THE SUFFOLK LAWYER

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November 2012

INSIDE...

November 2012

FOCUS ON COMMERCIAL & CORPORATE LAW

From Suffolk County to Scotland - Two Attorneys' Whirlwind Adventure

By Hon. A. Gail Prudenti

I distinctly recall the moment when I realized that I would become an attorney. I was a five year old girl growing up in Blue Point, Long Island and my father, a building contractor, was closing on a house. Being somewhat inquisitive for a five year old, I happened to notice that my father was the only person in the room not represented by a lawyer, and it stuck with me. Neither at that time, nor over the course of my subsequent 34 year career as a lawyer, including 21 years as a judge, did I ever dream that I would witness the opening of a spectacular library at my alma mater, speak in a lecture hall before hundreds of Scottish scholars and officials, and meet Her Majesty, the Queen of England, all in one week.

Nevertheless, this is exactly what happened during my recent whirlwind trip to Scotland. Having attended law school at Scotland's University of Aberdeen, I was invited by its current Principal, Professor Ian Diamond, to attend the official opening of the University's Sir Duncan Rice Library. My tremendous excitement to return to Scotland B the site of so many wonderful memories for me B became utterly uncontainable once I learned that the library was to be opened by none other than Her Majesty, the Queen of England. Meanwhile, my wonderful husband of 33 years and a fellow lawyer, Robert Cimino, was equally as excited to explore the infinite golfing opportunities that Scotland has to offer.

But this was not to be our only adventure on this trip. I was informed by the Judiciary's partners from the Center for Court Innovation that Scotland was in the early stages of exploring problem-solving justice reform, and that Scottish judges (some of whom are called "sheriffs"), officials and scholars were keenly interested in

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Photo courtesy of Hon. Prudenti

Honorable A. Gail Prudenti and her husband, attorney Robert Cimino meeting the Queen of England.

Author's Night at SCBA

Photo by Art Shulman

Former SCBA President (1983-86) Honorable Frederic Block, Senior US District Judge of the Eastern District of NY, speaking about his book, *Disrobed*, at a recent Author's Night at the SCBA. The principal sponsor for the evening was Lamb & Barnosky, LLP. (See more photos on page 16.)

PRESIDENT'S MESSAGE

Be a Pro Bono Attorney for a Returning Vet

Arthur Shulman

By Arthur E. Shulman

I am happy to report that the Suffolk County Bar Association Is doing very well and that the enthusiasm and participation of our members in the many Bar Association functions is overwhelming.

On September 20, I had the great pleasure of celebrating my birthday at the Bar Association along with my wife, Ruth, when we attended an SCBA-sponsored author's night at which time the Hon. Frederic Block, Senior United States District Judge of the Eastern District of New York and a past president of the SCBA, spoke about his new book, *Disrobed*, an inside look at the life and work of a federal trial judge.

Judge Block's comments about his book were riveting and extremely entertaining, especially his experiences concerning the many high profile cases in which he was involved in his early years as a young attorney in Suffolk County and the issues he dealt with during his year as President of the SCBA. I was all set to begin reading his book the next day, but my wife got to it first and enjoyed it immensely. All I heard for the next week while she was reading the book was "Did you know this? or "Did you know that Judge Block was involved in this?" By the time she finished the book, I almost felt that I had already read the book.

I'd like to offer my special thanks to the law firm of Lamb & Barnosky

(Continued on page 24)

BAR EVENTS

Academy Offering Securitized Mortgage Foreclosures, Part one

November 19, 6 to 9 p.m.
$150 for two parts or $85 for one part
Bar Center
Learn new foreclosure strategies.
6 mcle for completion of 2 parts.
Part two is January 14

Academy Offering Lawyers Helping Lawyers

November 16, 10 to 4 p.m.
A training program for all lawyers on helping those suffering from addiction, depression and other mental health issues.
Bar Center
$60, 5 mcle

SCBA Holiday Party

Friday, December 7, 4 to 7 p.m.
At the bar center.

FOCUS ON
COMMERCIAL & CORPORATE LAW
SPECIAL EDITION

Suffolk County Bar Association

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SCBA Calendar

OF ASSOCIATION MEETINGS AND EVENTS

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

November 2012

5	Monday	Executive Committee, 5:30 p.m., Board Room
7	Wednesday	Appellate Practice Committee, 5:30 p.m., Board Room Military & Veterans Committee, 5:30 p.m., EBT Room
9	Friday	Labor & Employment Law Committee, 8:00 a.m., Board Room
14	Wednesday	Elder Law Committee, 12 noon-2 p.m., Great Hall Education Law Committee, 12:30 p.m., Board Room Real Property Law Committee, 6:30 p.m., Board Room
19	Monday	Board of Directors Meeting, 5:30 p.m., Board Room
26	Monday	Surrogate's Court Committee Meeting, 6:00 p.m., Board Room
27	Tuesday	Solo & Small Firm Practitioners Committee, 4:30 p.m.-6:00 p.m., Board Room
28	Wednesday	Professional Ethics & Civility Committee, 6:00 p.m., Board Room

December 2012

3	Monday	Executive Committee Meeting, 5:30 p.m., Board Room
5	Wednesday	Appellate Practice Committee, 5:30 p.m., Board Room
7	Friday	SCBA Holiday Party, 4:00 p.m.-7:00 p.m., Great Hall
12	Wednesday	Elder Law Committee, 12 Noon-2 p.m., Great Hall Education Law Committee, 12:30 p.m., Board Room
14	Friday	Labor & Employment Law Committee, 8:00 a.m., Board Room
17	Monday	Board of Directors Meeting, 5:30 p.m., Board Room
19	Wednesday	Professional Ethics & Civility Committee, 6:00 p.m., Board Room Real Property Committee, 6:30 p.m., EBT 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."

Join Our Leadership

The Nominating Committee of the Suffolk County Bar Association is seeking involved leaders interested in running for the following positions: president elect; first vice president; second vice president; treasurer; secretary; four (4) directors (terms expiring 2016) and three (3) members of the Nominating Committee (terms expiring 2016). The Nominating Committee is accepting résumés from that interest in these leadership positions. Résumés may be sent to the Executive Director at the SCBA, marked for the Nominating Committee.

The members of the Nominating Committee are: John L. Buonora, Ilene S. Cooper, Hon. John M. Czygier, Jr., Annamarie Donovan, Scott M. Karson, Hon. Peter H. Mayer, Matthew E. Pachman, Sheryl L. Randazzo and Ted M. Rosenberg.

– LaCova

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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Pro Bono Requirements for Law Students Announced

By John L. Buonora

In last month's *Suffolk Lawyer* article, *Touro, Turning Law Students into Lawyers,* we discussed the numerous clinic and externship programs available to students at Touro Law Center and the provisions of *Court of Appeals/Board of Law Examiners Rule 520.3* that allow law students to earn credits in clinic and externship programs to be applied toward the 83 credits required to be eligible for the Bar examination. As we discussed previously, clinics and externships allow students to experience the everyday practice of law both in the courts and in transactional situations.

On the day the October issue of the *Suffolk Lawyer* went to press Court of Appeals Chief Judge Jonathan Lippman announced *Rule 520.16,* a new rule requiring law students to complete 50 hours of pro bono service prior to their application for the New York State Bar Examination. These two developments, the availability of clinics and externship programs and the impending requirements that law students complete 50 hours of pro bono work as a requirement to take the Bar examination, are related and will be the subject of this discussion.

Without getting too *wonky* let me say that Rule 520.16 defines pro bono service as *supervised pre-admission law related work for persons of limited means; not for profit organizations; or individuals, groups or organizations seeking to secure or promote access to justice….*

Pro bono service is further defined as providing *legal assistance in public service for a judicial, legislative, executive or other governmental entity…;* or providing *legal services pursuant to subdivisions two and three of section 484 of the Judiciary Law….* Section 484 of the Judiciary Law provides that only attorneys may practice law in New York State with the exception (in pertinent part) of current law students or graduated law students who can practice *pursuant to a program approved by the appellate division*. It is the provisions of Section 484 that allows students in clinics and externships to practice in the courts or otherwise to represent clients or other parties in interest as well as allowing graduated students who have not yet been admitted to practice under designated conditions (e.g. Jr. Assistant District Attorneys).

John L. Buonora

The start up date

The effective date of the new Section 520.16 is presently scheduled for January 1, 2013. Present third year students are exempted from the Rule. In other words, those students eligible to take the bar exam after January 1, 2014 will have to comply. As I understand it, current first and second year students will have a shorter period to satisfy the 50 hour requirement than students entering law school after the effective date of the Rule.

The point person

The implementation of new legislation or administrative rules is often a work in progress even after the effective date. As with most definitions set forth in a statute or rule there would still be a need for interpreting their application in particular situations. In the case of the new pro bono rule that job will be filled by Lawrence Raful, professor and immediate past dean of Touro Law Center. (For purposes of this article let's call him Dean Raful. I still refer to retired judges as Judge, but I digress). Dean Raful's general job description is to oversee the implementation of the rule throughout the entire state. As reported in a recent *New York Law Journal* article he has been described by Paul Lewis, Chief of Staff to First Deputy State Administrative Judge Lawrence Marks *as the point person in dealing with law schools, law firms, legal service providers and others who have questions about the new requirement.*

I recently met with Dean Raful in his modest office in a suite of faculty offices at Touro. On the floor leaning against the wall were pictures and plaques yet to be hung. On the table top amongst plenty of paperwork yet to be filed were the picture hangers waiting to be used. Numerous books and scholarly treatises on legal ethics and other subjects also were occupying significant space as the Dean tried to figure out a place to shelve them. Somewhere under the paperwork was a stapler that Larry, (oh well, let's call him Larry), handed me to staple the pages of a Nassau County Bar Association report on the new rule (More about that later). I have always felt that the best doctors seemed to have the most modest and unpretentious offices. I think the same may apply to law professors as well (But I digress).

As of this writing, the Office of Court Administration is still working on a title for his new unpaid position. *Czar, director, commissioner* or similar terms might be a little too grandiose for Larry. Speaking of titles, have you ever noticed that the longer more impressive sounding a title is the less important the job. Sometimes the most important person has the shortest title, for instance, *President.* I'm reminded of the old TV sitcom *Cheers* when Woody Boyd, the bartender played by Woody Harrelson, wanted a raise from Sam Malone played by Ted Danson. Instead he was offered a *promotion* to something like *Chief Deputy Assistant Bar Manager.* Ego having triumphed over practicality, Woody accepted the new title without the raise (But again, I digress).

A large part of Larry's job will be to determine what type of work qualifies for pro bono treatment.

"Obviously, if you painted a house for Habitats for Humanity that wouldn't qualify," Larry said. "It's clearly not legal assistance as set forth in the Rule."Other situations may be less clear. For instance, would the hours spent in the courts and prosecutors' offices that extern/law assistants in the Advanced Criminal Prosecution Externship program spend qualify? Tentatively, I would say yes, although they might not qualify for credit towards Touro's pro bono requirements (More about that below). Formally what will or will not qualify has yet to be determined. Law schools will be reviewing their programs to ensure that their programs will satisfy the new rule.

Presently at Touro a student is required to complete 40 hours of pro bono work as a

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Meet Your SCBA Colleague

Joseph Mauro **is a consumer attorney focusing his practice on debt collection, harassment, and credit reporting. Groomed to go into law enforcement, he took a different path, but in some respects he is still carrying on the family tradition.**

By Laura Lane

Even though you aren't a police officer you are still a law enforcer of sorts. Yes I did end up joining my relatives in a way. I come from three generations of police officers and to some degree I see my job as law enforcement. I wound up in a prosecutorial area of law. Debt collection harassment is a misdemeanor crime in New York but police don't have the funds to pursue it. The statute permits private attorney generals to enforce these laws in the justice system.

You received a master's degree before going to law school. What made you decide to become a lawyer? Money was one reason and independence. I'm probably not cut out for a more structured regimented type of employment. I thought I'd go into some sort of government job maybe ending up in the Attorney Generals office but I decided to become an attorney instead. After law school I immediately went into my own practice. I've always been on my own, never worked with a firm or a partner.

How did you end up as a consumer attorney? I worked as a matrimonial attorney for six to seven years which was quite an introduction to the legal profession. You aren't seeing people at their best and you see a lot of heartache.

How did being a matrimonial attorney lead you to what you do today? I found that either the client or I on behalf of the client was working with debt collectors. And there was a lot going on that raised a serious suspicion with me that at least some of what they were doing was not legal. I realized they could be sued for what they were doing

Sounds like things can get a bit dicey. Not many attorneys do this. I enjoy the cat and mouse aspect of it and it's very interesting. The laws are changing constantly and it is a constant battle to keep up with the laws as well as the debt collectors attempts to avoid the laws.

Do you enjoy reading detective novels and thrillers? No. I'm a big reader but I actually like humor. Some of my cases are very contentious putting me in some questionable situations which are like detective novels. There is a breed of debt collectors who are an inch away from being felons. It is a rough world. But I want to make it clear that there are a lot of legitimate, well meaning debt collectors – attorney and non-attorney. They practice professionally. I'm talking about unscrupulous debt collection.

How busy are you with this type of law? There are tons of people in trouble. This field is important in the current economic state with so many people jobless and losing their homes. A lawyer can turn the pressure off from the debt collectors. There are a lot of victims.

It sounds like unscrupulous debt collectors can pack a mean arsenal. They threaten rape, violence, make sexual and racial comments, threaten to take people's cars, houses and even threaten to have people arrested. I run into many people that are very frightened and unfortunately they don't know what their rights are.

Has social media altered the playing field? I think the internet has helped and hurt consumers. Debt collectors use social media to gather information about consumers and use it against them. They call the friends, relatives and co-workers and tell them they are looking to collect a debt. But on the other hand the internet has helped consumers by educating them. They can find out that the person harassing them lives in another state.

You've appeared on *Nightline and ABC's 20/20. Why?* I appear on these shows because they educate the general public that this stuff is illegal. It shows them that there is an avenue of relief and that you can't take it on face value what someone is telling you over the phone.

When did you join the SCBA? I became a member in 1996. From the beginning I got involved in the invaluable education that is offered at the Academy. You can practice in any field you want after law school but law school does not teach you the "how to," it teaches you theoretical law. The SCBA has one of the best CLE programs in New York. It is a virtual university and you are learning from actual practitioners.

joseph Mauro

Besides the opportunity to take great CLE courses is there any other reason you'd recommend that someone join the SCBA? You gain access to other professionals. Being a member will ground you and just to reiterate once again, the CLE programs are excellent. I believe they should be a model for the entire country.

VIEW FROM THE BENCH

Not so Obvious Mistakes in Criminal Trials – Closing Arguments

Failure to object during summation found ineffective assistance of counsel

By Hon. Stephen L. Ukeiley

Note: This is the second part of a two part series.

In Part I, atypical errors during jury selection of a criminal case were discussed. This month's issue focuses on errors during closing arguments.

In what appears to be a case of first impression, the Court of Appeals recently reversed a conviction because defense counsel failed to object during the prosecutor's summation. *See People v. Fisher*, 18 N.Y.3d 964 (2012). The court concluded defense counsel's inaction "[d]eprived defendant of the right to effective assistance of counsel". *Id*. at 967.

Ineffective assistance of counsel

A criminal defendant is entitled to "meaningful representation," not perfect lawyering. *People v. Baldi*, 54 N.Y.2d 137, 147 (1981). Indeed, the Court of Appeals has reasoned that errors at trial are often overlooked because "counsel's efforts should not be second-guessed with the clarity of hindsight." *See People v. Turner*, 5 N.Y.3d 476, 480 (2005).

Stephen L. Ukeiley

The court will vacate a conviction for ineffective assistance of counsel where clearly inferior representation results in a serious impairment to the defendant's right to a fair trial. *See generally People v. Benevento*, 91 N.Y.2d 708, 712-13 (1998). In other words, provided defense counsel's conduct "[r]eflects a reasonable and legitimate strategy under the circumstances and evidence presented, even if unsuccessful, it will not fall to the level of ineffective assistance." A showing of prejudice, while significant, is not required to sustain the claim. *See People v. Stultz*, 2 N.Y.3d 277, 284 (2004).1

To use a sports analogy, the decision to allow the starting pitcher to continue to pitch during the ninth inning of a close game may be second-guessed. However, except in unusual situations, there is no way of determining whether the same result would have occurred had a different course of action been taken. While the topic may make great debate on sports radio, no one truly knows whether the proper decision was made.

Similarly, in a courtroom there is no feasible manner for assessing whether a particular piece of evidence or which of the hundreds, if not thousands, of decisions made by counsel during the course of a trial was decisive. While experts may pontificate and opine with respect to strategies most similarly situated attorneys may have utilized, the reality is that only the jurors know why a certain verdict was reached.

Perhaps an oversimplification, but this highlights the difficulty in applying an objective standard to a subjective process. Thus, for good reason courts generally proceed cautiously when defense counsel's trial strategy is questioned.

People v. Fisher

In *Fisher*, the defendant was sentenced to 20 years in prison following his conviction for multiple sex offenses, including the molestation of his two nieces. It is noteworthy that the prosecution did not introduce a physician's report confirming the injuries at trial. In addition, the prosecution's witnesses included a jailhouse informant, a convicted murder, who was promised a favorable letter to the Parole Board in exchange for his testimony.

The defense claimed the informant's testimony was unreliable because he learned of the details of the crime from reviewing legal papers in defendant's possession rather than actual statements made to him in jail. *Id*. Defendant further claimed his nieces fabricated the claims for fear of their physically abusive mother who had stolen money from the defendant while incarcerated. *Fisher*, 18 N.Y.3d at 965.

Defense counsel has a duty to object during closing argument

It is well-established during summation counsel may not stray from the evidence or draw conclusions that may not reasonably be inferred from the admissible evidence. In addition, the prosecutor may not "[l]ead the jury away from the issues by drawing irrelevant and inflammatory conclusions which have a decided tendency to prejudice the jury against the defendant." *See People v. Ashwal*, 39 N.Y.2d 105, 109-10 (1976).

In *Fisher*, at the conclusion of the trial, defense counsel gave an impassioned closing argument. The prosecutor objected three times, only one of which was sustained. The prosecutor followed with an emotional argument of her own which included several misstatements and inappropriate comments. Defense counsel did not make a single objection.

The Court of Appeals noted the objectionable statements during the prosecutor's closing, including: encouraging inferences of guilt based on facts not in evidence; bolstering the nieces' testimony with the statement that they told the same story "over, and over and over again" to police, social workers and doctors; suggesting the niece's subsequent misconduct constituted evidence of the crime; materially diminishing the value of the consideration offered the jailhouse informant; and stating the "[d]ay the voice of a child is not evidence is the day ...[the courtroom] should be locked forever." *Fisher*, 18 N.Y.3d at 966-67.

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SCBA Announces Automated Membership ID Cards

After an idea came to the SCBA from one of our members regarding the delivery of a member ID card by e-mail rather than snail mail, Barry M. Smolowitz, Esq. the SCBA's Director of Technology ran with the idea and developed a system where our members can now receive their ID card directly from the SCBA website member portal. The newly designed card now includes the member's photo (if one is on file) as well as incorporating QR code technology. The new ID cards went live on October 16, 2012.

Barry suggested that we move away from the plastic ID card and instead implement a newly designed Electronic Membership ID Card. The SCBA quickly realized that the new system saves the association the annual cost of producing and mailing an annual ID card or sticker.

The new method of delivery is simple and allows a member to print, save or transfer their current ID card to any smart phone, computer or Ipad. The ID card's embedded QR code carries the member's ID number and name can be read by any QR code reader. It can even be read by a reader if the ID card is merely displayed on the screen of the smart phone or Ipad, thereby eliminating the need to carry a printed card. The QR code will allow the SCBA and SAL to process various transactions in the future, as well as track CLE attendance in accordance with the NYS CLE requirements. The hope is that this new feature, once fully implemented, will expedite the signing in and out process of CLE programs, and eliminate the need for the submission of the attendance form.

Any member wishing to obtain their ID card can do so by merely logging into the SCBA website as a member where they will now find a link in their member profile allowing them to download their membership card.

BENCH BRIEFS

By Elaine Colavito

Suffolk County Supreme Court

Honorable Paul J. Baisley, Jr.

Motion to vacate default judgment denied; proper remedy was to appeal.

In *David J. Felix, M.D. and Claire M. Felix v. Thomas R. Stachecki General Contracting, LLC, Thomas R. Stachecki, Robin A. Blackley, The Corcoran Group, Inc., Law Offices of Kovan & Krausz, Mordchai Krausz, Agawam Realty, Ltd., Joan Robinson and Paul Robinson,* Index No.: 31346/10, decided on August 15, 2012, the court denied defendants' motion for an order pursuant to CPLR §5015 vacating the default judgment granted against the movants on October 25, 2011. In rendering its decision, the court noted that the submissions established that plaintiffs' cross-motion for a default judgment was opposed by the moving defendants' attorney of record. In light of the foregoing, the court found that defendants' proper remedy, if they were aggrieved by the default judgment entered against, them was to appeal rather than move to vacate.

