointly forming "…the Abraham Lincoln of Negro Music."

The tide of criticism, artistic and "political," would ebb; across the years; critics would ultimately be overwhelmed by both the timeless beauty of Gershwin's score and the belated recognition of the eternal tenacity of the human spirit that Heyward celebrated in the person of Porgy.

The opera would go on to set precedents. Washington's National Theater would integrate its seating for the production; Milan's La Scala would welcome "Porgy," the first time an American work and company had been invited there. The State Department would see it as its principal instrument of international goodwill, and the production would tour the Mediterranean, the Near East, the Soviet Union, and South America. In 1976 the Houston Grand Opera selected our preeminent native opera to honor America's bi-centennial. And in 1985 the question of Porgy's "status" was conclusively put to rest. That year saw its presentation at New York's Metropolitan Opera. "Porgy," writes Hutchisson, "now belonged to the ages."

Heyward and Gershwin's masterwork: its theme possibly ever-controversial; its music decidedly ever-glorious. "Porgy and Bess," 80 years young, in the wings, standing ready for yet another opening curtain, is "here to stay." Further invoking Gershwin, while I won't "watch over" your choice of literature — you're on your own, you may wish to "follow my lead" and enjoy James M. Hutchisson's outstanding book.

Note: William E. McSweeney, a member of the SCBA, lives in Sayville. He was a plebe at The Citadel in Charleston, S.C. during the academic year, 1957-'58, all those years ago. It was yesterday. Now and again he visits the still-sparkling city.

Splitting Up the Family Business (Continued from page 13)

shares in separate corporations to each child.

- Distributing contributes one business to Controlled and then distributes Controlled to parent and son, as above. Parent and daughter continue to own Distributing and to operate the other business.
- Distributing contributes the "children's business" to Controlled and then distributes Controlled to Son and Daughter in exchange for all of their Distributing stock.

In each instance, the parties and their respective businesses may be separated without incurring income tax. This enables the children to pursue their own interests and retain the benefits of their own efforts. It allows parent to maintain some level of involvement, while also enabling parent to better tailor his gift and estate planning. In light of these benefits, a taxpayer should, in the appropriate circumstances, consider the application of a corporate separation to a family-owned business.

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.

Trusts and Estates (Continued from page 11)

relying on information supplied to him about her from her mother from whom she was estranged.

The trustee opposed the application, alleging that the petitioner had engaged in various acts of fraud and criminal behavior against her mother and father, that the petitioner had failed to document her request for funds, and that he had exercised his discretion in good faith based on his desire to preserve the trust funds until petitioner was more fiscally responsible.

Based on the record, the court denied the trustee's motion for summary relief. The court concluded that although the trustee's discretion was extremely broad, it was not unbounded, and was subject to judicial review in order to prevent any abuse in the exercise of such authority. To this extent, viewing the record in a light most favorable to the petitioner, the court found that the record was unclear as to whether the trustee had failed to exercise his independent judgment or adequately evaluate the beneficiary's needs before refusing to make distributions to her from the trust, and thus whether he had acted in good faith. Accordingly, the court directed that a hearing be held on the allegations contained in the petition.

***In re Hammerschlag,* N.Y.L.J., Apr. 24, 2013, at 22 (Sur. Ct. New York County).**

Relief from Late Filing of Notice of Election

In a probate proceeding, the surviving spouse of the decedent appealed from an order of the Surrogate's Court, Kings County (Lopez Torres, S.), which denied her petition for leave to file a late notice of election against the decedent's estate. The record revealed that the decedent had been married to the petitioner for 49 years prior to his death in November 2004. Preliminary letters testamentary issued on April 19, 2006 to the executor named in the decedents' will, and on December 6, 2006, the surviving spouse served her notice of election on his attorney. However, the notice of election was not filed with the Surrogate's Court as required by the provisions of EPTL 5-1.1-A(d)(1).

The surviving spouse retained new counsel in October 2007, who discovered that her notice of election had not been filed in court in November 2008. Accordingly, in April, 2009, the surviving spouse filed a petition for leave to file a late notice of election pursuant to EPTL 5-1.1-A(d)(2). Letters testamentary were issued in May, 2009, and on October 26, 2011, the Surrogate's Court denied the surviving spouse's application.

In reversing the Order of the Surrogate's Court, the Appellate Division held that the surviving spouse had demonstrated reasonable cause for her failure to timely file her notice of election, by establishing that it was attributable to law office failure. In addition, she established that her late filing would not prejudice any party. Accordingly, the court held that the Surrogate's Court improvidently exercised its discretion in denying the application.

***Matter of Sylvester,* 2013 NY Slip Op 4613 (AD 2d Dept).**

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

Repeat Alcohol Offender (Continued from page 19)

the commissioner should not take effect. The administrative law judge will make a determination by taking into account the entire driving record.

Unless the administrative law judge finds that there are unusual, extenuating and compelling circumstances, the administrative law judge must issue findings to confirm the revocation proposed by the commissioner. The defense counsel should certainly apply for a hearing and prepare to present unusual, extenuating and compelling circumstances.

Should the administrative law judge confirm the proposed revocation, your client may file an administrative appeal §261, and if unsuccessful, an action for judicial review pursuant to CLPR Article §78.

The takeaway is a client who is a repeat multiple DWI offender with more than three offenses who was able to secure their license before the new regulations went into effect on or about September 25, 2012, is in jeopardy of losing their license for at least more than two years for a non-alcohol related revocation and perhaps, permanently, if they have five or more offenses during their lifetime for a relatively ordinary speeding violation of six points or more as well as the 5 point violations discussed in this article.

Defense counsel in the initial interview of any client must ask about previous DWI convictions or incidents. Should the number be three or more, counsel must make a searching inquiry to determine their client's exposure to license revocation. Defense counsel should seek dismissals, of course, dispositions of four points or less, where possible, or reductions at trial on speeding cases to four points. Standard advice should be to inform your client not to plead guilty until a complete review of their case and their driving record has been performed.

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

Looking Back (Continued from page 5)

and killing the economy. Things are tough in the U.S. You will not find it easy to sell and you'll be stuck for taxes with a draining asset and if you do sell it you won't be able to get any more than what you valued and sold it to us for."

Mal asked them to think about it.

He then continued, "All of us are veterans who went to war for our country and Horn, over here, has a chest full of medals, a battlefield officer's commission, and scars that will make you cringe. Before you say no, take a few minutes and give some consideration to the merits of our position and come back with a reasoned judgment."

McGraw-Hill, as it turned out, ***did*** take paper. We closed.

We went down the elevator, walked outside and into the nearest bar and toasted and congratulated each other and ourselves. We went over the entire transaction from day one to the closing, laughing, smiling, patting each other on the back. And we wished ourselves good luck in the future. On the train ride home we sat in the bar car and repeated all of the foregoing more than once.

Epilogue

It is now some 45 years later. Some of us have moved on, some died, one of us moved to Virginia, and the rest of us have retired. We all did fine. The building has been sold a couple of times during this interval. A few months ago it was sold again. The scuttlebutt is that it brought in just under one million dollars.

Note: Morton I. Willen was a member of the SCBA for many years, and served as a Family Court Judge from 1978-1987, the last three years as an Acting Supreme Court Justice. He served thereafter for almost 20 years as a Judicial Hearing Officer in the Family Court and Supreme Court.

This new column will appear monthly in *The Suffolk Lawyer* and will be written by veteran SCBA attorneys and judges. Like life itself, so much of the practice of law changes over the years. Through the experiences of our members we hope to offer a window into what the practice of law was like in the past and how it has evolved.

We need volunteers to share their experiences. If you would like to contribute an article please contact Laura Lane by e mail at scbanews@optonline.net or Past President John Buonora at jlgoodhour@optonline.net. We'd love to hear from you and will even help you craft your column if you wish. You probably have so much to share with us.

Weight vs. Admissibility (Continued from page 15)

Board of Managers of 165 Hudson Street Condominium v 195 Hudson Street Assoc., LLC,[11] the trial court precluded the plaintiff's expert from testifying as to future costs and directed a verdict to that effect. The Appellate Division disagreed with the preclusion, finding that although the qualifications of an expert are within the trial court's "sound discretion," any question as to the expert's particular area of knowledge or expertise "goes to the weight and not the admissibility of the testimony," and could have been cured with a limiting instruction.[12] Similarly, in *Thorne v Grubman*,[13] the Appellate Division affirmed the trial court's decision denying the defendant's motion to preclude the plaintiff from offering the opinion from an accident reconstruction expert. The defendant argued that the expert opined as to the defendant's state of mind. The court not only disagreed with that characterization of the expert's testimony, but found that a limiting instruction could cure any question that the expert opined on the defendant's state of mind.