Motion for an order pursuant to CPLR §3126 awarding costs and fees to the defendant for plaintiff's failure to appear at deposition granted; court has the discretion to impose a sanction of attorney's fees based upon a party's failure to appear for a deposition.

Elaine Colavito

In *Karen Muno, as Executrix of the Estate of Joseph Sopata, and the Estate of Joseph Sopata v. J.P. Morgan Chase and "John Doe" 1-10 and "Jane Doe" 1-10,* Index No.: 42011/08, decided on August 15, 2012 the court granted defendant, J.P. Morgan Chase Bank, N.A., s/h/a J.P. Morgan Chase's motion for an order pursuant to CPLR §3126 awarding costs and fees resulting from the continued deposition of plaintiff Karen Muno as Executrix of the Estate of Joseph Sopata to the extent that defendant was awarded costs and fees totaling $731.85. The court pointed out that the submissions reflected that after numerous adjournments, the deposition of plaintiff Karen Muno was commenced on November 4, 2011 but was adjourned after two hours of testimony when plaintiff complained of back pain and announced that she was unable to continue. The continued deposition was scheduled for February 28, 2012, however shortly before 9:00 am defendant's attorney was informed that plaintiff was ill and would not be appearing for the deposition. Defendant's attorney placed a statement on the record noting plaintiff's default in appearing and reserving the defendant's right to a continued deposition and to seek costs and expenses incurred in connection with the aborted deposition. In rendering its decision, the court noted that it was well established that the court had the discretion to impose a sanction of attorney's fees based upon a party's failure to appear for a deposition. The court held that the defendant was entitled to recover the following costs and expenses: $150.00 charges by the court reporter for the appearance; legal fees of $534.00 for one attorney to attend the deposition and place the default statement on the record, as well as the travel costs of $47.85 for one attorney. The court found that defendant's submissions did not, however demonstrate its entitlement to recover for legal fees for "preparation" for the deposition, which would have been required whether the deposition proceeded on February 28 or on a later date, or for duplicative services performed by two attorneys.

Motion pursuant to CPLR §§510(1) and 511(a), transferring the venue of the action from Suffolk County to Nassau County granted; it was undisputed that all parties resided in Nassau County and the accident occurred in Nassau County.

In *Veenu Puri v. Jessica Rae Solomon and Nancy H. Solomon,* Index No.: 8245/12, decided on June 15, 2012, the court granted defendants' motion pursuant to CPLR §§510(1) and 511(a), transferring the venue of the action from Suffolk County to Nassau County on the basis that the venue selected by the plaintiff was improper. The court noted that the plaintiff commenced the instant action in Supreme Court, Suffolk County on March 15, 2012 to recover damages allegedly sustained in a motor vehicle accident which took place on June 17, 2011. Although the summons identified Suffolk County as the place of trial, it did not specify the basis of venue designated. It was undisputed that all parties resided in Nassau County and the accident occurred in Nassau County. As such, plaintiff's designation of venue was improper. Since the plaintiff selected the improper venue for the action in the first instance, she was deemed to have forfeited her right to choose the place of venue and the defendants having followed

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TECHNOLOGY

Is Twitter for You?

By Glenn P. Warmuth

There is little about Twitter that makes it particularly useful to attorneys in general. Twitter isn't likely to help you market your firm and Twitter is spotty as a source of information about developments in the law. Nevertheless, Twitter is a major force in the world of social media and attorneys should understand what it is, how it works and what it can do.

Twitter defines itself as "an information network made up of 140-character messages called Tweets." This is an accurate but not very helpful definition. Let's start with the basics. You can post messages or "tweets" and you can read tweets which have been posted by others. That's Twitter in a nutshell. There are other things you can do like tweeting pictures and sending private messages but posting short messages and reading short messages is the majority of what you do with Twitter.

In order to use Twitter, users need a Twitter account. The easiest way to get started is to go to www.twitter.com. Creating an account is simple and requires the creation of a username. Each username is unique. Therefore, there can only be one user with the username Glenn_Warmuth - that would be me. Choosing a good username is important as it will be your first introduction to other users. There are many articles online which give tips on picking a good username. On Twitter the "at symbol" or "@" is added to the username to identify it as a username. So if I were to tell you my Twitter username I would say I am @Glenn_Warmuth.

After creating an account, users can "follow" other Twitter users. The effect of following another user is that their future tweets will instantly appear in the follower's "timeline." Twitter defines the timeline as "a long stream showing all Tweets from those you have chosen to follow on Twitter."

There are many ways to find users to follow. The easiest way to start is to use Twitter's "search" feature which is found at the top of the user's Twitter homepage. A search for "Bar Association" yields a list of about 20 users including The American Bar Association @ABAesq which has 12,103 followers and The New York State Bar Association @NYSBA which has 2,197 followers. These organization tweet about member benefits, law updates, etc.


Glenn P. Warmuth

Another way of finding users to follow is to read tweets and look for "mentions." A mention is the use of a user name within a tweet. For example, if I were to tweet: "I am at the debate with @BarackObama and @MittRomney" you could then click @BarackObama or @MittRomney where those usernames appear in my tweet. Twitter then gives you the option to follow them. But beware, following these politicians will subject you to an endless barrage of policy statements and donation requests.

Twitter also recommends people you might like to follow. Some recommendations are paid promotions for products or services such as @brooksrunning, the Twitter account for Brooks Running Shoes. Brooks Running pays Twitter to recommend @brooksrunning to users. Others are unsponsored recommendations such as @DalaiLama, the Twitter account of the Dalai Lama. Twitter recommended @DalaiLama to me based on a complex algorithm which they use to determine who I may be interested in. The Dalai Lama frequently tweets inspirational messages such as "Improvement requires continuous effort" to his 5,194,848 followers.

You should be mindful of the many imposters on Twitter. It can be difficult to determine whether the owner of a Twitter account is genuine because anyone can choose any unregistered username. Twitter's policy is to revoke an imposter or squatter account only upon the showing of trademark infringement. This is often difficult to show and, as such, many imposter accounts remain active. Twitter has implemented a verification system by which certain users are assigned a check mark located in a blue circle next to their username. The check mark means that Twitter has "verified" that a "legitimate source is authoring the account's Tweets." Twitter does not take requests for verification. Instead, it independently identifies which "highly sought users" and "business partners" will be verified. @DalaiLama is a verified account so you can be sure that those tweets are from His Holiness.

Many Twitter users, like me, never tweet. I only use Twitter to follow what other users are tweeting. I have no audience that I need to speak to on Twitter. I have no followers. If I were to tweet, nobody would receive it. For those who do wish to tweet, there is a box on the user's Twitter homepage with the words "Compose a New Tweet..." The user types in their tweet and clicks the tweet button. It is that simple.

Users can use Twitter to exchange information and ideas about particular topics by inserting "hashtags" into their tweets. A hashtag is a keyword with the hashtag symbol "#" in front of it. For example, if you search Twitter for #scotus you will find tweets about the U.S. Supreme Court and if you search Twitter for #medicare you will find tweets about Medicare. Clicking on a hashtag in a tweet will bring up other tweets which contain that hashtag. Inserting a hashtag into a tweet lets other users know that the tweet is part of a particular discussion and makes it more likely that the tweet will be read by an audience beyond the user's followers.

Lady Gaga @ladygaga has 29,796,803 followers on Twitter and during the time I wrote this article she gained hundreds of thousands of additional followers as she tweeted photos of herself in her underwear. Attorneys will find it more difficult to build such a strong following. For attorneys, using Twitter as a marketing tool requires frequently tweeting and commenting on other user's tweets. This is a lot of work and a heavy investment of time which may be better spent on other types of marketing. A search on Twitter for "Suffolk County Attorney" yields only three results. In contrast, a Google search for "Suffolk County Attorney" yields 1,290,000 results including websites for most local firms.

Despite my views with respect to the usefulness of Twitter to attorneys I must emphasizes the importance of Twitter in general. Twitter has over 500,000,000 users and has changed the way in which the world communicates. Perhaps in time Twitter will become a more useful tool for attorneys.

Note: Glenn P. Warmuth has been working at Stim & Warmuth, P.C. for over 25 years. He is a Director of the Suffolk County Bar Association and an Officer of the Suffolk Academy of Law. He teaches a number of courses at Dowling College including Entertainment & Media Law. He can be contacted at gpw@stim-warmuth.com.

Think Before You "Cease and Desist" Somebody

By Mona Conway

Intellectual property attorneys have at least one standard form in their protective arsenals against infringement: the "cease and desist" letter. For the novice business owner or individual receiving such correspondence, this can be quite worrisome. The reason is that such letters do not tend to merely state, "Knock it off, Buddy," they threaten litigation (usually of the federal kind) and contain statutory citations, which appear to be cryptically forceful. And they surely are packed with a punch. Many federal intellectual property statutes allow for coveted remedies such as attorney's fees, costs, treble and punitive damages. Perhaps unlike your run-of-the-mill cease and desist letter, the ones served to prevent intellectual property infringement are to be taken most seriously.

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Thanks to the ubiquitous mechanism of transparency which is the Internet, lawyers should be mindful at the outset that their cease and desist correspondence may be newsworthy. Recently, Mitt Romney received a cease and desist letter from the creator of the TV show Friday Night Lights in response to Romney's Facebook photos indicating the tagline: *Clear Eyes. Full Hearts. Can't Lose!* Although not written by an attorney, the nature of the letter garnered enough interest to be fully scanned and published on the Web. The letter states: "I was not thrilled when I saw that you plagiarized this expression to support your campaign by using it on posters, your Facebook page and as part of your stump speeches."


Mona Conway

Another letter, written by the attorney for Jack Daniels whiskey, was published on the Web this month, touted as perhaps the nicest cease and desist letter ever written. It offered to pay the costs of replacing the infringing material and thanked the infringer for being such a big fan of Jack Daniels whiskey, evidenced by the blatant rip-off of the bottle's label style.

Another important consideration for IP counsel is whether the infringement is actually a good thing for the intellectual property holder. What if the infringer's actions actually resulted in a benefit to the holder of some intellectual property right? Here is a case in point. A couple of years ago, Long Island *Newsday* created a clever ad for the iPad, which, as luck would have, went "viral" on YouTube. The ad says that *Newsday's* iPad app is better than the paper in all kinds of ways, except for one. The video then depicts a man attempting to swat a fly with the device (instead of a newspaper), which, of course, shatters into a million pieces. The 30-second clip received 600,000 views in just days and was well on its way to receiving even more attention, when the ad was abruptly pulled. Apparently, all that good, free publicity was not worth seeing the iPad smashed to bits. Some call this decision by Apple one of the biggest business blunders of 2010.

Yet another consideration is whether the infringement is just too ridiculous to be taken seriously. Can sending a cease and desist letter be bad for business in addition to being a tremendous waste of time and legal fees? Here is a case in point. Not long ago, attorneys for the National Pork Board (NPB) sent a 12-page cease and desist letter to ThinkGeek, Inc. for using the slogan, "Unicorn – the new white meat" on its website, thinkgeek.com. The "infringer" launched the fake product on April Fools Day (as a joke, of course). The NPB owns the mark "The Other White Meat." ThinkGeek publically apologized, albeit sarcastically, by responding, "It was never our intention to cause a national crisis and misguide American citizens regarding the differences between the pig and the unicorn." It seems that the April Fools stunt ended up making fools of the NPB when their letter became disclosed to public reaction. News agencies and bloggers have had a field day poking fun at the NPB's way-too-serious reaction to the parody of their mark.

Finally, the Nestle matter should advise intellectual property attorneys to think carefully before sending out their cease and desist letters, because the backlash of such action could be much worse than the infringement. Greenpeace posted a graphic video on YouTube about how the food conglomerate, Nestle produces palm oil in a way that negatively impacts an endangered orangutan population. This is where the battle began. In response, Nestle had the video pulled for copyright issues. Greenpeace then fired-up its resolve and resources by using Facebook to get its message across to the public. Nestle then made a slew of what it admits to be "rude" remarks to its Facebook "fans," which resulted in an onslaught of bad press. In the end, Nestle changed its source of palm oil, folding under the pressure of consumer outrage, which would not have been so forceful had it not been for Nestle's determination to fight for its intellectual property rights.

Note: Mona Conway practices business law and commercial litigation at the firm Conway Business Law Group, P.C. in Huntington. She is also Co-Chair of SCBA's Commercial and Corporate Law Committee.

SIDNEY SIBEN'S AMONG US

On the Move…

Michael S. Brady has joined Riverside 1031 LLC , overseeing operations for the 1031 Exchange Qualified Intermediary company. As a Certified Exchange Specialist®, Michael will continue to help clients navigate the treasury regulations governing tax deferred exchanges, and through the company's affiliate, Riverside Abstract, Michael will also be assisting clients with title insurance matters. He can be reached at mbrady@rs1031.com , and toll free (855)268-6430.

Rick Chalifoux has joined First Republic Trust Company as a Managing Director and Senior Trust Officer, with offices located at 1461 Franklin Avenue, Garden City. He has recently been certified as an Accredited Estate Planner [AEP] by the National Association of Estate Planners and Councils (NAEPC), which is a graduate level specialization in estate planning. He can be reached at, rchalifoux@firstrepublic.com.

Ettore Simeone now has his law firm at the Suffolk Law Center, 228 East Main Street, Patchogue.

Jeffrey Mongelli has joined Lamb & Barnosky, LLP as counsel.

Congratulations…

Congratulations to Suffolk Administrative Judge **C. Randall Hinrichs** and Mrs. Laurie Hinrichs on the birth of their new grandson Nathaniel Charles, born August 19. Nathaniel weighed in at 7 lbs. 11 oz., and is 18-l/2" tall. His mom Alexandra and dad Brian are very proud parents.

To the Honorable **Randall T. Eng**, upon his appointment as Presiding Justice of Appellate Division, Second Judicial Department by NY Governor Andrew Cuomo on October 1, 2012. Justice Eng is a former prosecutor with appellate and administrative experience will lead one of the busiest appellate courts in the nation.

Jacqueline Siben

To **Dawn L. Hargraves**, Esq., Attorney and Partner of Hagney, Quatela, Hargraves & Mari, PLLC, who is being honored as a 2011/2012 Professional Woman of the Year in Law by National Association of Professional Women. The prestigious distinction is awarded by the 400,000-strong membership of NAPW who join together to develop innovative business and social relationships.

President Arthur E. Shulman, on behalf of the Officers and Directors wishes to congratulate SCBA staff members **Mary Shannon** and **Tina O'Connor Santiago** on their 25th anniversary of service and dedication to our Bar Association. Through their long years of service they have worked with the utmost efficiency and dependability. We are happy and proud to have this opportunity to honor Mary and Tina for their achievements.

Attorneys **Leo K. Barnes Jr**. and **Matthew J. Barnes**, founding members of the boutique commercial litigation law firm Barnes & Barnes, P.C. in Melville, New York, have been named to the 2012 Super Lawyers list for the New York metropolitan area. Last year, Leo and Matt were named to the Super Lawyers Rising Stars list, which names the state's top up-and-coming attorneys.

Edward J. Nitkewicz, senior consultant at Sanders Sanders Block Woycik Viener & Grossman PC, was recognized in the 2012 edition of NY Super Lawyers for his work representing personal injury plaintiffs and cited for his work as a leader in the field of education law.

Announcements, Achievements, & Accolades…

James F. Gesualdi, a sole practitioner in Islip, whose practice concentrates on animal welfare (relating to zoos and aquariums), spoke at the Canadian Association of Zoos and Aquariums' 2012 Conference at the Delta Chelsea Hotel, Toronto, Ontario, Canada, on Wednesday, September 26, 2012. Gesualdi's presentation, "Examining the Real Sustainability Challenge for Zoos and Aquariums" featured a discussion of his project, "EXCELLENCE BEYOND COMPLIANCE™: Making a Difference in the Implementation, Administration and Enforcement of the Animal Welfare Act to Enhance Animal Welfare and Promote Institutional Excellence."

Condolences….

To the families of long-time active members of the SCBA **Adolph H. Siegel** and **Sheldon D. Katz**.

To **C. Donald Shlimbaum** and Lark Shlimbaum on the passing of Donald's father, Charles W. Shlimbaum, we send our deepest sympathy.

To the family of SCBA member **Fred Garner,** 94, who passed away. Fred joined our Bar Association in 1956 and practiced law in Huntington for 55 years.

New Members…

The Suffolk County Bar Association extends a warm welcome to its newest members: **Chartrisse A. Adlam, Stephen Albright, Amy F. Altman, Jeffrey V. Basso, Myra E. Berman, Joseph Bestreich, Stephanie L. Bogart, Laura Spencer Brennan, Alfred J. Camaiore, Sabato Caponi, Deborah A. Hagelin, John H. Hagelin, David S. Kritzer, John H. Lynch, Stephanie Mazzotta, Peter L. Rand, Drew W. Schirmer, Sarah M. Sferrazza, Richard M. Sheridan, Sharon D. Simon and Kevin R. Toole.**

The SCBA also welcomes its newest student members and wishes them success in their progress towards a career in the Law: **Sharon Abel, Arthur J. Burdette and John C. Mooney.**

District Court Supervising Judge Madeleine Fitzgibbon Retiring

By Len Badia

In 1996 at the State of the World Forum Bella Abzug, the outspoken congresswoman from New York's nineteenth congressional district famously stated "Women will change the nature of Power; Power will not change the nature of women."

In 1996 when Congresswoman Abzug made her statement Madeleine Fitzgibbon had already been working as a District Court Judge from Babylon. She had been appointed to that position to replace Judge Dounias in January 1994 and was elected to the position in November of that year. Already identified as a leader who was first hired as a Hearing Examiner in the Family Court's Part 13 in 1993 Judge Fitzgibbon quickly stood out as a jurist that could manage the challenges of a busy courtroom while never forgetting her role as a public servant. In fact, when asked what she would miss the most when she retires as the Supervising Judge of the District Court of Suffolk County in December, without hesitation and with the smiling glint in her eyes that have calmed countless defendants who stood before her, she remarked "the people."

Judge Fitzgibbon looked fondly back on those days when she shared a suite with Judge Salvatore Alamia and her Law Secretary Terence Carroll. In her classic unpretentious style she couldn't help but comment on Attorney Carroll's skill at legal writing (something that every lawyer should envy). In those days the Cohalan Court Complex was new and she was assigned to Part D 61 where she heard all manner of misdemeanor complaints. After being elected again in 1997 Judge Fitzgibbon was again called upon to expand her role as a judge. She was appointed as an Acting County Court Judge and was assigned to one on the most complex courtrooms in the District Court - Part D 35. There she heard felony and misdemeanor cases in an environment that on a daily basis handles a large mix of both incarcerated and at-liberty defendants. The courtroom can be a cacophony of motions and people and is certainly not the realm of choice for the faint-hearted.

Judge Madeleine Fitzbibbon

Judge Fitzgibbon loved it.

She (as Judge Lozito does today) managed her courtroom with clarity and precision. It was not a surprise that in January of 2000 she was appointed as the Supervising Judge of the District Court. In the 12 years that she has served in that capacity Judge Fitzgibbon has indeed changed the "Nature of Power." During her 12 year tenure the

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Piercing the Corporate Veil

Theodore D. Sklar

A Suffolk County case is rapidly becoming one of the leading cases in the State of New York on the question of what a plaintiff must plead to state a claim to pierce the corporate veil and hold the owner of a corporation personally liable for corporate obligations. To the extent that case law had blurred the pleading requirements for a claim seeking to pierce the corporate veil, the Court of Appeals and the Appellate Division, Second Department, have spoken on that issue.

In East Hampton Union Free School District v. Sandpebble Builders, Inc., 16 N.Y.3d 775 (2011), the plaintiff school district tried to hold the owner of the district's construction management company personally liable for an alleged breach of contract. The Court of Appeals affirmed the Appellate Division, Second Department's ruling (66 A.D.3d 122) by holding that mere allegations that a shareholder engaged in improper acts, acted in bad faith and dominated and controlled the corporation are insufficient to state a claim seeking to hold the shareholder personally liable. To state a viable claim for piercing the corporate veil, the "plaintiff must allege facts that, if proved, indicate that the shareholder exercised complete domination and control over the corporation and 'abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice."

The decision points out that a shareholder's complete domination and control of the corporation must also include acts that constitute an abuse or perversion of the privilege of doing business in the corporate form, and that there must be a nexus between that conduct and the wrong alleged to be have been suffered by the plaintiff. By reiterating this rule, the Court of Appeals reinforced the policy that businesses can be incorporated in New York for the very purpose of enabling their owners to escape personal liability, and that the corporate form is not lightly to be disregarded. See Treeline Mineola, LLC v. Berg, 21 A.D.3d 1028, 1029 (2d Dept. 2005). The critical inquiry in a case where a plaintiff is seeking to impose personal liability on an owner is whether in respect to the transaction at issue, the plaintiff has sufficiently pleaded: (1) domination and control, constituting an abuse of the corporate form; and (2) injury resulting from the abuse.

Theodore D. Sklar

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By emphasizing that more than an allegation of domination and control is required, the Court of Appeals has reaffirmed the principle of a shareholder's limited liability and has cautioned plaintiffs against using insufficient allegations that threaten shareholders with personal liability as leverage in litigation against the corporation. If conclusory allegations of domination and control alone were enough, without any corollary facts showing that there was also a perversion of the privilege of doing business in the corporate form which injured the plaintiff, then the sole officer and shareholder of every closely held and otherwise bona fide corporation would be unnecessarily exposed to individual liability. The imposition of liability, however, cannot logically be predicated on the mere fact that the sole shareholder of a corporation also personally handled the corporation's business or management.

In addition to sufficiently particularized allegations of abuse of the corporate form, the complaint must allege a nexus between the alleged abuse and some harm, injury or wrong to the plaintiff. Domination alone, without an additional showing that through such domination the defendant "misused the corporate form for its personal ends so as to commit a fraud or wrongdoing or avoid any of its obligations," is insufficient to warrant piercing the corporate veil. See TNS Holdings, Inc. v. MKI Securities Corp., 92 N.Y.2d 335, 339-340 (1998). The Court of Appeals reiterated that aspect of the pleading requirements by noting that, "[the school district] failed to allege any facts indicating that [the shareholder] engaged in acts amounting to an abuse or perversion of the corporate form, much less that the school district was harmed as a result of such actions." East Hampton Union Free School Dist., 16 N.Y.3d at 776. To state a claim for piercing the corporate veil, a plaintiff must allege that the actual abuse of the corporate form "was a cause of their alleged damages." Smith v. Delta Intl. Machinery Corp., 69 A.D.3d 840, 842 (2d Dept. 2010).

Note: Theodore D. Sklar is a partner with Esseks, Hefter & Angel, LLP. He argued East Hampton Union Free School District v. Sandpebble Builders, Inc. on behalf of the construction manager, Sandpebble Builders, Inc., in the Appellate Division and in the Court of Appeals. His legal career encompasses 30 years of experience as a civil litigator in the public and private sectors. Prior to joining Esseks, Hefter & Angel, LLP, Mr. Sklar was the Deputy County Attorney of Suffolk County.

COURT NOTES

By Ilene Sherwyn Cooper

Ilene S. Cooper

Attorney Resignations

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

Nava Bar- Avraham
Gene Marc Bauer
Cheryl Kuttenkuler Beece
Henry J. Florence
Laura Barasch Gitelson
Rhys W. Hefta
Michelle R. Holness
Richard Stever O'Brien
Christopher Jon Ruckh
David Edward Wilson
Barbara M. Wolvovitz

Attorney Resignations Granted/Disciplinary Proceeding Pending:

Joseph J. Giordano III: By affidavit, respondent tendered his resignation, indicating that he was aware that he is the subject of an ongoing investigation by the Grievance Committee involving the failure to communicate with clients, failure to timely refund unearned fees, and failure to cooperate with the Grievance Committee. Respondent acknowledged his inability to successfully defend himself on the merits against any charges predicated upon his misconduct under investigation. He stated that his resignation was freely and voluntary rendered, and acknowledged that it was subject to an order directing that he make restitution and reimburse the Lawyers' Fund for Client Protection. In view of the foregoing, the respondent's resignation was accepted and he was disbarred from the practice of law in the State of New York.

Leesa Shapiro: By affidavit, respondent tendered her resignation, indicating that she was aware that she is the subject of an ongoing investigation by the Grievance Committee involving the failure to zealously advocate for clients in real estate transactions, engaged in conflicts of interest in those transactions, and drew a check on her attorney trust account that was dishonored. Respondent acknowledged her inability to successfully defend herself on the merits against any charges predicated upon her misconduct under investigation. She stated that her 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 Censured:

Elliot F. Bloom: By decision and order of the court, the Grievance Committee was authorized to institute a disciplinary proceeding against the respondent and the matter was referred to a Special Referee. The referee sustained all five charges against the respondent, and the Grievance Committee moved to confirm. The respondent opposed the motion and cross-moved to disaffirm

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The Suffolk Lawyer wishes to thank Commercial and Corporate Law Special Section Editor Mona Conway for contributing her time, effort and expertise to our November issue.

Mona Conway

Business Arbitration a New Handicapping?

By J. Scott Colesanti

President Obama, who, on at least one occasion served as a securities arbitration attorney himself,[1] came to high office pledging a level playing field for consumers.[2] That pledge crystallized, in part, *via* a provision within the Dodd-Frank Reform Act of 2010, which empowered the Securities and Exchange Commission to "prohibit or impose conditions or limitations" on mandatory arbitration agreements.[3] Such limitations have yet to materialize.

Nonetheless, the spirit of such reform may have spread, as the last 12 months of publicly disclosed arbitration decisions provide sufficient warnings to proponents of written agreements compelling arbitration. Specifically, federal courts as of late have reaffirmed or announced new approaches in granting punitive damages, limiting review of panel decisions, and questioning the confidential nature of the proceedings themselves.

A 1953 Supreme Court decision gave rise to the doctrine known as "manifest disregard of the law"[4] ("MDOL"). MDOL expands the four bases for vacatur found in the Federal Arbitration Act.[5] Over time, such expansion came to be viewed by some circuits as being too disruptive. A 2008 Supreme Court case raised, but did not answer the question of whether MDOL should survive.[6] Ensuing case law acknowledged the open question; aggrieved parties in the Second Circuit thus often attempt use of the doctrine.

In 2009 and 2010, SDNY Judge Jed Rakoff issued colorful decisions attesting to arbitration (with its lax procedural requirements) as a "wondrous alternative to the rule of reason." Nonetheless, in both cases, corporate appellants failed to unsettle arbitral findings. In July 2012, the New York Court of Appeals upheld the latter of these decisions (thus confirming a judgment against a Goldman Sachs affiliate exceeding $20 million). The court took the occasion to restate the MDOL test for the Circuit: 1) The law allegedly disregarded must be "well defined, explicit, and clearly applicable," and 2) The arbitrator(s) must be said to have known of the "clearly governing legal principle but decided to ignore it or pay no attention to it." But the court stressed that the standard of review is "exceedingly difficult to satisfy."[7]

In January 2012, it was disclosed that a FINRA arbitration panel had, a month prior, taken the bold action of awarding punitive damages to a former securities broker. Claiming breach of contract, fraud, and negligent misrepresentation, the former employee was accorded damages of $3.6 million upon a finding that an agent of the employer had "systematically blocked" part of the employee's business.

Commentators, while noting the rarity of punitive damages in FINRA arbitration awards, speculated that the arbitrators' decision may have been based in part on findings of intentional wrongdoing, or the onset of the 2008 recession (therefore making it difficult for the claimant to pay back the underlying note in favor of his employer).[8]

Eight months later, a separate federal court confirmed an award of $5 million in punitive damages in favor of two former brokers. In dismissing arguments that the panel had rendered unfair rulings and exceeded its authority, the U.S. District Court for the Southern District of Florida found allegations of bias "too remote and speculative to warrant vacatur." The court also found that the panel had "some reasonable basis for the actions it took," and that the respondent firm had not been denied a fair hearing.[9]

J. Scott Colesanti

Of course, the specter of being unconscionable forever looms above cases stemming from arbitration clauses. A June 2012 decision in an antitrust arbitration reminded that arbitrators may, on occasion, simply do the math to determine that the arbitral forum precludes meaningful recovery for a plaintiff class.[10] Looming anew is judicial skepticism of strict confidentiality, a staple of arbitration procedure. To wit, a seismic shift in the traditional deference accorded arbitrations may have occurred in September when a federal judge in Pennsylvania ruled unconstitutional the arbitration program linked to the famed Delaware Court of Chancery.

Delaware's statutory arbitration program – like countless arbitration protocols - keeps private pleadings and evidence. The judge nonetheless decried its closed-door nature. Equating the two year old forum to a "non-jury" civil trial before a Chancery Court judge, the jurist ruled that "[t]he First Amendment protects a qualified right of access to criminal and civil trials. Except in limited circumstances, those proceedings cannot be closed to the public." In thus finding for the Delaware Coalition for Open Government, the court added that "[p]ublic scrutiny discourages witness perjury and promotes confidence in the integrity of the courts." The defendants vowed an appeal, declaring that the decision places America at a "competitive disadvantage in providing efficient ways for business to resolve their disputes."

While the ruling, of course, holds merely that one, relatively new trial alternative must be held to public access standards inherent to conventional trials, it also may portend a larger skepticism. The Chancery program had been openly touted to parties because of its confidentiality.[11] Other similarly marketed, consensual forums may

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ESTATE PLANNING

Estate Planning for Zombies, Vampires, Werewolves, and Ghosts

By Alison Arden Besunder

Happy Halloween! By day, I help clients deal with not-so-happy life events: death, dying, disability. By night ... well, I don't turn into a vampire, but I often use my few spare moments scouring the Internet for bizarre estate-planning related issues. So, for your ghoulish enjoyment, here's a wacky look at how to plan for the most mind-boggling of phantasmal situations: If the only certainties in life are death and taxes, how do you deal with those certainties if (as a zombie) you are "undead?"

Now, before you put down your paper and commence an Article 81 proceeding, much higher powers than me are actually contemplating this possibility. The Centers for Disease Control (CDC) published a "Preparedness 101 for the Zombie Apocalypse," available at: http://blogs.cdc.gov/publichealthmatters/2011/05/preparedness-101-zombie-apocalypse/.

And Arizona State University law school professor Adam Chodorow drives a wooden stake in the heart of (yawn) traditional estate planning for the living in *Death, Taxes .... and Zombies,* published in the May 2012 issue of the Iowa Law Review (available for download at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2045255).

Simultaneously citing the IRS Code and *Weekend at Bernie's* (who would have guessed that both could be cited in a scholarly publication?), Chodorow examines the tax implications of being "undead" and (potentially) returning to the land of the living once succumbing to and recovering from a zombie virus. He notes that some might seek or avoid zombiehood depending on their estate planning objective:

Alison Besunder

"*If people who become zombies are considered dead for federal estate and income tax purposes, little will have changed. Becoming a zombie will be no different than dying from pneumonia, aside from the part where you eat your friends and loved ones. However, other outcomes are possible. For instance, if someone who becomes a zombie is considered not dead (as opposed to undead) for estate and income tax purposes, neither the estate tax nor the basis reset would be triggered. We would be in a situation similar to the one Congress negotiated as part of the Bush tax cuts, which relaxed the basis reset rules in conjunction with eliminating the estate tax. This could turn out well for those intending to hold onto their property for a long time. Alternately, both the estate tax and basis reset could kick in only when a person's zombie was dispatched. Were this the rule, people might have incentives to become zombies to delay the application of the estate tax.*"

Love it. And here I thought I was the only one entertaining such whack-a-doodle notions. Could this become a not-so-far-fetched future, however, if cryogenics take hold? Consider the nuanced issues raised already by fertility treatments and posthumous children, as well as the depository provisions that deal with certain (ahem) "deposits" such as fertilized embryos or even cord blood left in storage centers. How should such property be disposed?

My favorite excerpt is the following:

Count Chocula has clearly made a killing on his cereal and rumor has it that even the Count Who Counts is loaded. While harnessed to the greater good of teaching children to count, it turns out that the Count's OCD-like fascination with numbers turns out to be typical of vampires. See BARBER, supra note 76, at 49 (describing a tradition where people placed bags of grain near a suspected vampire's grave on the theory that the vampire would be compelled to count all the grains, thus occupying the vampire through the night and precluding other, less beneficial activities). Batman is also well off, owning a mansion, the bat cave, and all the great toys at his disposal. However, all evidence suggests that he is not a vampire, just some guy who likes to dress up in tights and pretend to be bat-like.

And here the voice of Sesame Street's Count died in 2012. I wonder if he got his full $5.12 million federal estate tax exemption. (*Ah ah ah ah*).

Stay tuned next month for some mind-blowing thoughts about the inheritance rights and difficulties planning for posthumous children! Until then - Happy Halloween!

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

EDUCATION LAW UPDATE

Antidiscrimination & Harassment in NYS Human Rights Law Not Applicable to Public School Districts

By Candace J. Gomez

In *North Syracuse Central School District v. New York State Division of Human Rights*, 19 N.Y.3d 481, 973 N.E.2d 162 (June 12, 2012), the issue before the court was whether a public school district is an "education corporation or association" as contemplated by Executive Law § 296 (4) ("NYS Human Rights Law"). The Court of Appeals concluded that it is not, and, therefore, the New York State Division of Human Rights ("SDHR") lacks jurisdiction to investigate complaints against public school districts pursuant to that provision.

This case originates from complaints filed with the SDHR on behalf of public school students, claiming that their respective school districts engaged in an "unlawful discriminatory practice" under the NYS Human Rights Law by permitting their harassment on the basis of race and/or disability.

The court stated that the vicious attacks that these students were subjected to were deplorable, and the court's holding should not be interpreted as indifference to their plight, since the merits of their underlying discrimination claims were not at issue upon this appeal. Furthermore, the court held that this ruling does not leave public school students without remedy because, in addition to potential remedies pursuant to federal law, public school students may file complaints with the Commissioner of Education. Additionally, the recently enacted Dignity for All Students Act addresses a myriad of harassment and discrimination issues that arise within a school context and its goals comport with the goals of the NYS Human Rights Law.

Candace Gomez

In *Bryant v. New York State Education Department*, 10-4029-CV, 2012 WL 3553361 (2d Cir. Aug. 20, 2012), the U.S. Court of Appeals for the 2nd Circuit upheld a prohibition against the use of "aversive interventions" such as manual and mechanical restraints, food-control programs, and electric skin shocks. This prohibition extends to New York students with disabilities being served in out-of-state schools that permit such practices.

In 2006, the New York State Board of Regents promulgated a regulation prohibiting schools, including out-of-state day or residential schools, from using aversive interventions on New York students. In response to that regulation, a group of parents and legal guardians of children with severe behavioral problems filed suit to challenge this ban. The severe behavioral problems exhibited by these students included aggressive and self-injurious behaviors such as head-banging, yanking out their own teeth, attempting to stab themselves, and assaulting teachers. Plaintiff parents and guardians claimed that they tried a number of other measures to treat and educate their children, but those methods were unsuccessful. In contrast to those unsuccessful

(Continued on page25)

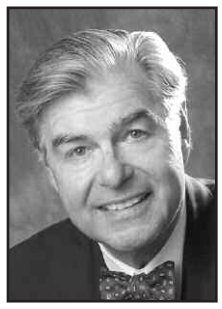
BOOK REVIEW

DISROBED

By Joseph W. Ryan

In *DISROBED: An Inside Look at the Life and Work of a Federal Trial Judge*[1] federal district judge and former SCBA President Frederic Block has revealed himself in an eye-opening account that is a "must read" for every aspiring student, practicing lawyer and member of the judiciary. It is a non-fiction story of a bright solo practitioner who traversed the "country lawyer" practice in Suffolk County to becoming a U.S. District Judge presiding over the most challenging cases in the Brooklyn courthouse that took him as far away as Egypt.

How to tell a story in an entertaining fashion should come as no surprise based upon the Judge's life experience off the bench as the co-creator of the off-Broadway musical "*Professionally Speaking*." In straightforward simple language laced with humor, the book takes you through his career as a risk-taking lawyer starting out as a Suffolk solo practitioner with the anxieties of a silent telephone. The book demonstrates how performance breeds clientele. Three months after hanging out his shingle, Block brought, *pro bono*, a federal lawsuit challenging the constitutionality of the Suffolk Board of Supervisors as a violation of the "one-man, one-vote" principle espoused by the U.S. Supreme Court in a reapportionment case involving state legislation. Six years later, after oral arguments before the U.S. Supreme Court and Second Circuit Court of Appeals, he won the case which lead to the establishment of Suffolk County Legislature. State Family Court Judges also won a pay raise as a result of engaging Fred Block for a lawsuit which challenged the disparity of higher wages paid to their colleagues sitting in the New York City Family Court.



Joseph W. Ryan

Block tells the story of the political realities of a Democrat lawyer aspiring to become a judge in the Republican controlled Suffolk County with unvarnished frankness. Not until three decades later did the political scene change. And in 1994, President Clinton, upon the recommendation of the late U.S. Senator Daniel Patrick Moynihan, with prompt confirmation by the Senate, appointed Judge Block to serve for life tenure in the Eastern District of New York. The book received a resounding endorsement from President Clinton as a "compelling introduction to the world of a federal judge."

The book demonstrates the unique influence Judge Block has brought to the Eastern District of New York. Not having served as a former U.S. Attorney, nor as a product of New York City law firms or academia, the book illustrates how the Judge's influence has brought a refreshing prospective appreciated by his fellow judges. Judge Jack B. Weinstein adds in his Preface to the book: "I would be remiss were I not to point out how engaging Fred is as a companion and colleague. His conversation is captivating: he has the knack for preventing acrimony at conference: in tête-à-têtes, he is entrancing."

Judge Bock's outline of the morass of federal discrimination and gun laws provides a superb, simple account of their vast breath and application in practice before the federal court. The book offers an insider view of the federal judge nomination process, the inner workings of the EDNY courthouse, and the Judge's frank observations of lawyers trying cases before him, including his personal reactions to the proceedings. All of this gives full meaning to the title *DISROBED*.

Finally, the book demonstrates the wisdom of our Founding Fathers in creating a constitutionally independent federal judiciary who serve for life without fear of improper influence. *DISROBED* fills that role as a rare, fearless and enjoyable account that shouldn't be missed.

Note: Mr. Ryan serves as Chair of the SCBA Federal Court Committee, and is a former NCBA President.

1. Thompson Reuters WESTLAW and NACDL Press

LAND TITLE

Don't Delay, Plead Laches Today!

By Lance R. Pomerantz

The defense of laches in land title disputes has been looked upon with favor by the Second Department in 2012. Let's look at these cases and contrast them with another from the not-too-distant past.

"Laches is defined as 'such neglect or omission to assert a right as, taken in conjunction with the lapse of time, more or less great, and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity.' The essential element of this equitable defense is delay prejudicial to the opposing party." *Matter of Barabash*, 31 NY2d 76 (1972) [internal citation omitted].

In *Wilds v Heckstall,* 93 AD3d 661 (2nd Dept., 2012), the borrowers' fee title was found to be invalid, but the mortgage given by the borrowers remained a valid lien on the property.

Beulah owned the property. She made a will leaving the property to her sister, Rovina, subject to a life estate in Beulah's husband, Carroll. Beulah died in 1993 and, apparently, no proceeding was commenced concerning her estate. Carroll continued to live at the property. In 1999, Carroll deeded the property to his niece and nephew. Carroll died in 2002. The niece and nephew mortgaged the property to Delta Funding in 2003. In 2004, Rovina commenced an action in Supreme Court to quiet title based on Beulah's will. The action was transferred to Surrogate's Court for a determination of the probate issues.

Lance Pomerantz

The Surrogate's Court determined that the will was valid and, therefore, fee title had devolved to Rovina. The niece and nephew were without title. But, the Surrogate's Court also held that Rovina was guilty of laches in offering the will for probate, and that the delay prejudiced the lender's rights under the mortgage. The Second Department panel agreed, stating that the delay "prejudiced the mortgagee, which did not know and could not have known at the time that it took the mortgage on the property that the plaintiff would challenge [the borrowers'] ownership interest."

It may be precisely true that the lender could not have known that the *plaintiff* would challenge the title. However, examination of the deed chain would have revealed the gap in record title from Beulah to Carroll, alerting the lender to the possibility that *someone* would challenge the title. While the decision appears to leave the niece and nephew personally liable on the note, as a practical matter it results in a windfall for them at Rovina's expense.

Laches requires both an unreasonable delay and knowledge that the opposing party has detrimentally changed his position. The opinion, however, fails to mention any evidence indicating when Rovina obtained knowledge of the assertion of title or the giving of the mortgage.

When *Wilds* first came down, it was featured in my "*Constructive Notice*" newsletter. At the time, an esteemed member of the New York land title bar had this comment: "Lance, I hope you are not suggesting that laches alone, without regard to the law as to adverse possession, should be a basis for barring someone from asserting fee title." While I assured counsel back then that I was not suggesting that position, the Second Department has, in fact, just adopted that very position as the law. *Stein v. Doukas, et al.,* 2012 NY Slip Op 06204 (2nd Dept., September 19, 2012).