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

1. 92 NY2d 396 (1998).
2. *Id.* at 402.
3. 94 AD3d 557 (1st Dept 2012).
4. *Id.*
5. 2002 NY Slip Op 50428(U) (Sup Ct, Nassau County 2002).
6. 197 AD2d 605 (2d Dept 1993).
7. 16 AD3d 393 (2d Dept 2005).
8. *See also Borawski v Huang*, 34 AD3d 409 (2d Dept 2006) (trial court erred in precluding the plaintiff's expert from testifying); *Bodensiek v Schwartz*, 292 AD2d 411 (2d Dept 2002) (trial court should have permitted the plaintiff's expert to testify because the lack of knowledge in a particular field goes to the weight of the expert's testimony).
9. NY PJI 1:90 (3d ed. 2013).
10. 97 NY2d 500 (2002).
11. 63 AD3d 523 (1st Dept 2009).
12. Limiting instructions concerning expert testimony are commonly given in criminal cases, particularly in prosecutions for drug-related offenses (*see People v Brown*, 97 NY2d 500 [2002] [holding that expert testimony concerning the methods and terminology used in street-level drug transactions must be paired with an appropriate limiting instruction, and the jury must be informed that it is free to reject the testimony offered and that it is not proof that the defendant was engaged in the sale of narcotics]).
13. 40 AD3d 375 (1st Dept 2007).

ACADEMY OF LAW NEWS

A Dozen Doorways to New Knowledge in October

By Dorothy Paine Ceparano

October features twelve CLE offerings from the Academy, all of them covering new subject matter or new takes on lawyering skills.

The **Trial Practicum**, which began in September with a stellar program on jury selection and opening remarks, continues with three more lecture-seminars in October: **Evidence** on the evening of October 3; **Direct Examination** on October 16, and **Cross Examination** on October 30. The outstanding faculty will share strategies and illustrate key points through demonstrations. In addition to advocacy tips, they will provide insights into qualifying and examining experts and using the PJI effectively. Presenters include: Hon. Mark Cohen, William Ferris, and Brian Doyle on Evidence; John Bracken, Michael Colavecchio, Hon. James Flanagan, Hon. Barbara Kahn, and Steven Wilutis on Direct Examination; and Michael Brown, Hon John Collins, James Farrell, Michael Levine, and Hon. Peter Mayer on Cross. Those who did not enroll in the full Practicum, which includes mentoring workshops, may register for any of the single programs.

Litigators will also want to keep in mind two popular fall updates. On October 7, Professor Patrick Connors returns to Suffolk (Hyatt Wind Watch) with his **2013 New York Civil Practice Update.** His presentation will cover a number of challenging topics, including disclosure of information from social networking sites, pleading and statute of limitations in new No Fault Divorce cases, new "affirmation rule" in mortgage foreclosure actions. electronic signatures on affirmations, compensation of doctors who act as fact witnesses, objections by nonparty witnesses at depositions, and sanctions for not preserving electronically stored information. On October 23, Hon. Mark Cohen and Kent Moston perform a similar service for criminal law attorneys. Once again, their **Criminal Law and Procedure Update** will focus on key, sea-changing Court of Appeals and U.S. Supreme Court decisions. Warrants, *Mirandizing* suspects, alternatives to courtroom closure, and failure to obtain a client's psychiatric records are just a few of they issues they will address.

Those who represent or advise business clients – large or small – will find a number of must-attends in the October syllabus. At a lunch and learn on October 2, David DePinto and CPA Robert Bertucelli explain **The Benefits of Captive Insurance Companies,** an increasingly popular way of handling risk and engaging in cost-effective estate and gift tax planning. On the evening of October 17, Hon. Thomas Whelan and Vincent R. Martorana (Reed Smith, LLP) illustrate the importance of language and show attorneys how to **Avoid Contract Disputes through Effective Drafting.** And on the evening of October 28, Sima Ali, Troy Kessler, Irv Miljoner (U.S. Department of Labor), and Hon. John Leo address **Wage and Hour Developments,** issues about which large and small employers need awareness in order to avoid putting their businesses at risk for violations and costly litigation.

Real estate lawyers will want to calendar two October programs, one at the SCBA Center and one on the East End. On October 17, at the SCBA, a succinct lunch 'n learn will address the benefits and pitfalls of **Reverse Mortgages.** Attorneys Gerard McCreight and Ann-Margaret Carrozza, with Worldwide Capital Mortgage Corp. President Salvatore Petrozzino, explain available products, the application process, and tax and elder law planning. They will also provide cautionary advice on when a reverse mortgage may not be an advisable alternative. The East End program, scheduled for the evening of October 30 at Bridgehampton National Bank, will deal with **Snowbirds and Summer Homes.** Yvonne Cort of Karen T. Tennenbaum, PC, will discuss, among other things, the effects of residency on income tax and estate tax. Michael Brady, corporate counsel to Riverside Abstract, will talk about the relationship of residency and property sales, including 1031 tax-deferred exchanges.