In 2004, Doukas allegedly "wrongfully manufactured" a deed for a shopping center from Claire Stein to Doukas's company, Telcor. In August, 2007, Telcor conveyed the property to Jay Realty Enterprises, Inc. for $1,425,000. In 2008, Douglas Stein commenced this action to set aside both deeds.

The court held that "Jay Realty demonstrated its prima facie entitlement to judgment as a matter of law by establishing that the doctrine of laches precluded the plaintiffs from asserting a claim against it" because it demonstrated that, as of February 2007, Douglas Stein knew of the existence of the deed to Telcor. "Further, Jay Realty demonstrated that, despite that knowledge, the plaintiffs took no action to assert their rights to the shopping center property until they commenced this action in April 2008, more than one year later." That knowledge and delay, coupled with

(Continued on page 30)

Presiding Justice for Appellate Division Appointed

Justice Randall T. Eng, former prosecutor and longtime judge with a wealth of trial, appellate and administrative experience, has been appointed Presiding Justice of Appellate Division, Second Department by Governor Andrew Cuomo, one of the busiest appellate courts in the nation.

Photos by Scott Karson

Reflections on a Family Vacation in Africa

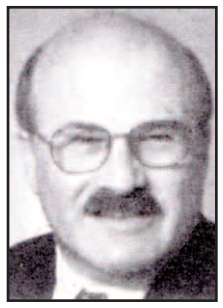
By Scott M. Karson

In last month's issue of *The Suffolk Lawyer*, I reported on the 134th Annual Meeting of the American Bar Association in Chicago, Illinois, which I attended as the Suffolk County Bar Association's delegate from August 2 through 7, 2012.

Four days after my return from Chicago, my wife Joleen and I, along with our 11 year old grandson Isaiah, embarked on another trip. This time, the destination was southern Africa; specifically, South Africa, Zimbabwe and Botswana.

After a seemingly interminable 16 hour flight from New York to Johannesburg, followed by another two hour connecting flight, we arrived in Cape Town, a coastal city near the southernmost point on the African continent and the meeting place of the Atlantic and Indian Oceans. Cape Town is a city of great contrasts: we observed clear evidence of poverty in some of the townships we passed on our way from the airport to the city, but the city itself showed signs of significant affluence. Regrettably, it was still winter in the Southern Hemisphere, and the weather in Cape Town reflected that. It was, for the most part, stormy, with rough seas, which prevented us from taking the cable car to the top of Cape Town's signature attraction, Table Mountain, and from taking the ferry to Robben Island, where former South African President Nelson Mandela spent 18 of his 27 years in prison. We did, however, tour the Cape Peninsula and made it to the Cape of Good Hope, and saw our first African wildlife *en route*, including seals, penguins, ostriches, impala and baboons.

The next phase of our journey was to the northern part of South Africa, in the vicinity of Kruger National Park, where we hoped to see many more animals in their natural state. We stayed at two different safari lodges, Kapama and Ngala, for a total of seven nights.



Scott M. Karson

Although our lodgings were quite luxurious, the food superb and the service impeccable, our stays were anything but relaxing.

At both lodges, the staff would awaken us at 5:30 a.m. each morning. At 6:00 a.m. we met our guide and tracker, and our fellow guests for a quick cup of coffee and then we were off on our specially-designed open vehicle (which held nine guests) for three hours of animal viewing (most of the animals are reputedly more active during the early morning hours). It was generally quite cold as we departed, and we were routinely provided with hot water bottles and blankets. However, as the sun rose, it warmed up quickly and actually went above 90 degrees on several days (keep in mind that all temperatures were measured in centigrade – not Fahrenheit – and distances were measured in kilometers – not miles).

Upon our return to the lodge following the morning drive, we would enjoy breakfast and, later in the day, lunch and high tea. Then, at 4 p.m. we would embark on another three hour drive to see more animals. About two hours in, we would stop for 15 minutes to watch the sunset while enjoying a glass of wine or cocktail (very civilized!). We would then return to the lodge for dinner.

Of course, the highlight of all of this was seeing and shooting (with cameras, of course!) the animals – close up and in the wild. We saw lions, cheetahs, leopards, servals, elephants, giraffes, zebras, crocodiles, rhinos, hippos, water buffalo, monkeys, baboons, antelope, gazelle, impalas, kudus, wildebeests, hyenas, mongoose, springbock, warthogs, eagles, vultures, guinea fowl, ostriches and all manner of colorful exotic birds. We became the envy of the lodge when we spotted a pangolin, an extremely rare toothless armor-plated ant-eating mammal.

The balance of our visit to South Africa included a return to Johannesburg and an excursion to historic Soweto, the nearby township which played a vital role in the anti-apartheid movement. Remarkably, on one street in Soweto, Vilakazi Street, we saw the homes of two Nobel peace prize laureates, Nelson Mandela and Archbishop Desmond Tutu. We also visited the site of one of the many tragic events that led to the creation of modern South Africa: the 1976 Soweto Student Uprising, in which 12 year old Hector Pieterson was shot and killed by police simply because he – along with countless other students – engaged in a protest demonstration against the apartheid regime. I explained to our grandson that this event was not unlike some of the seminal events in our own nation's struggle for civil rights, including the 1963 bombing of the 16th Street Baptist Church in Birmingham, Alabama which caused the death of four young girls, the 1963 assassination of Medgar Evers and the 1964 slaying of three civil rights activists in Mississippi.

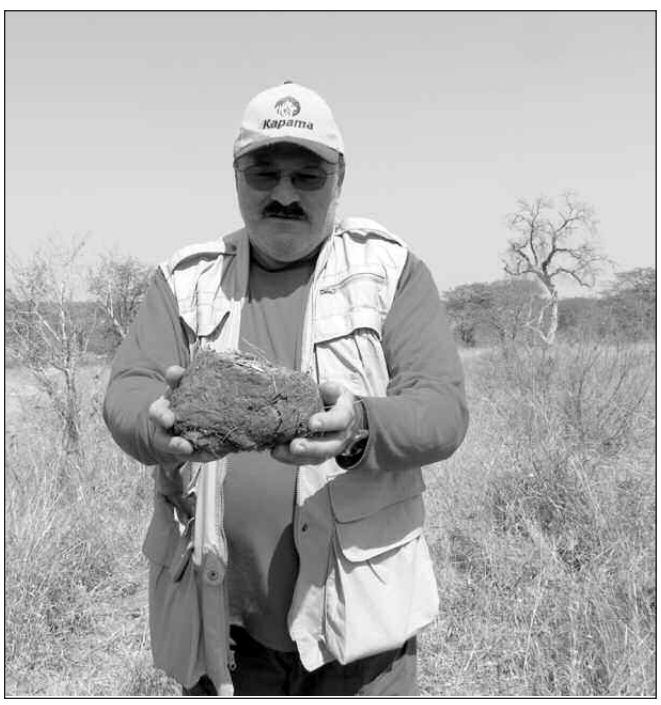
Upon leaving South Africa, we entered Zimbabwe, the home of one of the world's great natural wonders, Victoria Falls. As I marveled at the beauty and power of the cascading waters, I thought of the immortal words of Henry Stanley who, in 1871, upon finally locating David Livingstone, the first European to view the falls, uttered, "Dr. Livingstone, I presume?"

In addition to the majestic falls, and a cruise on the crocodile-filled Zambezi River, we took an excursion to Chobe National Park in Botswana, where wildlife abounded both around and in the Chobe River; in every direction, we saw literally thousands of animals, including great herds of elephants, buffalo, giraffes, antelopes and hippos.

One of the most memorable moments of our trip occurred when we left our bus to go through customs at the Zimbabwe-Botswana border. The driver inadvertently left the bus door open, and a monkey apparently wandered into the empty bus and helped itself to some food belonging to one of our fellow travelers. We found the monkey sitting on the road outside the bus enjoying a container of yogurt!

We returned home after 16 days, with a crate of souvenirs, thousands of photos and memories that will surely last for a lifetime.

Note: Scott M. Karson is a partner at Lamb & Barnosky, LLP . He is a former President of the SCBA (2004-05) and currently serves as a member of the NYSBA House of Delegates and the ABA House of Delegates. He is also Vice-Chair of the Board of Directors of Nassau Suffolk Law Services Committee, Inc.



VEHICLE & TRAFFIC LAW

Relicensing of Multiple DWI Offenders

By David A. Mansfield

David A. Mansfield

Governor Andrew Cuomo announced in a press release on September 25, 2012 the completion of an ongoing review of Department of Motor Vehicles Rules and Regulations regarding the relicensing of drivers convicted of multiple alcohol offenses.

The Department of Motor Vehicles had frozen all applications for relicensing for anyone convicted of three or more alcohol or drug related driving offense.

The regulations implemented as of Sept. 28, 2012 require a lifetime review of a driving record by the Department of Motor Vehicles of all drivers seeking to have a license or privilege reinstated after a revocation. It is not clear from the press release whether it applies to clients revoked for any reason or simply, repeated alcohol related convictions.

The sum and substance is that five or more alcohol related drug convictions in a lifetime will result in a permanent license revocation. Three or more alcohol or drug related convictions in the last 25 years plus at least one other serious driving offense in this period will result in a permanent license revocation.

A serious driving offense is defined as a fatal crash, a driving related penal law conviction, 20 or more points assessed for driving for the past 25 years with two or more convictions each with five points or higher. These are very low thresholds to meet.

A client must therefore be advised that they are in jeopardy of permanent license or privilege revocation in the State of New York if they have three or more alcohol or drug related driving convictions.

The Department of Motor Vehicles intends to tack on five years to the statutory minimum revocation period if revoked for an alcohol or drug related driving offense should your client have three or four alcohol convictions (but no other serious driving offenses) in the last 25 years. The Department of Motor Vehicles will add an additional two years if your client has three or more alcohol/drug related driving convictions is revoked for another reason such as operating without insurance, speeding, reckless driving or a finding after a fatal accident fatal accident. The DMV intends to restore a license to a client in this category with an additional period of a restricted use license which would limit your client's driving to and from work, school and medical visits. But they will require an ignition interlock device installed on any owned or operated vehicle for a period of five years for those drivers who are fortunate enough to be relicensed after three or more alcohol and drug related driving offense.

The DMV is also moving to extend the minimum §1192 related suspension or revocation period. The new regulations will provide that completion of the Driving Driver Program will not terminate the revocation and entitle repeat offenders to have their full licenses restored. The other impact it would have is on the defense practitioner, now at a disadvantage in terms of lifetime driving records because access is limited. DWI convictions are kept on the abstract for 10 years except those involving personal injury accidents and fatal accidents. Convictions for other traffic offenses drop off the record after about four years.

The press release does not mention if there will be regulations implemented regarding whether chemical test refusal finding §1194 will also count toward the classification of the driver for a permanent license revocation. The regulations once promulgated would most likely be found in 15 NYCRR Part §136. I will include the exact citations for the regulations when available.

The press release can be found at: http://www.governor.ny.gov/press/09252012dwiregulations

This is sure to be a hot topic of discussion along with the coming changes at Suffolk TVB at the annual Vehicle and Traffic Law update on November 7, 2012 at 5 pm for the East End and November 14, 2012 at 5:30 pm at the SCBA.

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

Honoring Justice Crecca at St. John's Alumni Dinner

Photo by Arthur Shulman

Justice Andrew A. Crecca, a member of the SCBA Board of Director's, was the honoree at the St. John's Distinguished Alumni dinner held at the Irish Coffee Pub on Oct. 1. Dean Michael Simons, left, with President of St John's School of Law Alumni Association, Suffolk County Chapter and SCBA President Elect Dennis Chase; award recipient Justice Andrew Crecca; and President of St. John School of Law Alumni Association, Alan Hodish.

PRO BONO

Pro Bono Attorney of the Month - Raymond Lang

By Maria Dosso

This month Nassau Suffolk Law Services honors Raymond Lang as Pro Bono Attorney of the Month for his hours of dedicated service to the Pro Bono Foreclosure Settlement Project.

Mr. Lang is a native Long Islander, graduate from Fordham University and then received his law degree from New York Law School in 1984. During his career, Mr. Lang often found himself balancing his family life and formal education while working in New York City, first in the computer field, then in the banking industry on Wall Street where he practiced securities law and later managed several investment firms and businesses. These experiences and skills have proven especially valuable in his current legal practice.

For Mr. Lang it has always been about networking and forging new connections. These days he uses his skills while focusing on saving homes and creating jobs. In addition to his work in foreclosure defense and loan modifications, he serves as General Counsel to several small companies, including internet and retail businesses, who rely on his prior experience as a CEO, corporate counsel, and investment banker for advice on corporate governance, business development, finance and management. Mr. Lang utilizes a cadre of outside resources and experts to provide a holistic and team oriented service to his clients.

He prides his approach as being not transactional, but relationship-oriented. "I care about my clients and seek to be their family lawyer or general counsel. Anyone I introduce to a client must be good hearted," Lang says.

Raymond Lang's work with Pro Bono started with a particular interest in the economic crisis, analyzing the problem and possible solutions in dealing with the huge rise in mortgage foreclosures and unemployment. He founded Economic Recovery Advisors LLC, to advise governmental agencies and business enterprises to meet the challenges faced in the economic downturn. Through this firm, he has advised on foreclosure legislation at the national and state levels. He has written "white papers" on the subject and his experience in mortgage foreclosure continued to grow through his advocacy in his law practice. His familiarity with the banking industry, how banks are structured and how they think, as well as his extensive knowledge of mortgage backed securities, have been valuable assets in his foreclosure defense practice.

He soon became involved with the Suffolk County Bar Association as a way to better network and get a grassroots perspective. After attending a foreclosure seminar sponsored by the Empire Justice Center, he was inspired to participate in the SCBA's Pro Bono Foreclosure Settlement Project spearheaded by Barry Smolowitz. The Project, currently being administered by Nassau Suffolk Law Services, is based on a web-based software program initiated by Smolowitz, where pro bono attorneys who are interested in volunteering at foreclosure settlement conferences, can assign themselves to a matter for a single appearance or multiple appearances, at their choosing. Lang has been a CLE presenter and loyal volunteer with the Project for several years devoting thousands of hours and seeing hundreds of clients.

Notwithstanding his achievements on Wall Street and as an entrepreneur, Raymond believes that the most rewarding work of his career has centered around his participation in the Foreclosure Project. He has derived a great deal of personal satisfaction from giving back to the community by helping those truly in need to navigate through the foreclosure settlement process. Raymond brings a positive approach to his clients in the Project and his dealmaker skill set has enabled him to persuade banks to work out mortgage modifications in many cases.

Raymond Lang

"My pro bono activities related to settlement conferences are the most rewarding work that I do, helping those who are burdened with the stresses of a losing home," said Lang. "We are all in this together and doing pro bono work is rewarding and inspiring." He observes that pro bono work has also helped to build his practice and referrals, as he networks with other attorneys and continues to learn and grow. Mr. Lang's mentoring young people through the Project, such as the students at Touro Law School, is also a rewarding part of his work. "We need to help each other, educate each other, and empower each other," he stated.

Mr. Lang shared two recent examples of how he was able to make a difference through his pro bono efforts. A senior citizen whose house was in foreclosure had not taken Social Security because he was afraid his creditors would take his retirement checks. Lang told him that the benefit could not be garnished to satisfy his credit card debt, and in fact that the Social Security income could help to qualify him for a loan modification. This advice helped to turn things around dramatically for the grateful client.

Another client suffering from muscular sclerosis had reluctantly stayed in his house while the rest of his family, including his three very young children, moved to North Carolina where his wife had an employment opportunity as a teacher. He stayed on Long Island because he was told that his mortgage lender would aggressively pursue his family's assets if he left his house which was in foreclosure. He was living a very lonely and unhappy life until Lang told him that he had been misinformed and that nothing imminent was going to happen. He advised the client to reunite with his family and pursue a short sale instead. The client left in tears of gratitude and relief.

Mr. Lang's personal life is also quite full. His family is very important to him and he is very proud of his wife, daughter, two sons and grandson. He is active in sports, coached CYO and has been a religious education instructor for over 30 years.

Mr. Lang's philosophy is that if you give, you receive much more in many ways. Bringing faith, hope and positive energy to people through service in his law practice has become his ministry. We are very fortunate and inspired to have such a generous pro bono attorney working with the Foreclosure Settlement Project. Our congratulations go to Raymond Lang for this much deserved award.

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

ANIMAL LAW

"A Dog By Any Other Breed"

Why breed specific laws are no doggone good

By Amy L. Chaitoff

For thousands of years humans have shared their homes and lives with the family dog. Historically, there has been no other animal that has been more endearing to the hearts of humans than the dog. According to recent polls by the Human Society of the United States more than 78 percent of Americans own at least one dog. In fact, no other animal has been depended on more to be loyal to and protect its master's property and life from harm, even risking its own life for that of its human companion, than the family dog. Many of us grew up watching *Lassie* and *Benji* and stained the pages of *Old Yeller* and *Where the Red Fern Grows* with childhood tears. We cry because we understand that almost instinctual bond that the majority of us have with dogs. Many of us grieve as much for our pets as we do our human family members, some more. Perhaps that is why it is so disturbing when the public reads a story in the media of a dog attacking a human, and that attack possibly ending in a fatality. Typically when such a tragic but rare event occurs, the media frenzy has a tremendous effect on the public, especially the local community where the incident occurred. Many times this intense reaction is followed by a need to blame someone or something, and a public outcry to prevent the incident from ever happening again. In the old days it was getting a mob together with pitchforks and torches in hand to round up the guilty party and dispense justice. Today's favored method, although more civil, is just as mindless and mob mentality based - the use of legislation, or more specifically "breed specific legislation" or ("BSL").

Amy Chaitoff

Breed specific legislation is legislation that targets and places restrictions and conditions on the owning or keeping of a specific breed of dog or just plain outright bans on a specific breed of dog. Many times, the breeds that typically fall victim to these breed discriminatory laws are the breeds commonly referred to as the bully breeds and usually include, but are not limited to, the American Staffordshire Terriers or (commonly referred to as Pit Bulls), American Bulldogs, Rottweilers, Dobermans, Mastiffs, and anything that remotely looks like it has any mix or characteristics of any of these breeds.

Fortunately, New York is among the states that make it illegal for municipalities to pass breed specific laws under Agriculture and Markets Law Article 7, Section 107 (5) which states:

§ 107. Application. . . .

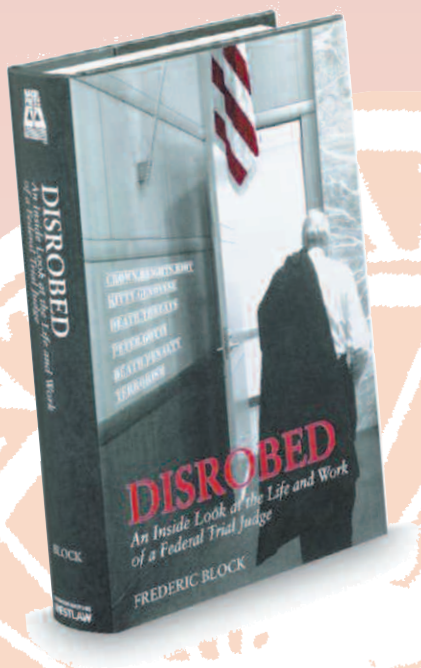
5. Nothing contained in this article shall prevent a municipality from adopting its own program for the control of dangerous dogs; provided, however, that no such program shall be less stringent than this article, **and no such program shall regulate such dogs in a manner that is specific as to breed. [Emphasis Added]**

For well over 100 years the law of the State of New York regarding injuries/damages caused by a domestic animal has been that of strict liability, provided the owner knows or should have known of the animal's vicious propensities. *Collier v. Zambito,* 1 N.Y.3d 444, 807 N.E.2d 254 (2004), *See also, (Bard v. Jahnke,* 6 N.Y.3d 592, 599, 815 N.Y.S.2d 16, 848 N.E.2d 463 (2006). The owner's knowledge of a known "vicious propensity" must be proven in order for a plaintiff to recover. An owner who has no prior knowledge of such vicious propensity will not be held liable even if the owner was in violation of a local law or ordinance at the time of the incident. *Petrone v. Fernandez*, 12 N.Y.3d 546, 550, 910 N.E.2d 993, 996 (2009).

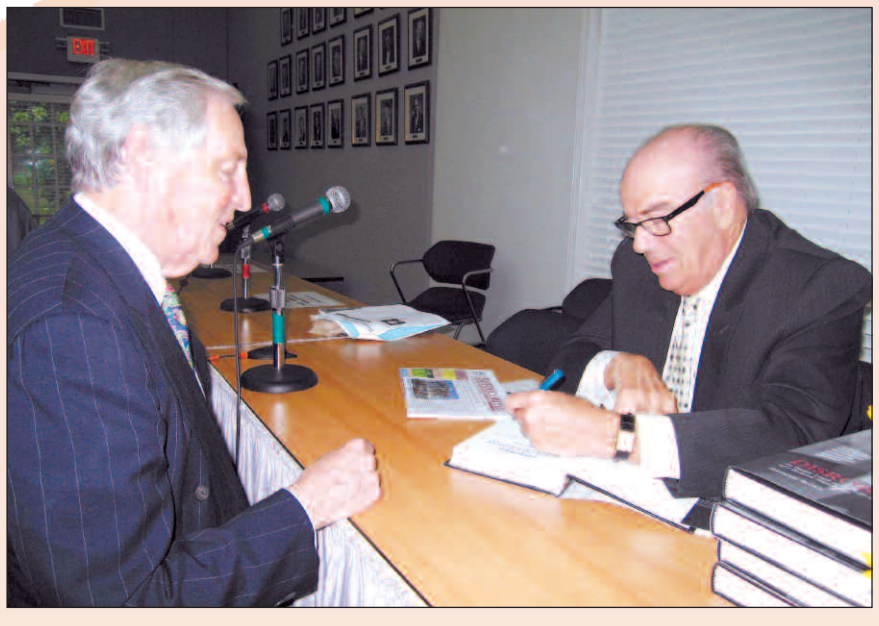
The intent of Agriculture and Markets

(Continued on page 27)

Author's Night at the SCBA - *DISROBED*



Photos by Art Shulman and Laura Lane



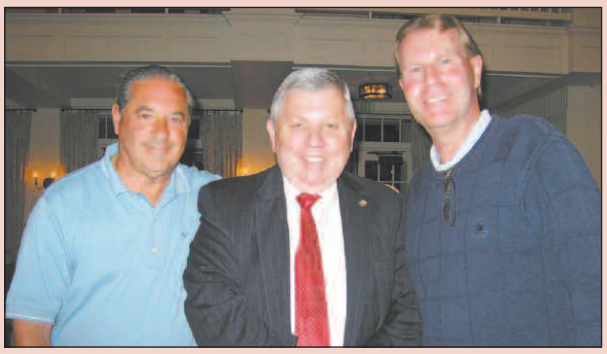
FREEZE FRAME

Annual Lawyer Assistance Foundation Golf Outing

Founded in 1991 by a handful of lawyers including Judge Ira P. Block, its mission is to provide relief, aid and assistance to all members and former members of the Suffolk County Bar Association and other members of the legal profession who reside in Suffolk County. About five years ago, the golf outing was named in Judge Block's memory.

Photos by Art Shulman

Mark Rudner, left, Judge John J. Toomey, Jr., Justice William J. Condon and Chris Olson.



SCBA Past President David Besso who coordinates the outing, left, SCBA President Art Shulman and District Administrative Judge C. Randall Hinrichs, who was the honoree of the evening.

Fred Eisenbud, left, SCBA Past Presidents Lynne Adair Kramer, John Buonora, and George Roach.

Roger Stern, left, Christopher Olson, District Administrative Judge C. Randall Hinrichs, and Frank S. Russell.

Murphy Receives Rare Military Honor

A 510-foot Navy destroyer was recently christened the USS Michael Murphy in honor of Lt. Michael P. Murphy, son of SCBA member Dan Murphy. Lt. Murphy was a Navy SEAL killed in Afghanistan and posthumously awarded the Medal of Honor.

Photo by Annamarie Donovan

MUSIC REVIEW

"This is one of the great pleasures of my life"

Love For Levon – A Tribute To Levon Helm

By Dennis R. Chase

Take a load off, Annie,
Take a load for free,
Take a load off, Annie,
And (and) (and) you put the load right on me,
(You put the load right on me).

Sometimes, you see what appears to be a very clear path and are fairly certain of the direction in which you are headed . . . only to experience divine intervention and realize true inspiration. While the course change may be unexpected, there are no regrets.

This review was scheduled to chronicle attendance at the opening night of the New York Philharmonic at Avery Fisher Hall in Lincoln Center . . . and, more importantly, meeting Itzhak Perlman in the *green room* following his performance. Then, a friend mentioned this tribute show taking place two days later at the Izod Center in Jersey for Levon Helm. Mark Lavon "Levon" Helm (May 26, 1940 – April 19, 2012) was an American rock multi-instrumentalist and actor who achieved fame as the drummer and frequent lead and backing vocalist for The Band. Helm succumbed to throat cancer in April of this year.

"This is one of the great pleasures of my life" were the immortal words first uttered by Neil Young just prior to his performance of *Helpless* during The Band's last performance. That performance, filmed by Martin Scorsese, entitled *The Last Waltz*, closely resembled tonight's extravaganza. In a magnificent tribute to an unbelievably amazing and talented performer, these words were echoed by Grace Potter, 36 years later, in a show stealing performance of the classic Dylan tune, *I Shall Be Released*. Larry Campbell, a singer and multi-instrumentalist serving as the show's unofficial master of ceremonies, was clearly moved by her performance just barely managing to choke out, "how about that?"

Dennis R. Chase

Potter highlighted a show featuring rock n' roll luminaries from rock, blues, soul and country like Garth Hudson of The Band, Roger Waters, My Morning Jacket, John Mayer, Joe Walsh, Dierks Bentley, Eric Church, Gregg Allman, Bruce Hornsby, Ray LaMontagne, John Hiatt, Warren Haynes, Lucinda Williams, Mavis Staples, Allen Toussaint, Robert Randolph, John Prine, Jorma Kaukonen, Marc Cohn, Jakob Dylan, David Bromberg, and Mike Gordon. All performed with the house band, the Levon Helm Band renamed the Midnight Ramble Band and led by Campbell. The concert, eventually to be released as a DVD, raised money to keep music going at Mr. Helm's barn in Woodstock, N.Y. The barn is a recording studio and, since 2005, the home of the Midnight Ramble, a concert series where the Levon Helm Band had been joined, through the years, by most of the musicians at the concert.

Original Band member, Robbie Robertson, who had been feuding with Helm, reconciled with Helm prior to Helm's death; however, Robertson was still conspicuously absent. Robertson's music, however, was in full swing. Although worn and weary and required assistance getting on and off the stage, 75 year-old keyboardist, Garth Hudson, the only other surviving member of The Band, still managed to quite enthusiastically join his fellow performers for many of the tunes Robertson wrote. Warren Haynes, best known for his work as longtime guitarist with The Allman Brothers Band and as founding member of the jam band Gov't Mule, opened the evening with an especially stirring rendition of one of The Band's live staples, *The Shape I'm In*. Gregg Allman joined Haynes for a bluesy, organ heavy, moving version of one of The Band's covers, *Long Black Veil*.

Tris McCall, from *The Star Herald* may have said it best, *Helm stood for many things: authenticity, dignity, respect for history, dedication to musical craft and an old-fashioned Southern gentility that did not always seem to fit the elbow-throwing arena of professional rock 'n' roll. His work with the Band helped redefine the relationship between drummers and singers (Helm, one of the first notable singing drummers, was both) and his austere groove made rock music safe for storytelling. Many of the younger artists at the benefit played their Band covers with reverence and remarkable fidelity to the source material. Louisville roots-rockers My Morning Jacket tackled "Ophelia" and "It Makes No Difference" with all the tones, cadences and inflections taken straight from the versions in the Band's "Last Waltz."*

Country music superstar, Eric Church, CMA's 2011 winner for Top New Solo Vocalist and recipient of no less than five nominations in 2012 including Male Vocalist of the Year; Single of the Year - *Springsteen* Album of the Year - *Chief;* Song of the Year – *Springsteen*; and Music Video of the Year – *Springsteen*; ripped through spirited versions of Band deep cuts, *A Train Robbery* and *Get Up Jake*. More sentimentally, Church spoke of his experience playing a Ramble, closing with the pervasive theme throughout the evening, "I've been told that I march to the beat of a different drummer, and I do . . . Levon Helm."

The Band singer and drummer's daughter received some of the biggest applause of the night, according to the *Poughkeepsie Journal*. Amy Helm helped deliver two songs, including 'Wide River to Cross' with Roger Waters of Pink Floyd. Waters also performed 'The Night They Drove Old Dixie Down' with My Morning Jacket. Later he told the story of his favorite red hat.

Levon Helm

Following Waters' triumphant production of The Wall in Berlin in 1990 attracting over 350,000 fans, Waters met Helm for the first time. "This guy came over to me, and he kind of chewed a little, like he did, and he went, 'Roger, I like your style, I want you to have my hat,'" Waters said, speaking of Helm. "And he gave me his hat, and it's been my fishing hat ever since … and it will be with me to the day I die."

The culmination of the evening, after nearly three and a half hours of great music, was an eight and a half minute version of Robertson's The Weight, a song listed as number 41 in *Rolling Stones* 500 Greatest Songs of All Time. The stage was packed with well over 55 performers each having something special to offer . . . each alone and together expressing their love for Levon.

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

REAL ESTATE

The Mortgage Forgiveness Debt Relief Act of 2007 Expires December 31, 2012

By Andrew M. Lieb

If you litigate foreclosures pay attention. Transactional attorneys take notice. Whether you are a generalist or focus your practice in debt relief it is your job to know that an act with great implication to our region is expiring. While many have commented that they have it on good authority that the Act will be extended and logic dictates that it should, your author is a realist and believes that until something happens, nothing has happened. So let's discuss what is without a doubt one of the Bush era's most logical legislative accomplishments and the implications of its expiration.

Cancellation of debt income is reported on IRS Form 1099-C by the creditor for each debtor for whom the creditor canceled $600 or more of a debt owed. The relevant IRS publication on this topic is Publication 4681, entitled "Canceled Debts, Foreclosures, Repossessions, and Abandonments." Therein, Canceled Debts are explained as follows: "if a debt for which you are personally liable is canceled or forgiven, other than as a gift or bequest, you must include the canceled amount in your income." Therefore, pursuant to Publication 4681, a mortgage modification that includes a principal reduction will result in income tax to the debtor. Likewise, a short sale that includes principal forgiveness will result in income tax to the debtor. Additionally, a deed-in-lieu of foreclosure will also result in income tax to the debtor where any underwater sums are released on the recourse note.

Andrew M. Lieb

However, The Mortgage Forgiveness Debt Relief Act of 2007 avoided this income tax outcome for many homeowners in our county and throughout the United States. According to the IRS, the Act "allows taxpayers to exclude income from the discharge of debt on their principal residence." To obtain this relief, the taxpayer was required to file Form 982 and attach it to their federal income tax return. Pursuant to Form 982, a principal residence is defined as follows: "your main home, which is the home where you ordinarily live most of the time. You can have only one main home at any one time."

Moreover, the form caps the exclusion from taxable income as follows:

> "This indebtedness is a mortgage you took out to buy, build, or substantially improve your main home. It also must be secured by your main home. If the amount of your original mortgage is more than the cost of your main home plus the cost of any substantial improvements, only the debt that is not more than the cost of your main home plus improvements is qualified principal residence indebtedness. Any debt secured by your main home that you use to refinance qualified principal residence indebtedness is treated as qualified principal residence indebtedness, but only up to the amount of the old mortgage principal just before the refinancing. Any additional debt you incurred to substantially improve your main home is also treated as qualified principal residence indebtedness." Lastly, the "maximum amount you can treat as qualified principal residence indebtedness is $2 million."

During the previous five years it has become commonly understood among all real estate industry professionals that short sales on a primary residence will not result in income tax. Real estate brokers and salespersons preach this gospel when making their short sale listing presentations. Attorneys support this understanding when engaging in negotiations and/or closing a short sale transaction. In fact, accountants ratify this understanding when preparing tax returns. Our message must be changed.

As attorneys we are charged with the duty to advise clients and the public with an understanding of the laws that will impact their lives. Hopefully, The Mortgage Forgiveness Debt Relief Act of 2007 will be extended. Yet, it's imperative for practitioners to begin advising clients and ancillary real estate service providers with whom we work that this act is set to expire and that they must make informed strategic decisions under this light. While the Act existed, a short sale offered credit score and esteem advantages over bankruptcy coupled with the fact that the debtor in a short sale would not be precluded from filing for bankruptcy for eight years. Yet, with the Act expiring, it is submitted that a discharge of a Mortgage Note pursuant to a Chapter 7 Bankruptcy is the best practice as opposed to obtaining debt forgiveness in a short sale. Our advice to clients should mirror this understanding as obtaining debt forgiveness in a short sale will cost the homeowner thousands of dollars in taxes should the Act not be extended.

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.

CONSUMER BANKRUPTCY

Suspended Bankruptcy Attorney and Paralegal Punished

Pair flaunted bankruptcy petition preparer statute

By Craig D. Robins

Non-attorney bankruptcy petition preparers can get into a heap of trouble if they do not accurately follow certain Bankruptcy Code provisions designed to protect consumer debtors. This was evident in a case just decided by Judge Carla E. Craig, the Chief Bankruptcy Judge of the Eastern District of New York, sitting in the Brooklyn Bankruptcy Court.

To make matters more interesting, the case also involves disgraced attorney, Peter J. Mollo, who was the subject of my column in May 2012. Despite having been suspended from practicing law earlier this year, Mollo continued to represent clients and tried to get away with it by forging another attorney's name on several bankruptcy petitions which he then filed. Judge Craig sanctioned him in a decision dated March 22, 2012. *In re: Clyde Flowers*, (01-12-40298-cec, Bankr. E.D.N.Y.)

Craig D. Robins

It seems that Mollo didn't learn his lesson and immediately embarked upon a new scheme to circumvent his suspension by having his paralegal, Anna Pevzner, continue to meet with debtors and prepare petitions. When the Office of the United States Trustee learned about this conduct in four separate Chapter 7 consumer cases, it quickly brought proceedings against both of them seeking sanctions and disgorgement of fees.

After several evidentiary hearings, Judge Craig issued a 31-page decision on September 28, 2012, in which she severely sanctioned the pair, and in doing so, discussed the various statutory requirements that bankruptcy petition preparers must adhere to. *In re Edith L. Moore, et. al.*, (12-41111-cec, Bankr. E.D.N.Y.).

A bankruptcy petition preparer (BPP) is essentially a non-attorney who prepares bankruptcy petition legal forms. Congress was so concerned about vulnerable debtors who had been victimized by non-attorney petition preparers who rendered bad legal advice and charged unreasonable fees that in 1994 it implemented Bankruptcy Code section 110 which is devoted to regulating their services.

That section defines a BPP as a person, other than an attorney or an employee of an attorney, who prepares a bankruptcy court document for a fee.

Since BPPs are non-attorneys, they are not permitted to give legal advice and may only type documents and charge a reasonable fee for doing so. That means that they cannot assist with determining what assets are exempt or what exemptions statutes to use, nor can they suggest what chapter to file. They cannot offer advice as to whether a debt is dischargeable or whether a car loan should be reaffirmed.

In addition, BPPs may not collect, receive, or handle court filing fees in connection with a bankruptcy case. That means that BPPs cannot file petitions with the bankruptcy court. BPPs may not us the word "legal" or any similar term in any

(Continued on page 30)

TRUSTS AND ESTATES UPDATE

By Ilene Sherwyn Cooper

Revocation of letters due to Status as creditor denied

In a proceeding for revocation of letters of co-trusteeship issued to the decedent's son, the petitioner, the decedent's spouse, moved for summary judgment.

The trust at issue was created pursuant to the terms of the decedent's will for the benefit of his wife during her lifetime, and upon her death, his three children. Upon admission of the will to probate, letters of trusteeship issued to the petitioner and the decedent's children, who were the nominated trustees there under. The assets of the trust allegedly consisted, in part, of shares of stock of two corporations, of which the decedent's son was also a shareholder.

These corporations were the subject of two other related proceedings commenced by the petitioner; one for discovery pursuant to SCPA 2103, and the second for judicial dissolution of the entities.

In opposition to the petition for his removal, the decedent's son asserted eight counterclaims against the decedent's estate based upon breach of contract and unjust enrichment. In support of her motion for summary relief, the petitioner argued that by alleging these counterclaims, the respondent placed himself in a conflict of interest with the estate that required his disqualification as trustee as a matter of law.

The court opined that a conflict of interest in itself did not warrant removal of a fiduciary. Indeed, given the great deference accorded to the testator's selection of a fiduciary, only a finding of actual misconduct, as specified by the provisions of SCPA 707, would justify the removal of a fiduciary or a refusal to issue a fiduciary letters.

Ilene S. Cooper

Within this context, the court found that the petitioner had failed to establish a basis for summary relief. Specifically, the court held that the mere fact that the decedent's son had asserted claims against the estate and was thereby an estate creditor did not constitute grounds for his removal as a matter of law. In fact, the court noted that the provisions of SCPA 1805 were designed to enable a fiduciary with a claim against an estate to serve by requiring that court approval be obtained for payment of such claim.

Further, the court opined that the counterclaims asserted by the decedent's son did not create a de facto conflict of interest with the trust since they were asserted against the estate. To this extent, the court found it significant that the decedent's son was not a fiduciary of the estate, and thus, was not in a position where he would be forced to make decisions regarding litigation strategy as a fiduciary of the estate that would conflict with the prosecution of his claims. The court held the petitioner's claims that the subject trust was impacted by these claims conclusory and belied by the record, which revealed that the trust had already been funded. As in the case of the estate, the court concluded that even if the claims of the decedent's son were against assets purportedly owned in part by the trust, it was not sufficient to warrant his removal as trustee on the basis of a conflict of interest. Accordingly, summary judgment was denied.

***In re Estate of Hersh,* NYLJ, June 18, 2012, at 26 (Sur. Ct. Queens County).**

Wrongful Death Compromise Order held jurisdictionally defective

In a proceeding for the allocation and distribution of the proceeds of a wrongful death action, the Surrogate's Court, Queens County, in *In re Stokes,* scheduled a hearing on the grounds that the order of compromise issued by the Supreme Court, purportedly pursuant to EPTL 5-4.6, was not in compliance with the statute.

The court noted that the Supreme Court order allowed the payment of attorney's fees and disbursements without requiring that those funds remain in an interest-bearing escrow account pending the filing of a petition for allocation and distribution. Additionally, the court found that one of the distributees of the decedent was a person under a disability for whom a guardian ad litem should have been appointed. Further, the court determined that in the application before the Supreme Court, the petitioner had not served all the necessary parties interested in the decedent's estate.

The court opined that the foregoing problems and issues raised by the Supreme Court proceedings were not isolated incidents within the context of wrongful death compromises. Indeed, the court indicated that there appeared to be a consistent misunderstanding of the provisions of EPTL 5-4.6, as evidenced by compromise orders that are facially and procedurally non-complaint with the statute. To this extent, while the court recognized the significant efforts of trial counsel in bringing a wrongful death action to fruition, it also found that the safeguards and procedural prerequisites of the statute were to be strictly adhered to by practitioners seeking relief in the Supreme Court. In like manner, it is the duty of the Surrogate's Court to insure compliance with the statute, especially when a person under a disability was interested in the proceeding.

Based on the foregoing, specifically, the jurisdictional deficiencies of the Supreme Court action, the fact that a guardian ad litem had not been appointed prior to entry of the Supreme Court order, and that counsel in the Supreme Court had appeared in the Surrogate's Court as counsel for the fiduciary, the court directed that counsel return all attorney's fees previously paid and to deposit same in escrow, and that the petitioner amend her petition and accounting to include all necessary parties.

***In re Stokes,* NYLJ, May 30, 2012, at p. 27 (Sur. Ct. Queens County).**

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

He Wanted His Day in Court!

By Edwin Miller

This is a true story. The names of the three judges have been withheld out of respect.

The Accident

The plaintiff was a union carpenter. His car was hit in the rear on Sunrise Highway near Patchogue on June 30, 1973. He injured his neck and lower back and claimed that he could no longer work as a union carpenter. This accident occurred prior to the enactment of the No-Fault Law in 1974 so there was no "threshold" problem. His doctor confirmed his injuries and disability as a carpenter. After a few years, he was able to perform light carpentry work. Because of the great calendar delay which existed in Suffolk County this case was not tried until 1979.

The Insurance Coverage

The other driver had a $20,000 liability policy. The insurance company thought the plaintiff was a malingerer and only offered $3,000. Even if the jury gave us a verdict, there would be no interest on the verdict for the six years it took to get to trial. This was a boon for the insurance companies. That is where the matter stood until shortly before trial.

Edwin Miller

The History of Plaintiffs

The plaintiffs were from England. He was in the British Army and after his discharge they married, had children, and then immigrated to the United States. They were from a very poor section of East London. The family home of the plaintiff had been condemned, demolished, and was now a parking lot! They were like a couple from "Upstairs/Downstairs." The wife always wore white gloves and a little hat with a flower.