A program practitioners handling tax issues, divorces, real estate transactions, and estate planning will want to attend is **Medicare Surtax: Analysis and Planning,** an October 10 lunch 'n learn. Alan E. Weiner, CPA, JD, LL.M,, will discuss IRC 1411, a new tax on investment income many taxpayers will have to pay. In fact, lawyers who expect their 2013 adjusted gross income to be in excess of $250,000 will want this information for themselves.

Another program for attorneys in many practice areas is **Representing Non-Citizens,** scheduled for the evening of October 21. A skilled faculty will cover caveats to keep in mind so that legal advocacy does not result in unintended consequences for the client. Presenters are Hon. Stephen Ukeiley, Dennis Valet, George Terezakis, Troy Kessler, Donald Smith, and Hon. Theresa Whelan. Hon. John Leo serves as moderator. Topics include land-lord tenant matters, real estate, criminal defense, labor and employment law, commercial and corporate, matrimonial and family law.

Practitioners are welcome to call the Academy Office (631-234-5588) with questions or for information about any of the programs.

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

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 CALENDAR AT WWW.scba.ORG for course descriptions and registration details. For information, call 631-234-5588.

October

1	Tuesday	Curriculum Meeting. 5:30 p.m. All welcome.
2	Wednesday	**Captive Insurance.** Lunch 'n Learn. 12:30–2:15 p.m. Lunch from noon.
3	Thursday	**Trial Practicum: Evidence.** 6:00–9:00 p.m.; light supper from 5:30 p.m.
4	Friday	Meeting of Academy Officers & Volunteers. 7:30–9:00 a.m. Breakfast buffet. All SCBA members welcome.
7	Tuesday	**New York Civil Practice Update (Professor Patrick Connors).** 6:30–9:30 p.m.; deli buffet from 5:45 p.m. Hyatt Regency Wind Watch Hotel.
10	Thursday	**Medicare Surtax: Analysis & Planning.** Lunch 'n Learn. 12:30–2:15 p.m. Lunch from noon.
16	Wednesday	**Trial Practicum: Direct Examination.** 6:00–9:00 p.m.; light supper from 5:30 p.m.
17	Thursday	**Reverse Mortgages.** Lunch 'n Learn. 12:30–2:15 p.m. Lunch from noon.
17	Thursday	**Concepts in Contract Drafting: Avoiding Disputes.** 6:00–9:00 p.m.; light supper from 5:30 p.m.
21	Monday	**Representing Non-Citizens.** 6:00–9:00 p.m.; light supper from 5:30 p.m.
23	Wednesday	**Trial Practicum: Cross Examination.** 6:00–9:00 p.m.; light supper from 5:30 p.m.
25	Friday	**Criminal Law Update (Hon. Mark Cohen & Kent Moston).** 1:30–4:30 p.m. at Nassau Supreme Court
28	Monday	**Wage & Hour Developments.** 6:00–9:00 p.m.; light supper from 5:30 p.m.
30	Wednesday	***East End:*** **Snowbirds & Summer Homes.** 6:00–9:00 p.m.; light supper from 5:30 p.m. at Bridgehampton National Bank

November

1	Friday	Meeting of Academy Officers & Volunteers. 7:30–9:00 a.m. Breakfast buffet. All SCBA members welcome
4	Monday	**Real Estate Brokerage Law for the Transactional Practitioner.** 6:00–9:00 p.m.; light supper from 5:30 p.m.
6	Wednesday	**Trial Practicum: Summation.** 5:30-9:15 p.m.; light supper from 5:00 p.m.
7	Thursday	**DMV Update –** ***East End;*** 5:30–8:00 p.m. Location TBA
12	Tuesday	**DMV Update –** ***SCBA;*** 6:00–8:30 p.m.; light supper from 5:30 p.m.
13	Wednesday	**Trust Contests.** Lunch 'n Learn. 12:30–2:15 p.m. Lunch from noon.
13	Wednesday	**Allen Sak Municipal Series: Part One–How to Get Your Building Permit Approved**, 6:00–9:00 p.m.; light supper from 5:30 p.m. (Part Two on Dec. 5)
19	Tuesday	**Real Property Update (Scott Mollen),** 6:00–9:00 p.m.; light supper from 5:30 p.m.
20	Wednesday	**Family Court Update–Part One.** 6:00–9:00 p.m.; light supper from 5:30 p.m. (Part Two on Dec. 4)
21	Thursday	**Distributions out of Family Partnerships.** 6:00–9:00 p.m.; light supper from 5:30 p.m.
25	Monday	***18 B Mandatory Training:*** **Family Court.** 6:00–9:00 p.m.; light supper from 5:30 p.m.