The Final Conference

Shortly before trial, there was a final attempt by a judge for settlement. Lo and behold, after six years, the insurance carrier finally offered their policy limits, $20,000. Everybody thought there finally was a settlement, including the judge. However, the plaintiff still wanted his day in court! Both the judge and I explained to him that this was the most he could possibly recover. The defendant was divorced, employed as a custodian, and the house he lived in was owned by his second wife. His personal lawyer, with whom I had gone to law school, called me and indicated that if a judgment was obtained for more than $20,000, his client would immediately file for bankruptcy, which would eliminate the excess judgment debt. Despite all of this information, the plaintiff still insisted on having his day in court! We placed the settlement offer on the record, and my advice to settle, just in case the verdict was less than $20,000!

The Trial

The trial judge also tried to reason with the plaintiff. He was the third judge who did so. It didn't matter he wanted his day in court! The case was tried, and all of the witnesses testified, including the plaintiff's doctor. His wife also testified, with her white gloves, as to loss of services. The jury's verdict was $55,000, $50,000 to plaintiff and $5,000 to his wife. The plaintiffs were ecstatic! I told them not to get too excited since they would only collect the $20,000. A judgment was then entered, the carrier paid the $20,000, and a partial satisfaction of the judgment was given to them.

Epilogue

A week or so after we gave the plaintiff a copy of the $55,000 judgment, I received a call from a local collection lawyer whom I knew well. He was all excited about collecting the excess $35,000. I asked him if his "new" client had told him about the impending bankruptcy filing. Of course, he had not. Two days later, the bankruptcy notice came in the mail. The collection lawyer then called me to tell me he wasn't going to waste any more time on this matter.

The plaintiff was technically within his rights to insist on "his day in court," but to what end?

At another time, and in another place, another Englishman had written, "What fools these mortals be!"

Note: Edwin Miller has been practicing law in Suffolk County for more than 50 years. He is a partner in the firm of Campbell & Miller, Esqs. at 94 Maple Avenue, Smithtown, New York. He has a general practice with an emphasis on litigation.

REAL ESTATE

What is Mortgage *Securitization Fail?*

By Charles Wallshein

Before you can understand *securitization fail* you have to understand the basic principles of securitization.

A mortgage securitization is where a group of several thousand mortgages, commercial or residential, are pooled into a security known as a Mortgage Backed Security (MBS). The MBS is sold as a security and is usually listed on the Over the Counter market as a "pink slip." These securities are likewise registered with the Securities and Exchange Commission.

The basic economic principles of the secondary mortgage market apply to MBS transactions. The MBS investors known as trust-certificate-holders pay the originator of the mortgage pool also known as the "seller" a premium for the present value of the future cash flow from the mortgage pool. This is commonly known as the "discount." The seller's profit comes from the "spread." The investor's benefit is receiving stable cash flow from an investment grade security. [1]

However, RMBS (Residential Mortgage Backed Securities) transactions are different from traditional loan sale transactions in one remarkable way. RMBS transactions are designed in such that they are subject to income-tax taxation at the investor level only. The millions of dollars of income generated by the thousands of mortgages in the mortgage pool annually are taxed at the investor-certificate-holder level only. To accomplish this, the mortgage pool has to be set up as a Real Estate Mortgage Investment Conduit or "REMIC."[2] If the mortgage pool is not set up as a REMIC then the income from the pool could and would be taxed twice by the IRS (and the states), once at the pool level and then again at the certificate-holder level. It is therefore crucial that the REMIC rules governing RMBS trust construction are followed to the letter of the law.

To achieve REMIC status the RMBS must meet three specific criteria. First, the RMBS mortgage pool must be static. Once it is created it cannot accept any new assets into the pool. The assets must be specifically identified and vested in the trust within a statutory time frame.

Second, the trust must take good title to the assets (mortgages and notes) deposited into the trust.

Third, the assets in the trust must be insulated from creditors. The trust assets cannot be reached by creditors in the event the seller/originator of the loans that constitute the corpus of the trust files for bankruptcy. This is called "bankruptcy remoteness."

In order for the RMBS transaction to meet all three criteria a trust has to be created. The trust creation document is often referred to as a Pooling and Servicing Agreement or PSA. The PSA is the document that governs all trust activities. Breaches of the agreement that violate the above criteria could result in the exclusion of assets from the pool and/or the loss of the pool's tax-free-pass-through status. Both or either of these results would diminish the pool's value and hence the value of the trust certificates to the detriment of the certificate holders.

The PSA is a contract between all participants in the RMBS transaction wherein complex contractual interrelationships are created between and among the parties that originate and transfer assets to the trust, the entity that manages the assets in the trust, the entity that holds the assets and the investors in the trust.

The entity that eventually "owns" the loans is the trust. The entity that manages the assets in the trust is the "trustee." The entity that deposits the loans into the trust by transferring the loans to the trustee is the "depositor." The entity that transfers the loans to the depositor is the "seller." The entity that transfers the loans to the seller is the "originator." The entity that creates the trust is the "sponsor."

The casual observer asks why loans have to go from the originator to the seller to the depositor to the trustee. These multiple steps have to be taken to insulate the loan/asset from being "clawed back" by a bankruptcy trustee in the event of the insolvency and bankruptcy of the originator or seller. The last purchaser of the assets (the trust) has to be "bankruptcy remote." A string of bona fide purchasers of the loans is necessary to accomplish this.

The PSA is therefore very specific as to the method and manner by which the trust accepts assets and as to the manner and method of asset delivery. The architects of the RMBS transaction drafted PSAs such that the document created a transactional model wherein the IRC's requirement of the static corpus was satisfied, and bankruptcy trustees were deterred from reaching trust assets.

These were probably the primary considerations in devising the manner and method of transferring legal title to the note and security instruments along the chain of entities to effectuate lawful and enforceable title to the loan in the trust. It is important to understand the scope of the number of document transfers necessary considering over 7 trillion dollars of these securities were created during the peak years of the bubble. Of secondary consideration was enforcement by the trustee of the note and security instrument in equity against defaulted borrowers (foreclosure).

It has become very clear that the document transfer process among all RMBS participants is rife with omissions such that the trusts' title to the underlying loans is in question. Real estate loans generally consist of two documents, a promissory note and a mortgage. Different bodies of law control the transfer of the note and the mortgage. As a general rule 49 states have adopted the amended 2001 versions of Article 9 provisions of the Uniform Commercial Code. On the other hand each state has its own rules governing the transfer of the security instruments (mortgages). Real estate law governs how mortgage instruments must be recorded such that they may be lawfully enforced in foreclosure.

Our system of titled ownership to real estate is hundreds of years old. Its primary function was and is to prevent parties from unlawfully claiming rights in real property they do not have. Title law also establishes an order of priorities between and among competing interests in real estate. Foreclosure is the equitable remedy pursued against the defaulted borrower by the lawful owner of a promissory note secured by a mortgage or deed of trust.

Foreclosure allows the promisee/lender to elect to take the secured property from the promissory. The mortgage note and the mortgage lien merge into the judgment of foreclosure, the property is sold at public auction and all junior interests are cut-off. It follows that the enforcing party must have an interest in the promissory note and that party [claiming that interest] be identified with notice to the world to be a lawful plaintiff in a foreclosure action.

These principles are receiving a lot of attention lately in the courts for two reasons. First, foreclosure defendants are raising "standing" defenses against plaintiffs. Second, investor certificate-holders are suing trustees for their failure to ensure that the trust took good title to loans in the trust. These cases are called "put-backs." "Put-Back" litigation is just what it sounds like. Certificate holder-investors are trying to force the loans to be "put-back" to the originator-sellers and have their investment refunded.

It is safe to say that many RMBS investors' certificates are worth considerably less now than when they were purchased.[3] The real estate bubble caused the riskier tranche certificate holders to be severely impaired with respect to the likelihood of performance and recapture of principal. In many cases the certificate-holders of lower tranche certificates have been effectively wiped out. These investors are suing trustees for failing to create the trusts properly. Investors are also suing the originators and sellers for failing to adhere to their "representations and warranties."

"Representations and warranties" are

(Continued on page 26)

TRUSTS AND ESTATES

Standing of "Potential Heirs" to Sue for their Parents' Assets

By Robert M. Harper

Robert M. Harper

Oftentimes estate litigation arises when parents favor one or more of their children over others in their estate plans. Fortunately, at least for the parents, they do not have to deal with the issues involved in the litigation, as they are deceased by the time that it arises. As the Second Department's decision in *Sharrow v. Sheridan* demonstrates, however, disfavored children do not always wait for their parents to pass before commencing litigation concerning the parents' assets. Indeed, some disfavored children have gone so far as to sue their parents and siblings as "potential heirs" of the parents' estates. This article explains why such a strategy will prove unsuccessful.

In *Sharrow*, the plaintiff commenced an action against his mother and his sister, seeking to impose a constructive trust on certain assets that the mother transferred to the sister.[1] The plaintiff alleged that a constructive trust was warranted because the sister exercised duress and undue influence on the ailing mother in pressuring her to transfer the assets to the sister. When the mother and sister moved to dismiss the plaintiff's complaint, the plaintiff asserted that he had standing to seek a constructive trust over the assets formerly belonging to his mother as a "potential heir" of her estate.

The Supreme Court granted the defendants' motions to dismiss and the Appellate Division affirmed. In affirming, the Second Department found that the plaintiff lacked standing to seek to impose a constructive trust on the assets that his mother transferred to his sister. As the court explained, for as long as she was alive, the mother had "the absolute right to change her intentions regarding the distribution of her assets." Accordingly, the court concluded that the plaintiff's interest as a "potential heir" of his mother's estate was a "potential, speculative interest" that did not vest him with standing to prosecute a constructive trust claim concerning his mother's former assets.

Of course, *Sharrow* is not the only case in which a child sought to void an inter vivos transfer made by a parent as a potential heir of the parent's estate. In *Schneider v. David*, the plaintiff commenced an action to impose a constructive trust on real property that her mother transferred to her brother.[2] Among other things, the plaintiff alleged that her brother had fraudulently induced their elderly mother to convey the properly to him by telling the mother that the deed she signed only permitted him to manage the property while she was out-of-state. The defendant moved to dismiss, arguing – with his mother's support – that the plaintiff lacked standing to seek a constructive trust.

Although the Supreme Court denied the defendant's motion, the First Department reversed. The Appellate Division reasoned that the plaintiff was not a party to her mother's conveyance of the property and could not void it simply because she considered herself to be an heir of her living mother's estate. In short, the plaintiff's self-serving description of herself as a potential heir of her mother's estate did not cloak her with standing to sue or exercise rights on her mother's behalf.

There are several lessons to take away from *Sharrow* and *Schneider*, the most obvious of which is for children to respect the wishes of their parents as those wishes relate to the parents' assets during life. Putting the obvious aside, however, disfavored children and their attorneys should take note of the well-reasoned legal principle that, as "potential heirs" of their parents' estates, they lack standing to take legal action concerning their parents' assets. During their lives, the assets belong to the parents and are subject to the parents' absolute right to dispose of their property as they wish.

Note: Robert M. Harper is an associate at Farrell Fritz, P.C., concentrating in trusts and estates litigation. In addition to his work at Farrell Fritz, Mr. Harper is a Special Professor of Law at the Maurice A. Deanne School of Law, an officer of the Suffolk Academy of Law, and a member of the New York State Bar Association's House of Delegates.

1. *Sharrow v. Sheridan*, 91 A.D.3d 940 (2d Dep't 2012).
2. *Schneider v. David*, 169 A.D.2d 506 (1st Dep't 1991).

Remembering Two Supportive Members of our Bar Association

Adolph Siegel and Sheldon D. Katz will be missed

Adolph Siegel, Esq., formerly of East Islip, passed away on Oct. 2. Dolf's practice focused on real estate, construction and zoning matters. He represented some of the largest developers, land title insurance companies, local small businesses, as well as families and he quickly became one of the most respected attorneys on Long Island.

He was a member of the Suffolk County Bar Association for more than 50 years and he served as a member of the Board of Directors, chaired the Real Property Committee and the LIBOR task force. Dolf successfully argued cases before the New York State Supreme Court, New York State Appellate Division, Second Judicial Department as well as the New York State Court of Appeals. One of his greatest accomplishments was drafting an act to amend the Real Property Law in New York State which was signed into law by then Governor Mario Cuomo in 1991.

Dolf was an avid golfer and participated in our Annual Outing for years. He also enjoyed playing tennis and bridge with his beloved wife Beverly, who passed away a few months before him. He is survived by his daughter and son-in-law, Michelle and Joe Bodnar of Sarasota, Fl., son and daughter-in-law, Bill and Susan Siegel of Hampton Bays, NY and granddaughters Jennifer and Sharon Siegel, and grandson Jared Bodnar.

We also lost an avid tennis player who chaired the Annual Outing Tennis Tournament for many years, Sheldon D. Katz, Esq., a member of the SCBA since 1959. Up until the time of his passing in early October, Shelly was a District Court Small Claims Arbitrator; he participated in the Maritime & Recreational Boating Law, Creditor's Rights, District Court, and legislative Review Committees. He lectured for the Academy of Law and took pleasure in all of the things he endeavored to do. His son, Gary said his father's passions and interests included stamp collecting, coins, antiques, art, boats and boating, tennis, skiing, magic, travel debate, learning, education, religion, philosophy, comedy, public service, a fondness for Shakespeare, love of theater, books, bridge, friends and family. To his wife of 55 years, Audrey and daughters Vicki and Lori, his son Gary and his grandchildren we offer our heartfelt sympathy.

BOOK REVIEW

Track was Prologue

By William E. McSweeney and Ryan Bergen

"Survival, it is called. Often it is accidental, sometimes it is engineered by creatures or forces that we have no conception of, always it is temporary."

Wallace Stegner, "Crossing To Safety"

In *Seabiscuit: An American Legend*, Laura Hillenbrand celebrated a fleet-footed quadruped. In *Unbroken: A World War II Story of Survival, Resilience, And Redemption*, she celebrates a fleet-footed biped, Louie Zamperini.

Is this an unfamiliar name? Those of you who watched the recent PBS biography of Olympian Jesse Owens were likely impressed by a white-haired talking head—a man animated, enthusiastic, youthful, white hair notwithstanding—who recalled Owens's brilliant performance in Berlin in 1936. That witness to Owens's performance was Louie Zamperini, who had himself been a teammate of Owens on the United States Track Team, and, though he wouldn't get to stand victorious on the tripartite podium, had spun his final lap in the 5000-meter event in an astounding 56 seconds. His finishing kick was so remarkable that its performer was brought to The Fuhrer's box. "Ah," said Hitler, "you're the boy with the fast finish."

Yet, for Zamperini, his speed of foot as a 19-year-old Olympian would serve merely as prologue. Unlike Irwin Shaw's protagonist in *The Eighty-Yard Run*, whose brush with greatness lay long behind him, his sole college touchdown in an unnoted intramural scrimmage, having been locked in memory as life's highlight, Zamperini would lead a long life that unceasingly gained in greatness.

Unbroken: A World War II Story of Survival, Resilience, and Redemption
By Laura Hillenbrand
With photographs.
473 pp., Random House, New York
ISBN 978-1-4000-6416-8

Born to immigrant parents on January 26, 1917 in Olean, New York, Louie was brought to Torrance, California when he was but two, this as a curative measure; their son having suffered a bout of childhood pneumonia, his parents were advised that the California warmth would be good for the boy. And more than good for him it was, after a shaky start. His very early years saw him as a petty thief, ever-outrunning the neighborhood cop; his childhood stories usually ended with "…and then I ran like mad." Little surprise then, that at Torrance High School, his pre-teen misdemeanors behind him, he began setting scholastic records in the mile.

Upon graduation, Louie cleared the Olympic trials held on Randall's Island, New York, and at 19 years was the youngest distance runner, essentially a "boy," as Hitler would note, ever to make the Olympic team. In Berlin, his eighth-place finish while yet a teenager seemingly assured him of a berth on the 1940 team.

Now in college, wearing a singlet that bore the words "University of Southern California," Zamperini steadily approached the four-minute mile (once running the distance in 4:08.3), and anticipated competing in the 1940 Olympics, to be held in Tokyo, when the world erupted in warfare. He was thus to be foreclosed from Olympic glory, but, typical of his generation, he didn't whine at his loss; he understood that millions of people were being cheated of things far more precious than participation in sports. Which isn't to discount the value Zamperini gained by his exertions in track; indeed, it could be argued that, by dint of track, he had early learned to "run through the pain." This lasting physical stoicism and a salutary psychological component, the latter fortune-sent, "engineered by creatures or forces that we have no conception of," as novelist Wallace Stegner well puts it—both elements fused within him, wired his system with an obdurate optimism. No matter Fate's vagaries, Zamperini was, simply stated, unbreakable.

This would be proven in the years to come. In early 1941 he volunteered for the Army Air Corps, and was commissioned as a lieutenant. Serving as a bombardier, he was among the crew of the "Green Hornet," a B-24 Liberator which, on a rescue mission, itself crashed into the Pacific, the result of an inexperienced co-pilot's error. Three men survived, Zamperini among them. For 47 days they drifted in their rubber life raft across the Pacific living on rainwater and what fish they could catch; their sleep regularly broken by terrifying vibrations, triggered by sharks that passed under the raft, their dorsal fins rubbing against its hull.

When they finally raised an island, the men were joyful but it was fleeting. A Japanese patrol boat cut across their bow, guns were pointed at them, and they were taken ashore to Kwajalein Island. Soon thereafter, they were transported to a POW camp at Omori, which sat on an artificial island in Tokyo Bay. There, all that Zamperini had previously suffered would, in retrospect, collectively seem but a mild precursor, now that he was in the hands of the camp's guards.

These guards were not to be confused with Japanese warriors. The ideal Japanese soldier was informed by *Bushido*, the way of the warrior. He maintained a code of conduct formulated by the Samurai of feudal Japan, a code that emphasized loyalty, courage, plain living, and a preference for suicide (hara-kiri) over dishonor. Such was the ideal soldier, the select one. But total mobilization tramples selectivity; over-inclusiveness necessarily inheres in conscription. When the net is cast wide, some of its catch is inferior.

Photo credit: Shortell McSweeney.

Casting a critical eye on each other's work, Fowler's *Modern English Usage* sits on grandfather's knee, keeping both writers grammatical and George Orwell peers over the shoulders of grandfather and grandson, keeping both honest.

Inferior characterizes the great majority of the guards at Omori. With few exceptions, they were lazy, undisciplined, their cowardice proven by their sadistic treatment of the helpless; these men were guards precisely because they were adjudged by superiors as being unfit as warriors. They were so volatile, so easily inflamed, so quick to violence, that their prisoners, among themselves, designated them by the use of superficially innocuous nicknames, uncharged with any negative value; had the prisoners been overheard using nicknames laden with hate, they would summarily have been taught respect by means of anything available to the guards—fists, kendo sticks, baseball bats.

The most feared of these guards was "The Bird," a man whose nickname was conspiratorially understood by the prisoners to connote a bird of prey—a predator ever-ready to swoop down and ravage the defenseless. His conduct toward his prisoners was marked by the constant infliction of gratuitous assaults; the imposition of degrading drills, including push-ups over excrement pits; the supervision of forced labor in the advancement of Japan's war effort, violations of Geneva protocols. "This isn't Geneva!"

The Bird would scream at protesting officers, his screams invariably accompanied by attacks on the protesters, leaving them concussed and broken-boned.

Who was The Bird? Who was this savage? This savage, Mutsuhiro Watanabe, was reared in a privileged household, his family made wealthy due to real estate holdings. He held a degree from Tokyo's prestigious Waseda University, where he had majored in French literature; so much for "good" breeding and higher learning as conferrers of civility. At all events, by pedigree and education, then, he felt entitled to a commission. Military superiors thought otherwise. He attained only the rank of corporal, and this rejection, according to Hillenbrand, "…derailed him, leaving him feeling disgraced, infuriated…Those who knew him would say that every part of his mind gathered around this blazing humiliation, and every subsequent action was informed by it. This defining event would have tragic consequences for hundreds of men."

After serving briefly with a regiment of the Imperial Guards—his superiors soon wanting to rid the guards of an unstable and venomous soldier or perhaps to put his volatility to use transferred him to the military's most ignominious station for NCOs, a POW camp.

At Omori, his depredations intensified in direct proportion to allied victories. When our B-29s began bombing Tokyo, unopposed, panic set in among the guards, humor set in among the POWs, some of whom, those strong enough to speak, expressed it vocally:

"You must be sober," The Bird exhorted the exhausted. "You must be sincere! You must work for earnest! You must obey! I have spoken."

"Who the hell is Ernest?" muttered a POW.

But humor had little to do with captivity. To the contrary, Hillenbrand depicts so vividly the brutal treatment of the POWs that the reader comes close to co-opting the sufferer. If the

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ELDER LAW

Managed Medicaid

Advocating for Seniors & the Disabled at Home

By Melissa Negrin-Wiener, and Diana Choy Shan

Melissa Negrin-Wiener

Diana Choy Shan

It is no secret that the Medicaid budget in our state (and country, for that matter) is a large percentage of the annual budget. To that end, it is no surprise that New York State is working hard to reduce Medicaid expenditures each year. However, we have to ask ourselves, at what cost to our seniors and the disabled?