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

Legal Issues Surrounding Those That Care For Feral Cats *(Continued from page 21)*

most common actions brought against an individual feeding cats are from neighbors, for nuisance and negligence. Nuisance claims typically allege that the person who is feeding the cats is interfering with the use and enjoyment of their neighbor's property. New York courts have noted that, the question of whether there has been a substantial interference with plaintiff's use and enjoyment of his/her property is one to be resolved by the trier of fact and involves a review of the totality of the circumstances based upon a balancing of the rights of the defendant to use his or her property against the rights of the plaintiff to enjoy his or her property (*see, Turner v. Coppola*, 102 Misc.2d 1043, 1047, 424 N.Y.S.2d 864 [1980], affd. 78 A.D.2d 781, 434 N.Y.S.2d 563 [1980]; *Walker v. Wearb,* 6 N.Y.S.2d 548, 552-553 [1938]). *See, Iny v. Collom*, 13 Misc. 3d 75, 79, 827 N.Y.S.2d 416, 419 (N.Y. App. Term. 2006). Negligence claims usually claim that the person feeding the cats has caused a health concern or other problem and damaged the plaintiff through their negligent actions of feeding the cats, such as attracting wildlife, mice, cat poop, etc., Not all necessarily true, as cats typically kill mice and rats and frighten away other wildlife. Other claims can range from property damage, personal injury, to claims of both negligent and intentional emotional distress. Claims of emotional distress are really reaching and almost never founded. Tying back into ordinance violations, the plaintiff will typically allege that because the cat feeder has violated a local ordinance and/or has been issued summonses alleging violations of a local code, that this somehow parlays into a negligence per se claim.

However, the violation of a municipal ordinance constitutes only some evidence of negligence. See, *Elliott v. City of New York*, 95 N.Y.2d 730, 734, 747 N.E.2d 760, 762 (2001) citing, (see, *Martin v. Herzog*, 228 N.Y. 164, 169, 126 N.E. 814). Keepers and caretakers may also be liable for damage caused by feral cats to property or persons. The key question in either case is whether the owner has a duty to control the cat's behavior and whether the damages caused by the cat were reasonably foreseeable. In one New York case the trial court held that a store owner could be liable for personal injuries caused by a stray or feral cat in the store. *Fiori v. Conway Org*., 746 N.Y.S.2d 747, 750 (N.Y. App. Div. Dec. 14, 2001). In *Fiori,* a customer sued a store owner after the customer was injured by a cat that was being fed and cared for by store staff. The court held that the store owner was liable under a common law negligence theory for breaching his duty to provide a safe environment for his customers. See, *Fiori v. Conway Org*., 746 N.Y.S.2d 747, 750 (N.Y. App. Div. Dec. 14, 2001).

Over the past few years feral and stray cats have been blamed for the reduction of the Piping Plovers that make their nests here on the beaches of Long Island. Piping Plovers are protected under the Endangered Species Act of 1973 and are listed as a "threatened species."

Cats are dumped at beaches by their irresponsible owners because people believe that a beach is a good place to access food and water. Unfortunately, cats cannot drink the salty water and don't normally swim and fish. Many times people think it is not a big deal to abandon a cat in the outdoors, but if the cat has been domesticated and cared for their entire life they have never learned to be self sufficient and hunt. Cats that are declawed and abandoned outdoors have little to no chance of survival on their own, for the obvious reason that they no longer have claws to catch and kill prey.

The Endangered Species Act is regulated by the U.S. Fish and Wildlife Service ("USFWS"). The "USFWS" can and has threatened fines against municipalities that fail to adequately protect the nesting grounds of these threatened birds, with fines ranging from $1,000 for unintentional violations to 12,000 to 25,000 per violation, for crimes involving a "threatened species" such as the piping plover. Fines for endangered species and felonies can go as high as $50,000.

So what can be done about the feral cat situation? Well for starters, rather than punishing good Samaritans, municipalities should seek to enforce animal abandonment laws and drive home the importance of spaying/neutering. In this author's humble opinion, the key to reducing the unwanted cat population is four fold: education; neighborhood TNR programs; easy and inexpensive access to spaying and neutering services and last but not least, animal friendly housing. Long Islanders must be educated on the humane treatment of animals including the importance of spaying and neutering, the TNR method, and the fact that abandonment of a cat is a crime. Once educated, people need cheap and convenient access to spaying and neutering services, as well as, access to the tools to handle feral cat issues in their own neighborhood such as the ability to rent "Have a Heart Traps" and what to keep an eye out for so that pet cats do not get caught and cats already spayed/neutered are not recaptured. Other methods such as, simply gathering up feral cats and euthanizing them, is not only inhumane but futile, just as simply trapping and relocating is futile. More cats will always come as long as people remain ignorant and irresponsible and without access to the resources and services to help themselves, before the situation turns into one of abandonment out of desperation.

Note: Amy Chaitoff is a solo practitioner with a practice in Bayport. Her practice focuses on representing individuals, organizations, municipalities, and businesses with animal related legal issues. She is Chair of the New York State Bar Association's Committee on Animals and the Law and co-founder and Co-Chair of the Suffolk County Bar Association's Animal Law Committee. Ms. Chaitoff has written numerous articles and lectured extensively on animal related legal issues.

AMERICAN PERSPECTIVE

A Ruling on "Stop and Frisk"

By Justin Giordano

On August 12, 2013, Judge Shira A. Scheindlin ruled on a lawsuit that had been filed in 2008 in Federal District Court. The case's lead plaintiff was David Floyd, a medical student who was stopped twice including once in the middle of the afternoon right in front of his Bronx home, as per the plaintiff's claim. Ultimately the case went to trial in the spring of 2013 and lasted approximately 9 weeks concluding in May. Judge Scheindlin handed down her decision a few weeks later ruling that the New York Police Department's controversial "stop and frisk" policy is unconstitutional, at least in part, based on her determination that it targets African-Americans and Latinos unlawfully. Consequently, the judge ordered that an outside monitor be appointed to oversee changes to the policy as well as a number of other mandates.

More specifically Judge Scheindlin held that the policy violated the plaintiff's Fourth Amendment rights, that bars unreasonable searches, and in that regard, the judge found that the NYPD made over 200,000 "stops" without reasonable suspicion during the eight year period covering 2004 to June 2012. In addition, the judge also stated that she found evidence of racial profiling, violating the plaintiffs' Fourteenth Amendment rights, which guarantees equal protection under the law.

Judge Scheindlin further wrote, "The city's highest officials have turned a blind eye to the evidence that officers are conducting stops in a racially discriminatory manner. In their zeal to defend a policy that they believe to be effective, they have willfully ignored overwhelming proof that the policy of targeting 'the right people' is racially discriminatory and therefore violates the United States Constitution."

The judge therefore ordered that the policy be altered so that future stops must be based on reasonable suspicion and in a racially neutral manner. In her ruling she ordered the appointment of former Manhattan Chief Assistant District Attorney Peter Zimroth, to develop and oversee near-term reforms, which must include changes to the NYPD's policies and training. She also ordered that a pilot project be initiated where NYPD patrol officers in one selected precinct in each borough must wear video cameras. The chosen precincts would be those with the most stops in 2012.

In issuing this order she wrote, "The recordings should ... alleviate some of the mistrust that has developed between the police and the black and Hispanic communities," and "will be equally helpful to members of NYPD who are wrongly accused of inappropriate behavior."

Scheindlin ordered that community input must be actively sought in order to develop longer-term reforms.

In elaborating on her ruling, Judge Scheindlin said that more than 80 percent of the stops involved blacks or Hispanics, and that the NYPD made a total of more than 4.4 million stops from 2004 to June 2012 under the "stop and frisk" policy. She went on to write that the NYPD carried out more stops where there were more black and Hispanic residents, and they did so at a rate that was disproportionate with crime rates, and that the department's unwritten policy was to target "the right people" for stops. In effect this practice encouraged the targeting of Hispanics and young African-Americans based on their prevalence in local crime complaints.

She concluded her written remarks as follows: "No one should live in fear of being stopped whenever he leaves his home to go about the activities of daily life. Those who are routinely subjected to stops are overwhelmingly people of color, and they are justifiably troubled to be singled out when many of them have done nothing to attract the unwanted attention."

The mayor, police commissioner and other city officials respond

Mayor Blomberg Commissioner Ray Kelly and other city officials responded by voicing their unequivocal disagreement with the ruling and declared that they would be immediately filing an appeal to the 2nd Circuit Court of Appeals. City attorney Michael Cardozo will seek to block the implementation of Judge Scheindlin's ruling until the appeal is heard. The mayor and the commissioner strongly contended that the NYPD does not racially profile suspects and that its "stop and frisk" policy is to be credited for substantially reducing crime in the city.

New York Police Commissioner Ray Kell, specifically called Scheindlin's finding of racial profiling "disturbing and offensive." He went on to say "We do not engage in racial profiling. It is prohibited by law. We train our officers that they need reasonable suspicion to make a stop, and I can assure you that race is never a reason to conduct a stop." Commissioner Kelly continued by stating that the policy "is certainly a tool that every police officer needs throughout America." "If you see something suspicious, you pay your police officers to ask a question, stop to inquire. To the extent that this significantly impacts on that, I think you're going to have a problem, not only here, but across America."