It is imperative that attorneys understand the issues and the tools available to fight unfair reductions of services on the backs of our elderly and disabled neighbors.

Currently in New York City and coming soon to Nassau and Suffolk Counties, all individuals receiving Community Medicaid with Home Care services will have to choose a Managed Medicaid plan to service their care. The Managed Medicaid plan provides a case manager to each individual who will assist in determining that person's needs. As Managed Medicaid is rolled out throughout the boroughs, Community Medi-caid/Home Care recipients have begun receiving notices from the Medicaid agency that their home care hours are being reduced purportedly because, upon review of their case, their needs can be met with fewer hours. Individuals receiving 12x2 split-shift care (two home health aides working 12 hours each) are having their hours reduced to 24 hour sleep in services (an aide is present in the home around the clock but can only provide up to 13 hours of care). Other recipients are finding their hours reduced and new applicants for home health care are being authorized initially for far fewer hours than in the past.

When attorneys hear of such cases they must be aware that there are avenues to pursue to challenge these limitations and/or reductions in hours of care. By way of background, when a Community Medicaid/Home Care application is submitted, the initial review is of the applicant's finances. The local Department of Social Services ("DSS") reviews the application to ensure that the individual is below the allowable resource and income levels.

Once there is a financial approval, DSS must then assess the applicant's medical need. The agency does this by reviewing medical records and sending a DSS nurse into the home to evaluate the individual for an appropriate level of care. At this stage of the process, attorneys should advise families of the right to have a qualified advocate, such as a nurse, social worker or geriatric professional, present at this assessment to appropriately communicate health care needs, assistance requirements with activities of daily living and generally speak in terms the agency evaluator will understand. Of necessity, there are now a myriad of professionals available who will not only help prepare applicants and their families for this assessment but who will attend the assessment and interact with the DSS nurse/evaluator. People with knowledge of the assessment process and the Medicaid program are the key to helping ensure that the applicant gets the highest level of care possible.

As to individuals already receiving Community Medicaid/Home Care who have been advised of a reduction in hours, again, remedies are available. A reduction in hours can be challenged via a Fair Hearing, which is a review of the DSS action by an Administrative Law Judge and ultimately, a decision by the New York State Department of Health. Attorneys and families need to know that, while their challenge is pending, they have the right to "Aid Continuing" which means that the individual receiving benefits must continue to receive the same level of care until a determination is made as to the proposed reduction in hours. As the Fair Hearing process can be quite lengthy, it is critical that a recipient's level of care be maintained while the matter winds it way through the system.

As to the new Managed Medicaid plans being rolled out, attorneys should know that not all plans are created equally. Generally, each Managed Medicaid plan has a different reimbursement rate, meaning that certain plans with higher reimbursement rates can provide greater services, in some cases. For example, some Managed Medicaid plans are able to provide applicants with 12x2 split-shift care even under the Managed Medicaid model. It is important to investigate these options as switching from one Managed Medicaid plan to another is much simpler and less costly than pursuing an increase in services via a Fair Hearing.

In these days of tight budgets and escalating costs, it is easy to focus on the numbers and forget about the human face of this debate. However, at issue are real people – the elderly, the disabled – whose quality of life is at risk.

Take the case of Mary Smith (not her real name), for whom our office provided legal services on a pro bono basis. Mary is 35 and lives in the Bronx with her young children. She suffers from Spinal Muscular Atrophy, a progressive disease with no known treatment. Mary is wheelchair bound and only has limited use of her right arm, which she can raise to a 45 degree angle. She does not have the ability to use any of her other extremities whatsoever. Mary survives in the community with the assistance of a home health aid and relies on church volunteers to help her with her own children.

Mary requires care and assistance with

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IMMIGRATION

Wanted! An Ethical Mandate: Cultural Competence in Law

By Roy Aranda

This is part one of a two part series.

According to the 2010 Census, 50.5 million people or 16 percent of the population are of Hispanic or Latino origin. In addition, there are 3.7 million residents in the Commonwealth of Puerto Rico. Hispanics are the fastest growing minority group. The U.S. Census Bureau projects that by July 1, 2050, the Hispanic population will be 132.8 million, constituting 30 percent of the nation's population.[1]

Census data reveal that California, New York, and New Jersey have the highest foreign-born proportions in their total populations. Over 1 in 4 residents of California and over 1 in 5 in New York and New Jersey were foreign-born.

The implications for the practice of law in New York, in light of this large influx of immigrants that must consider how to accommodate effectively the needs of the more than 1 in 5 residents who are foreign-born, poses a challenge that is nothing short of formidable.

According to the Office of Minority Health, culture refers to "integrated patterns of human behavior that include the language, thoughts, communications, actions, customs, beliefs, values, and institutions of racial, ethnic, religious, or social groups." And competence "implies having the capacity to function effectively as an individual and an organization within the context of the cultural beliefs, behaviors, and needs presented by consumers and their communities."[2]

Oregon has a codified statute in which cultural competence means "accepting and respecting diversity and differences in a continuous process of self-assessment and reflection on one's personal and organizational perceptions of the dynamics of culture."[3]

Roy Aranda

As noted by the American Psychological Association, multiculturalism is broadly defined to encompass "race, ethnicity, language, sexual orientation, gender, disability, class status, education, religious/spiritual orientation, and other cultural dimensions."[4]

Becoming culturally sensitive and competent is a tall order. The consequences of not evolving into culturally competent attorneys and shedding stereotypes, however, leaves in its wake a trail of disservice to a sizeable population of Hispanic consumers in New York and consumers of other ethnic backgrounds, many of whom navigate turbulent legal waters with little if any assistance and are underrepresented and misunderstood.

Several potential errors may arise. These are driven largely by a lack of awareness of customs, behaviors, verbal and non-verbal communication, and several other factors particular to a given culture.

Further contaminating the field are pervasive stereotypes. For Latinos, for instance, all Hispanics are the same, less educated, less intelligent, less productive, more violent, more criminal, and less worthy of services because they are "illegals." The latter may extend to the offspring of immigrant parents as seen in references to "anchor babies" and efforts to promulgate the passage of Anchor Baby bills. Also worth noting are the consequences of racial profiling and Hispanophobia defined as a discrimination born of fear, distrust, and aversion of Hispanics.

Touro Law Center Associate Dean for Academic Affairs Deborah Waire Post notes an emerging consensus that "cultural competence is a skill and ethical obligation of practitioners."[5] And she describes pluralistic ignorance as erroneous beliefs held by one group about others.

The duty to become culturally competent rests with the attorney, not the client. Failing to don the lens of cultural competence can strain or damage the attorney-client relationship and affect the outcome of a case.

There are models drawing from legal mandates and the ethical standards of other professions that pertain to cultural and diversity-based competence. They are:

- New Jersey enacted a law in 2005 that requires doctors to take cultural competency training to obtain a medical license or renew their licenses. S118-2011 in N.Y. requires cultural awareness and competence training for all medical professionals as part of their licensing requirements. Similar legislation has been proposed or enacted in other states. The trend in the medical profession is for physicians to recognize language and cultural differences in their patients.

- New York State's Office of Mental Health (OMH) Cultural Competence Strategic Plan proposes to promote cultural and linguistic competence in the services provided by that OMH.

- Culturally and Linguistically Appro-priate Services (CLAS) mandates are Federal requirements for all agencies that receive Federal funds. CLAS standards are geared to make the practices of health care providers more culturally and linguistically accessible. There are 14 standards organized by themes: Culturally Competent Care; Language Access Services; and Organizational Supports for Cultural Competence.[6]

- International Human Rights provide a multitude of fundamental human rights and freedoms. The International Covenant on Economic, Social and Cultural Rights was ratified by 132 states including the United States as of September 30, 1995.[7] This gold standard calls for becoming aware of, appreciating, and understanding the culture of different people we come in contact with professionally to safeguard their cultural rights.

- The United Nations approved the Declaration on the Rights of Indigenous Peoples on September 13, 2007.[8] In his treatise, *The Rights of Indians and Tribes, Fourth Edition*, Stephen L. Pevar reports that according to the 2010 Census the total population of Indians and Alaska Natives is approximately 5.3 million.[9] He notes frequent victimization of Indians stemming from racial stereotyping and calls for increased education, dialogue, and heightened sensitivity to combat stereotyping.

Psychologists are required to abide by the 2010 Amendments of the *Ethical Principles of*

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AMERICAN PERSPECTIVES

Justice Above the Law

By Justin A. Giordano

Attorney General Eric Holder was held in contempt of Congress on June 28, 2012. This was the culmination of a lengthy investigation by the U.S. House of Representatives' Committee on Oversight and Government Reform into the "Operation Fast and Furious" gun tracking debacle conducted under the presumed directives of the Justice Department's Bureau of Alcohol, Tobacco, Firearms and Explosives. The agency had engaged in a practice known as "gun-walking," where low-level smugglers were allowed to traffic weapons with the expectation that this would lead to the capture of bigger fish down the line. In essence and in brief, about 1,400 of the 2,000 guns involved went missing. Ultimately two guns were found at the scene of the killing of Brian Terry, a US border agent.

The committee on Oversight and Government Reform chaired by representative Darryl Issa (R-CA) had sought on frequent occasions to have Eric Holder and the Justice Department that he heads turn over the full array of documents that the committee hoped would shed light on the policy, decisions, and the events that ultimately led to the death of Terry. In the course of the debate that led to the contempt vote, Republican representatives who spoke and questioned Holder repeatedly referred to Brian Terry's family wishes seeking the truth surrounding the death of their loved one.

The Oversight and Government Reform committee recommended that Holder be held in contempt of Congress by a vote of 23 to 17 on June 20, 2012 clearing the way for a vote by the full House of Representatives. The vote by the full House resulted in a tally of 255 to 67 in support of holding the attorney general in contempt. The vast majority of the Democratic Party representatives walked out of the chamber in protest prior to the vote being taken. However 17 Democratic representatives joined their Republican colleagues voting overwhelmingly in favor of the contempt resolution.

Holder thus became the first sitting member of a president's cabinet to be held in contempt of Congress. This is not to say that other high-powered office holders and officials haven't also been held in contempt of Congress. In fact the list is relatively extensive and over the past three decades includes former Bush White House Counsel Harriet Miers, Chief of Staff Josh Bolten and Deputy Chief of Staff Karl Rove. These emanated from disputes over documents and testimony related to the investigation into the firing of U.S. attorneys.

Justin A. Giordano

The Clinton White House saw several of its officials held in contempt by congress, including White House Counsel Jack Quinn, as a consequence of the "Travelgate" investigation of the firings of White House travel office employees. Former Clinton Attorney General Janet Reno was held in contempt for failing to turn over documents involved in the investigation of whether the Justice Department failed to investigate or prosecute cases involving Democratic donors. Former Clinton White House Associate Counsel William H. Kennedy III was also found in contempt during the investigation of the Whitewater scandal.

President Reagan's Attorney General William French Smith was held in contempt for refusing to produce documents on an investigation of General Dynamics Corp, while Energy Secretary Charles W. Duncan suffered the same fate for refusing to turn over documents when Congress was conducting an investigation of the imposition of a petroleum import fee.

The above list is certainly not all inclusive but it serves to point out that "contempt of Congress" has been utilized by congresses in the past and from majorities on both sides of the political isle. The difference however bears underscoring and that is that as stated earlier, Attorney General Holder constitutes the first sitting member of a president's cabinet to be held in contempt. In other words those in similar positions from the aforementioned group were no longer officially part of their respective administrations, meaning that they had either resigned, retired or been dismissed.

The Speaker of the House of Representatives, John Boehner, said: "I don't take this matter lightly. I hoped it would never come to this – but no justice department is above the law and the constitution."

This sounds like lofty language and obviously given the competitive and at times outright adversarial political climate, there is no doubt that a political underpinning is integral to that statement. Nevertheless the statement strictly taken at face value is absolutely on target in that no individual or agency or agency head should be above the constitution.

In a case such as this where one of the two chambers of Congress has clearly expressed its conclusion that an individual has violated the law, that individual should at the very least step down from his post. This is particularly true when that individual's position represents the highest legal enforcement office in the nation.

The normal course of events following a contempt of congress resolution is to hand over the case for prosecution to the U.S. District Attorney for the District of Columbia and that office who is required to prosecute the case against the Attorney General. The reality in this however has been that since the U.S. attorney for the District of Columbia is an official within Holder's Department of Justice, the U.S. District Attorney simply decided not to proceed with a case against his own employer and political ally. A case of crass or raw politics at its worst, making the pursuit of justice a travesty and a victim of a partisan prosecutor that places loyalty to its political benefactor above the mandates of the law.

There was also second vote held by the House of Representatives pursuant to this matter. In fact the House passed a "civil contempt" resolution by 258 to 95. However as in the case of the "contempt of Congress" resolution, that too has limited practical implications. This civil contempt motion allows the House to proceed in asking the courts to force General Holder to release the documents at issue. However judges seldom rule to intervene in cases where the president has already invoked executive privilege and that is exactly what the president has done. The latter leads to another question, if as the president has claimed he has not seen the contents of the documents in dispute why is he invoking executive privilege? That may be the subject for a lengthier discussion but it was worth noting given that it bears relevance to the dispute that led to the contempt resolutions.

The Constitution may seem a bit inconvenient in a situation such as this but in fact the intent of the U.S. Constitution was not to have anyone be above the law because of who they were or how high a position they held, nor did it intend the law to be skirted around or bend to meet the requirements of a given party in power. A prosecutor that will not prosecute a duly referred case by Congress is exactly what the framers did not want to occur. It was what the nascent nation was trying to escape, namely what was prevalent in the European nations of that time where no prosecutorial actions would ever be pursued against the monarch, no matter how meritorious. Let us hope that this does not set a precedent that will be emulated on a consistent basis in times to come. If that were to transpire the nation would be embarking on a slow, slippery slope to making a mockery of our constitutional legal system and all it stands for.

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

President's Message (Continued from page 1)

who underwrote the cost of the author's night for the SCBA. The job done by Scott Karson, another Past President of our Bar Association, in introducing Judge Block was outstanding.

It was particularly rewarding to read about the very moving ceremony conducted by the Navy when the destroyer USS Michael Murphy was commissioned in New York in October. As most of us know, Navy Seal Michael Murphy, the son of Daniel Murphy, one of our members, was killed in Afghanistan in 2005, and was awarded the Medal of Honor posthumously in 2007. I am sure that Michael's parents, Maureen and Daniel Murphy, were very proud to participate in the commissioning of the vessel named in their son's honor.

I am asking all of our members to consider joining in a program that is currently being run at the SCBA whereby we have a panel of volunteer attorneys offering their services to our veterans returning from Iraq and Afghanistan on a pro bono basis in such matters as custody, visitation, child support, landlord-tenant disputes and many other difficult areas our veterans face after returning home. A few years ago, the SCBA offered a free CLE program to those of our members who were willing to take on pro bono cases representing these veterans in need. Jane LaCova, the SCBA Executive Director, receives numerous telephone calls each week from our veterans and the panel of volunteer attorneys is severely short-handed to deal with the ever increasing caseload.

To encourage your participation in this program, the SCBA is planning to offer a free three-credit CLE seminar dealing with assisting our returning veterans and I request that all of our members consider attending this seminar and joining our veteran's panel. Having personally taken on a number of these cases, I can tell you that it is a rewarding experience and the returning veterans are very appreciative of our efforts.

In October I attended numerous functions on behalf of the SCBA and wish to congratulate the recipients of the many awards and honors bestowed that includes:

On October 1, the St. John's Distinguished Alumni Dinner at the Irish Coffee Pub honored the Hon. Andrew A. Crecca, a member of the SCBA Board of Directors. Although I am not a St. John's alumnus, I was impressed by the camaraderie shown by those St. John's alumni;

On October 4, my wife and I along with Jane LaCova and her husband, Joey, thoroughly enjoyed ourselves at the Nassau/Suffolk Law Services fund raising function held at the Carltun in Eisenhower Park;

On October 11, Jane LaCova and I were at the Academic Convocation to install Patricia E. Salkin as the 5 Dean of the Touro College Jacob D. Fuchsberg Law Center which was held at the Federal Courthouse in Central Islip. I had previously met personally with Dean Salkin at the SCBA and I look forward to continuing the close relationship between the SCBA and Touro;

On October 12, my wife and I attended the annual Hispanic Society Gala which was held at the Watermill Inn in Hauppauge. As usual, everyone in attendance had a great time and as also is the case each year, the music and dancing was lively and enjoyable;

On October 17, Jane LaCova and I attended a fund raiser for the Suffolk County Coalition Against Domestic Violence at Captain Bill's Restaurant, honoring two SCBA members, Pat Manzo and Gayle Rosenblum.

On October 18, it was my special pleasure to preside at the SCBA's Annual Judiciary Night at Lombardi's on the Bay in Patchogue. I want to personally thank all of the members of our judiciary who attended this event, especially Suffolk County's own, A. Gail Prudenti, the Chief Administrative Judge of the State of New York. I also want to thank each and every one of our members who took time out of their busy schedules and joined me in honoring our fabulous judiciary. This was one of the highlights of my presidency so far; and

On October 24, I had the honor of joining with the Women's Bar Association at a reception to welcome and honor Touro Dean Patricia E. Salkin at the Hamlet Windwatch Golf and Country Club in Hauppauge. As usual, the Women's Bar Association knows how to throw a successful party.

As to the various SCBA projects that I have discussed in my prior columns, be advised: the refurbishing of the Central Islip attorney's lounge and locating additional space for attorney conference rooms at the Central Islip courthouse are in final stages of approval; as of my writing this article, I have no news to report about the 18B program except hopefully that no news about the program running out of funding is good news for our 18B attorneys. The SCBA task force led by 1st Vice President Bill Ferris is staying on top of this subject which has caused great concern to our members in the past.

Congratulations to the Hon. Joan Genchi of the Family Court and the Hon. Madeline Fitzgibbons of the District Court on their recently-announced and well-deserved retirement from the bench at the end of this year. I am looking forward to attending their upcoming retirement parties scheduled for later this month. Their dedication and love for their jobs is well known to the members of our Bar Association.

I especially wish to thank the Hon. Judge C. Randall Hinrichs, our District Administrative Judge, who continues to work closely with our Bar Association in addressing the every day problems faced by our members in the practice of law. His dedication and constant offers to assist our Bar Association is deeply appreciated by me and our Board of Directors, as well as all of our members.

Happy Thanksgiving to all of you and to all of the members of the Armed Forces wherever they may be serving.

Two Attorneys' Whirlwind Tour (Continued from page 1)

hearing about, and learning from, New York's experience with problem-solving courts. I was therefore asked to give remarks and participate in an open discussion and debate about this innovative topic at the University of Strathclyde Law School in Glasgow. Soon our itinerary was planned and everything was booked (at our own expense), and before we knew it, Robert and I were heading out on one of the most amazing trips of our lives.

The adventure began in Aberdeen, where despite torrential rain and wind, I managed to look presentable (and even donned a hat!) for the Queen's visit. I was awestruck by the sheer magnificence of the University's Sir Duncan Rice Library B designed by Danish architects, it was conceived to mark the ice and light of the north, and its stark style and sweeping staircases were somewhat reminiscent of the Guggenheim. My amazement at the library soon gave way to sheer excitement as the Queen arrived. I watched intently as her car pulled up, and saw her small, but impeccably dressed, figure emerge. Unhindered by the rain, she proceeded on her mission with the grace and poise possessed only by one who has attended countless banquets, openings and galas. Wearing a classic suit with turquoise embellishments and a matching hat, the Queen proceeded to greet the eagerly-awaiting guests.

Before I knew it, I was before Her Majesty, who kindly extended her hand to me. I was introduced by the Dean as a distinguished alumnus from the States, the current Chief Administrative Judge of the New York State Court System. Though my precise memories of our brief encounter were clouded by excitement and a sort of out-of-body sensation, it was a truly unforgettable moment. Here was a girl from suburban middle-class roots, whose parents worked tirelessly to ensure that she received an education, and her husband, who stocked shelves to put himself through law school, face to face with the Queen of England. In that moment, I was struck by just how far we had come - two lawyers from Suffolk County who had met in the Suffolk County's Surrogates Court, where I began my career as an intake clerk. Even more so, I was struck by the thought of how being a part of our legal profession can open countless doors to truly amazing opportunities, and how you never really know where a law degree might take you.