For his part, Mayor Bloomberg indicated that the NYPD's "stop and frisk" policy was one of a number of programs that was instrumental in helping New York City's murder rate drop substantially. In fact, he pointed out the rate is now 50 percent below the rate that it was when he took office on January 2002, almost 12 years ago. He further stated that "we want to match the stops to where the reports of crime are. One of the problems we have in our society today is that victims and perpetrators of crime are (disproportionately) young minority men — that's just a fact. If there's any administration that's ever worked hard on that, I think it's ours ... we're trying to do something about it."

"That has nothing to do with, however, where we stop people. We go to where the reports of crime are. Those unfortunately happen to be poor neighborhoods and minority neighborhoods. But that's not the original objective or the intent or how we get there. We get there when there's a crime reported, and we will continue to do that."

Furthermore Mayor Bloomberg also stated that in any event "you're not going to see a change in tactics overnight," indicating that it would take a fair amount of time to implement all the changes that the judge imposed even if the appellate court does not stay the District Court's ruling until the appeal process is completed.

In search of a balanced and effective solution

The NYPD, the mayor and the commissioner will adamantly argue that the "stop and frisk" policy has yielded undeniable positive results. All one need look at is the homicide rate, which circa 1992 hovered at around 2500 per annum, compared to the current level of approximately 450, to appreciate the benefits of this and related policies and programs that the NYPD implemented even prior to the current mayor assuming office. The NYPD has also argued that the policy in which police stop, question and frisk people they consider suspicious is utilized as a deterrent to crime. This, the argument goes, is accomplished by discouraging those who might be thinking of carrying an illegal weapon from doing so. And thus even if those so discouraged account for only a portion of illegal gun carriers that can still be considered an achievement in that fewer violent crimes will ensue.

The law of unintentional consequences could also come into play here as pertains this ruling. One of those possible unintended consequences could have some police officers, weary of having to file a mountain of paper work to document and justify a "stop" action or fearful of being subjected to a lawsuit, simply choose not to bother to stop suspicious individuals. In essence, turning a blind eye, where prior to the ruling that might have been otherwise. The consequence could be a higher crime rate with the deterrent effect essentially removed. Of course the assumption is that the police department and its highly trained officers will not deviate from administering their duties in a professional and responsible manner. However, it is also a factual reality that any organization, no matter how sound, will always have errant individuals among its members that will seek the course of least resistance.

On the other hand the protections afforded by the United States Constitution to the American citizenry is imperative. The argument that dangerous times call for pushing the bounds of constitutional protection always risks embarking on the road to unwanted and unanticipated consequences. Not to say that this is the situation in the case at hand — that determination has not been made as of yet, one way or the other. However, it's worth remembering that the Fourth Amendment, along with the other nine amendments that constitute the Bill of Rights, were not authored at a time when the nation felt a heightened sense of security. In fact quite the opposite is true. An examination of history clearly reveals that at the time the Bill of Rights was adopted the nascent United States faced an abundance of serious dangers including domestic crime and foreign threats. The foreign threats emanated from the real possibility of hostile invasions from major European powers coveting the riches that the former colonies held. It must be remembered that many among the population were not yet fully committed to being loyal to the newly formed nation and therefore the potential that some among their ranks might be spies or insurgents was not negligible. In spite of those circumstances, or perhaps because of them, the framers of the constitution deemed it imperative that they adopt the Bill of Rights to protect the individual, and the Fourth Amendment does just that with regard to search and seizure.

To reiterate, the case for or against "stop and frisk" is still to be conclusively made. The Appellate Court will have its say in the months to come, and depending on the outcome, perhaps the Supreme Court of the U.S. may have the final say. This course of action however is uncertain since a change in the mayoralty of New York will occur by year's end and a new administration may opt not to pursue the matter further. If that occurs the opportunity may be lost to truly examine this issue in an in-depth manner based on constitutional law rather than from a highly charged political perspective.

The guiding constitutional principle, no matter how well intentioned a law legislative action or policy may be, is to benefit or safeguard the many (or society) while protecting the rights of the individual. That being the purpose and foundational thrust of the American Constitution neither expediency nor political calculations should ever carry the day.

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

Estate Planning *(Continued from page 18)*

expenses and do not contribute their personal residence to the FLP.

The Addamses have divested their estate of assets worth $15 million at a discounted valuation of $10 million. Although the Addamses have used their lifetime federal exemption ($5.25 million each) they have significantly reduced their federal estate tax exposure and possibly eliminated their New York State estate tax exposure (New York only has a $1 million exemption and no transfer tax). By using the annual gift exemption, they can continue to divest themselves of their limited partnership interests by gifting those interests to their children while still maintaining control over the assets during their lifetime as the general partners. They have also achieved creditor protection to the extent that they have minimized their personal assets as general partners, will continue to divest their limited partnership assets to their children, and because attaching a limited partnership asset can be a burdensome process. They are also pushing the income stream down to the next generations, thereby reducing their own income tax liability.

In comparison, the Trumpet family's assets consist of a personal residence, a vacant plot of land in Florida, an annuity, and a brokerage account valued at $2 million, consisting of commercially traded bonds, some over-the-counter stocks, and two certificates of deposit. They create the FLP retaining general and limited partnership interests, and fund it with the personal residence and brokerage account. The senior Trumpets live off their social security money. Their three children receive small limited partnership interests at inception and future gifts of limited partnership interests each year. Although the family sees each other at holidays and other gatherings, there are no FLP meetings or documentation.

In contrast to the Addams family, the Trumpets may have engaged in an exercise in futility. Recent decisions reflect the IRS rejecting any marketability discount and including the FLP assets in the decedent's estate, thereby negating any intended benefit of the FLP. The recent *Turner*[1], *Liljestrand* [2], and Lockett[3]cases indicate that the IRS is aggressively disputing estate claims of discounts on the transfer of assets into an FLP, and scrutinizing various aspects of whether the players complied with the requisite formalities.

In short, the FLP is not for the uneducated. It does not begin and end with the creation of a partnership agreement. Extreme care must be taken to observe the formalities of operating a partnership, and maintaining the FLP as an actual business. Next month's article will examine these cases.

Note: Alison Arden Besunder is the founder and principal of Arden Besunder P.C., an estate planning and elder law practice counseling clients in Manhattan, Brooklyn, Queens, Nassau and Suffolk counties. You can follow her: on Twitter @estatetrustplan, on her website at www.besunderlaw.com, https://www.facebook.com/pages/Arden-Besunder-PC/198198056877116and on her blog at http://trustsestateslitigation.blogspot.com

1. TC Memo 2011-209, RIA TC Memo ¶ 2011-209, 102 CCH TCM 214.
2. TC Memo 2011-259.
3. TC Memo 2012-123.

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Veil Piercing Claim *(Continued from page 12)*

But a petitioner succeeded in doing so last month in Richmond County. In *Agai v. Diontech Consulting, Inc.*, 40 Misc. 3d 1229(A) (Richmond County Sup. Ct. 2013), the petitioner Jacob Agai moved for summary judgment against all respondents, including Stylianos Antoniou and Sokrates Antoniou (the Antoniou brothers), seeking to pierce the corporate veil of Diontech Consulting Inc. in order to enforce a judgment rendered against Diontech upon the shareholders personally. The Antoniou brothers opposed the motion.

The court granted petitioner's motion and held that "[t]he weight of evidence supports plaintiff's claim that Diontech was a sham entity which never kept accurate records or minutes of meetings, did not observe any traditional corporate formalities, and diverted funds for the principals' own personal gains." *Id*., at 3. In reaching that conclusion, the court first relied on the damning deposition testimony that the Antoniou brothers failed to adhere to any corporate formalities. Specifically, the court noted:

- both bothers testified that they were unaware of any books or records concerning the operation of the corporation;
- neither brother could produce any documents of the corporation's separate existence (i.e. board meeting minutes, pay stubs, or bank statements);
- there was evidence that the brothers used corporate accounts for personal expenses, commingled corporate and personal assets, and maintained the corporation as a sham entity for the purpose of avoiding creditors and legal liability;
- Sokrates Antoniou testified he was never given a formal title in the corporation, nor did he ever carry out any of the official duties of a corporate officer, despite the fact that he was listed as the president and Stylianos as the secretary of the corporation on a business credit application;
- both brothers testified that they had no knowledge as to what became of any of corporate assets including computers, office furniture, and company vehicles, despite receiving compensation for their work in settling company affairs;
- their accountant testified that he refused to prepare corporate tax returns due to the corporation's failure to provide appropriate paperwork or to account for certain unspecified disbursements; and
- their accountant further testified from his review of the bank records, the respondents routinely took significant amounts of money from the bank account but failed to pay it back to the corporation.

In addition, the court found that the evidence made clear the Diontech was used to unlawfully avoid creditors and to the injure the plaintiff personally. Specifically, the court noted that:

- throughout the course of working with the plaintiff, the three principals of Diontech repeatedly used payments made by the plaintiff and materials purchased for plaintiff's projects for other jobs which they were involved in at the time; and
- both Antoniou brothers continued receiving payments from a supposedly insolvent Diontech despite the fact that other laborers and subcontractors remained unpaid.

Simply, the evidence was so overwhelming that the court pierced despite viewing the evidence in the light most favorable to the Antoniou brothers and affording them the benefit of all reasonable inferences. It is a valuable lesson for both sides of a caption.

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