Our next stop was Glasgow, where I had the wonderful privilege of sharing New York's tremendous successes with problem-solving courts with our counterparts in Scotland. As I explained the intricacies of our court system and administration, and outlined our various types of problem-solving courts before a crowd of over 200 Scottish judges, government officials and professors, I felt tremendous pride in our court system's extraordinary accomplishments. In less than 20 years, our problem-solving courts have gone from hopeful experiments to mainstream models with far-reaching impacts from reducing crime and aiding victims to promoting public confidence in our justice system. And despite a demanding workload and recent fiscal challenges, our incredibly dedicated and talented judges and court staff throughout the state have demonstrated the strength and resilience of our system, and continue to ensure that the highest quality of justice is delivered to each and every litigant who enters our courts.

It has been an unbelievably rewarding experience to work in our court system for the vast majority of my career. I am extremely grateful to Governor George Pataki for appointing me as the Presiding Justice of the Appellate Division for the Second Judicial Department, where I served for nearly a decade, and to Chief Judge Jonathan Lippman, for my present opportunity to serve as the Chief Administrative Judge of New York, to represent our exceptional court system, and to share our remarkable and inspiring story with people throughout the world.

The incredible opportunities Robert and I had on this trip, along with the many other opportunities both of us have been fortunate enough to have had throughout our careers, would not have been remotely possible without the support of our fantastic families, friends and colleagues - including, of course, County Executive Robert Gaffney, whose appointment of Robert led him to become the longest-serving County Attorney in Suffolk's history, and Robert's current colleagues at Lewis Johs Avallone Aviles, LLP. We will forever be thankful to each and every one of them. My husband and I ended our whirlwind adventure overwhelmed with feelings of gratitude and pride - grateful to have been offered this once-in-a-lifetime opportunity and teeming with pride to be a part of our distinguished legal community. Of course, our greatest honor has been to serve the people of Suffolk County and the State of New York.

Note: Honorable A. Gail Prudenti is the Chief Administrative Judge of the New York State Unified Court System and a member of the SCBA.

Business Arbitration (Continued from page 9)

one day soon find themselves subject to an accessibility inquiry.

The odds of Constitutional challenges to the conduct of arbitrations would seem to increase as corporations seek to steer more lawsuits into the forum. Concurrently, the chances of punitive damages being awarded seem a bit more likely as the mere size of awards ratchets upward. And on notions of fairness and openness, the courts in 2012 contributed new focus, no doubt altering the risk-reward for such substitutes for jury trials. Overall, while handicapping chances in arbitration remains a difficult business, some noteworthy decisions from the last year hint at a possible new set of odds for corporate litigants weighing alternative dispute resolution.

Note: Scott Colesanti an Associate Professor at Hofstra Law School, where he has taught Securities Regulation since 2002. He is a member of the SCBA Commercial and Corporate Law Committee.

1. *See Baravati v. Josephthal, Lyon & Ross, Incorporated*, 28 F.3d 704 (7th Cir. 1994).
2. *See generally* http://whitehouse.gov/wall-streetreform.
3. *See* Jay Eng, *Two Years & Still Waiting…, http://securitiesattorneys.us* (July 16, 2012).
4. *Wilko v. Swan,* 346 U.S. 427 (1953).
5. 9 U.S.C. §10 (West 2006).
6. *Hall Street Associates, L.L.C. v. Mattel, Inc*., 552 U.S. 576 (2008).
7. *Goldman Sachs Execution & Clearing, L.P. v. The Official Unsecured Creditors' Committee of Bayou Group, LLC*, 2012 U.S. App. LEXIS 13531 (2d Cir. July 3, 2012).
8. *See FINRA Arbitration Panel Awards Former Deutche Bank Employee $3.6M*, 44 SRLR 60 (Jan. 9, 2012).
9. *See Court OKs $10.2M Award to Former Merrill Advisers*, 44 SRLR 1775 (Sept. 24, 2012).
10. *See* Jessica Halloway*, Judge Cote Invalidates Mandatory Arbitration Clause in eBooks Antitrust Case* (June 28, 2012*), http://sdnyblog.com*.
11. *See, e.g.,* Steven M. Davidoff, *The Life and Death of Delaware's Arbitration Experiment*, *New York Times* (Aug. 31, 2012).

Pro Bono Requirements for Students (Continued from page 3)

condition of graduation so that perhaps a Touro student would need to acquire only ten additional pro bono hours to satisfy the rule.

The impact of the pro bono requirement on law schools

Touro is one of only two law schools in New York State that require students to complete a pro bono program as a graduation requirement, the other school being Columbia. I am told that nationwide there are only approximately 25 or so law schools with a pro bono requirement for graduation. Tom Maligno, the Executive Director of the Public Advocacy Center and Director of Public Interest at Touro Law Center, advised me that all of the 40 hours pro bono requirements would satisfy 40 hours under the new rule. Doing the math, one can see that in Touro's case, the school would need to add only 10 hours of pro bono work requirements to satisfy the new rule. Schools that do not have major pro bono programs in place, whether mandatory or not, will have some work to do to be in compliance with the new rule.

The new rule is pretty broad in allowing the pro bono requirement to be satisfied in many ways. In addition to what has long been considered pro bono work such as representing an indigent person, say in a landlord tenant matter, or a criminal defendant who cannot afford a lawyer, the rule allows the student to get credit for working in a public agency such as a District Attorney's Office or in the court system.

Historically, many years ago, Touro instituted the pro bono requirement to help address what it saw as a crisis in delivering legal services to those who could not obtain them on their own, whether due to indigence, disability or otherwise. For that reason, the term *public interest* is used at Touro to denote work done on behalf of the poor, disadvantaged, etc. The term *public service* is used to include work done for public agencies described above. Presently, Touro's mandatory pro bono requirement can only be satisfied by work done in the *public interest.* Whether that will change in response to the new rule is yet to be determined as will how Touro will add 10 hours of pro bono work to its curriculum and what type of programs they will be.

Some concerns expressed

There have been some concerns and reservations expressed by some members of the bar, as exemplified by The Pro Bono Admission Task Force Report recently released by the Nassau County Bar Association. Among the concerns expressed are the following:

- that the addition of large numbers of students and the strain on agencies to provide adequate supervision will negatively impact the quality of service;
- that if pro bono service is to be mandated, the requirement should not fall on future law school graduates;
- that students from out of state law schools may be at a disadvantage as there is doubt as to their ability to initiate programs;

It may be that the law schools will undertake the responsibility of placing their students in situations to earn their hours. Touro already does that through its clinics and public advocacy programs. Placing students in private law firms may be problematic due to the time needed to train which would likely count towards the 50 hours. By the time a student is trained he or she will likely leave, meaning there would be minimal benefit to the law firm. There is the additional difficulty in supervising the student especially among small law firms that predominate Long Island. Lawyers still have to earn a living.

There is also the fear from many members of the bar that mandating pro bono service for law students is a harbinger to the mandating of pro bono for admitted attorneys, a proposal that has been stridently opposed by organized bar associations for many years.

My thanks to Larry Raful, Tom Maligno and Lewis Silverman, Director of Externships, Family Law Clinic and Associate Professor of Clinical Law for their input and assistance in the preparation of this article

Because there are several weeks between when articles are submitted to *The Suffolk Lawyer* and when the paper is distributed to our membership by the time you read this new developments may have occurred, so stay tuned.

Note: John L. Buonora is a past president of the Suffolk County Bar Association and the Suffolk County Criminal Bar Association. He is a former Chief Assistant District Attorney and is an Adjunct Professor of Law at Touro Law Center where he teaches the Advanced Criminal Externship Program. John is a member of the Independent Judicial Election Qualification Commission for the Tenth Judicial District. He also sits on the Executive Committee of the Alexander Hamilton Inn of Court.

Bench Briefs (Continued from page 4)

the correct procedural sequence and selected a proper venue, was entitled to their requested relief.

Honorable Arthur G. Pitts

Affidavit submitted in support of defendants' contention that records sought were destroyed due to flooding and no longer existed was woefully in adequate; defendant to provide an affidavit specifying in detail, when the corporate defendant was dissolved, where the corporate records were stored, when the flooding occurred and what, if anything was recovered after the flood.

In *Louis Boisignano v. Sunrise Leasing, Inc., "John Doe," being the fictitious and unknown operator of Sunrise Leasing, Inc.'s commercial vehicle and Curtis Patterson,* Index No.: 28414/10, decided on August 30, 2012, the curt found that the affidavit submitted in support of defendants' contention that records sought were destroyed due to flooding and no longer existed was woefully in adequate. The court noted that on or about September 16, 2011, the plaintiff served a post-EBT notice for discovery and inspection for certain documents and records of the corporate defendant. In response to said demand, plaintiff was provided with an affidavit, which indicated that Sunrise Leasing ceased operation and its records were kept in storage and were destroyed due to flooding and no longer existed. The court found that the affidavit was woefully inadequate and as such, the defendant was directed to provide the plaintiff and co-defendant within 30 days of the order with Notice of Entry, an affidavit specifying in detail, when the corporate defendant was dissolved, where the corporate records were stored, when the flooding occurred and what, if anything was recovered after the flood. Upon receipt of said affidavit, plaintiff and the co-defendant were granted leave, if warranted, to move to strike the defendant's answer on the grounds of spoliation of evidence.

Honorable Peter H. Mayer

Article 78 proceeding converted into a declaratory judgment action; undisputed that the petitioners and their mother, the insured were not members or employees; the graveman of petitioner's claim was a breach of the insurance contract between the parties.

In *Application of Thomas Kirkchhoff and Kevin Kirchhoff, on behalf of Eileen Kirchhoff under durable power of attorney v. Narragansett Bay Insurance Company,* Index No.: 27593/11, decided on November 23, 2011, the court converted the article 78 proceeding into a declaratory judgment action, with the order to show cause deemed a summons, the petition deemed a complaint, issue deemed joined by the answer with counterclaims previously served, and petitioners' reply to counterclaims deemed served. In rendering its decision, the court noted that the proceeding was not cognizable under article 78. CPLR §7802(a) provides a method of relief against a "body or officer" including "every court, tribunal, board, corporation, officer or other person, or aggregation of persons, whose action may be affected by a proceeding under this article." The court further noted that generally, courts have extended article 78 relief against private corporations in rare instances to those petitioners who were members or employees of the respective respondents only. Here, the court stated that it was undisputed that the petitioners and their mother, the insured were not members or employees. In addition, the court said that it was clear that article 78 relief was inappropriate as the graveman of petitioner's claim was a breach of the insurance contract between the parties. Since this matter was in essence, an action for declaratory judgment, it was not authorized under article 78 and was converted into a plenary action.

Motion for default judgment denied without prejudice; absent proof that she complied with CPLR §3215(g)(4)(i), plaintiff failed to demonstrate her entitlement to a default judgment.

In *Francine Nachtigall v. ECA Construction, Inc., E.C.A. & Sons Construction & Services, Inc., Nicholas Arthur Varlotta, R.A., and The Town of Islip,* Index No.: 17298/10, decided on April 12, 2012, plaintiff's motion for an order pursuant to CPLR §3215 for a default judgment against defendants ECA Construction, Inc., and E.C.A. & Sons Construction & Services, Inc. was denied without prejudice. In denying the motion, the court noted that a party seeking a judgment on default was required to submit proof of the service of the summons and complaint, proof of the facts constituting the claim, and proof of the default in answering or appearing. In addition, when service of the summons and complaint had been made pursuant to Business Corporation Law §306, a default judgment may not be granted against a non-appearing corporation without proof of compliance with the additional service requirements of CPLR §3215(g)(4)(i). Pursuant to CPLR §3215(g)(4)(i), a second copy of the summons in the action must be mailed to the named defendant corporation at its last known address at least 20 days before the entry of judgment along with a notice that service was being made or had been made pursuant to BCL §306. Here, the court found that plaintiff only submitted affidavits demonstrating that service was made pursuant to BCL §306. Thus, absent proof that she complied with CPLR §3215(g)(4)(i), plaintiff failed to demonstrate her entitlement to a default judgment against the ECA defendants.

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

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

Human Rights Law Not Applicable

(Continued from page 10)

methods, plaintiffs claimed that aversive interventions have helped many students to participate in activities with peers and helped some to attend college, join the armed forces, obtain employment and go on extended family visits.

The plaintiffs contended that the ban against aversive interventions violates the Individuals with Disabilities Education Act ("IDEA") by preventing their children from receiving truly individualized educational programs. Plaintiffs also claimed that the State's prohibition violates the children's constitutional rights and the Rehabilitation Act of 1973 because the prohibition is arbitrary and oppressive.

The Second Circuit affirmed the dismissal of the plaintiffs' claims and concluded that New York's law represents a considered judgment by the State of New York regarding the education and safety of its children that is consistent with federal education policy and the United States Constitution.

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.

What is Mortgage Securitization Fail (Continued from page 20)

those warranties contained in the PSA made by the originator and/or seller that the loans in the pool are as they are represented in terms of borrower credit quality, loan to value ratio and other aspects of the loans in the pool that determine investment grade rating and ultimately the RMBS's yield.

The certificate-holders have two main claims against the trustees. First, there are numerous "derivative actions" by certificate-holders against trustees. In these actions the investors claim that the trustees failed to enforce the representations and warranties provisions for the mortgage pool.

Second, investors are claiming remuneration on the basis that the trust never took lawful title to the mortgage or the note and/or both. If the trust does not have lawful title to the loan then the trust does not have the right to collect loan payments from borrowers. It also does not have the right to foreclose in the event of borrower default.

In summary, there are really two main promises made by the trustee to the investors; the loans in the trust are completely insulated from outside creditors, and, the trust has lawful title to the loans in the trust. If either of these covenants is broken the RMBS transaction fails. A securitization failure results in the destruction of the trust's value, irretrievable losses to the RMBS investors and litigation that lasts for years.

Securitization failure is also unfixable. An RMBS trust is either lawfully created or it is not. A vast majority of these trusts were improperly created in that they did not take lawful title to the loans that form the corpus of the trust. The trusts are now subject to collateral attack by investors at the trust level and again by borrowers who claim that the trust has no legal authority to collect payment or enforce the loan.

The courts are dealing with an unmanageable foreclosure caseload. Most judges are confronted with a real dilemma. On one hand they have to deny the plaintiff's relief because that entity is not the real party in interest given they do not own the loan. On the other hand, borrowers are being allowed to remain in their homes without making payments. At all times during the litigation a recorded mortgage exists on the home. It is often impossible to determine who or what entity is the proper party that can lawfully enforce the mortgage.

There is no question that the borrowers executed a valid note at closing. What happened to the note and the associated security instrument thereafter is another matter entirely. Due to the complex nature of the RMBS transaction foreclosure some plaintiffs have engaged in conduct that is tantamount to criminal fraud. Loan documents transfers did not conform to state laws or the rules for transfer set forth in the document transfer sections of the trust's PSAs. These deficiencies are unfixable in that fixing these deficiencies in a lawful manner would render a worse result. Reversing an RMBS transaction so that the lawful "owner" of the loan was the entity entitled to enforce is nearly impossible considering the ramifications of taking the loan out of the mortgage backed security.

Faced with this no-win situation, foreclosure plaintiffs have essentially crafted the necessary loan transfer documents after the fact to recreate a lawful chain of possession of the note and lawful chain of title to the mortgage. To be kind it can be said that plaintiffs have "finessed" evidence to support their claim to lawful ownership of their loans. Hundreds of depositions have been taken of mortgage industry participants where they admit that their processes and procedures in foreclosure include the fabrication of mortgage transfer documents. In some instances these abuses are documented and admitted to in pleadings. It is impossible to ignore these facts, sworn to under oath, and made part of the record in hundreds if not thousands of foreclosure and derivative action cases.

Provided with the complete document transfer file, the practitioner who is familiar with securitized mortgage transactions can spot flawed and unlawful document transfers in a matter of moments. Robosigned mortgage documents are just the tip of the iceberg. There is a string of review-level decisions in New York that identify deficiencies in the chain of contractual and statutory authority that render these document transfers unlawful.[4] Other jurisdictions have identified these exact issues and ruled accordingly.[5] Many instances where plaintiffs have been caught red-handed never make it to the review level. These cases are usually settled to reduce the lender's exposure.

The solution to this problem lies within the judiciary. Both practitioners and the judiciary should understand that securitization fail is a tool to be used to force settlement. Foreclosure plaintiffs and defendants are in stalemate. Courts must force lenders to re-make their loans with terms that are consistent with today's interest rates and real estate values. Likewise, borrowers are going to have to make payments on these court-ordered modified mortgages to remain in their home. The current course is unsustainable.

Note: Charles Wallshein is a member of the law firm Macco & Stern LLP in Melville. His practice areas focus solely on real property and foreclosure defense litigation. Charles has an extensive background in commercial and residential structured finance. He is a member of the New York Bar, New York State Bar Business Law Section, and the Suffolk and Nassau Bar Associations.

1. This essay deals with the Residential Mortgage Backed Security (RMBS).
2. REMICS are distinguished from Fannie Mae, Freddie Mac and Ginnie Mae RMBS. In FNMA, FHLMC & GNMA, RMBS the tranche structure is different and that Fannie and Freddie are government sponsored entities (GSEs). However, to a large degree the same principles of document transfer rules apply.
3. In a private-label RMBS, certificate-holders purchase "tranched" certificates. The different tranches represent a certain interest-yield and risk rating. The lower yielding tranches contain less risk and conversely the higher yield tranches contain more risk. The order of the risk and yield tranches is referred to as the "waterfall".
4. The "party who claims to be the agent of another bears the burden of proving the agency relationship by a preponderance of the evidence"; *HSBC Bank USA, N.A. v Yeasmin*, 27 Misc 3d 1227[A], 2010 NY Slip Op 50927[U] [2010]; *HSBC Bank USA, N.A. v Vasquez*, 24 Misc 3d 1239[A], 2009 NY Slip Op 51814[U] [2009]; *Bank of N.Y. v Trezza*, 14 Misc 3d 1201[A], 2006 NY Slip Op 52367[U] [2006]; *LaSalle Bank Natl. Assn. v Lamy*, 12 Misc 3d{86 AD3d at 282} 1191[A], 2006 NY Slip Op 51534[U] [2006]. Plaintiff's attempt to foreclose upon a mortgage in which he had no legal or equitable interest was without foundation in law or fact, and the IAS court's dismissal of the foreclosure action pursuant to CPLR 3211(a)(1) was, accordingly, appropriate (*see, Kluge v. Fugazy,* 145 A.D.2d 537, 536 N.Y.S.2d 92).
5. *Bain v. Metropolitan Mortgage*, Washington State Supreme Court (August 2012), *U.S. Bank v. Ibanez*, Supreme Judicial Court Massachusetts, 2011.

Managed Medicaid (Continued from page 22)

everything – from feeding to grooming to toileting to transferring. She requires a lift in order to use the bathroom, a process which alone takes 30 minutes. She cannot feed herself or even drink. Someone must prop her up and assist her with eating and drinking in order to avoid aspiration pneumonia, a deadly condition. Her condition causes her to choke when eating and drinking and she is unable to cough due to a loss of muscle control. As such, an aid must manually manipulate her diaphragm to force her body to cough so that she does not choke to death. As she is entirely immobile, Mary must be turned every hour to avoid bed sores and to relieve the severe pain she suffers from being in one place too long.

Mary has received 12x2 split-shift care seven days per week from the Medicaid program for the past 17 years. Despite her extensive needs and deteriorating condition, the Medicaid Managed Care plan determined that she no longer needed this level of care and sought to reduce her hours to 24 hour sleep in services, effectively cutting her care back to a maximum of 13 hours per day. The notice provided to Mary stated the grounds as follows: "You can be more appropriately and cost-effectively served through sleep in services because your nighttime needs including toileting and transfer are infrequent and predictable. Thus, continuous 24-hour personal care services are not medically necessary to maintain you healthy and safe within the community [sic]."

Mary is one of hundreds of individuals who have received such a notice from the Medicaid agency advising of a reduction in hours. Many people will not fight these reductions as they do not know what options are available to them or they simply feel overwhelmed and powerless. We often hear the very realistic fear that challenging a reduction in hours will force the recipient into a nursing home.

In Mary's case, we fought the battle. A Fair Hearing was requested with Aid Continuing and Mary was able to keep her split-shift care in place while the matter was pending. We did extensive research on the new programs and new agencies providing care under the new Managed Medicaid model. We learned that, as different agencies have different reimbursement rates, certain agencies can provide higher levels of care than others. We were able, without even attending a Fair Hearing, to transfer Mary's case to a more appropriate Managed Care provider and keep her with her split-shift care. Mary was able to remain at home with her young children and the care she so desperately needs.

Forcing individuals into skilled nursing facilities is not only against public policy but is a great injustice to those elderly and disabled individuals whose only wish is to remain at home. In reality, although reducing Home Care hours for those in need of the care may lower New York State's Medicaid budget, forcing people into skilled nursing facilities will ultimately – and dramatically - increase Medicaid costs.

Note: Melissa Negrin-Wiener is a partner and Diana Choy Shan an associate in the Elder Law firm Genser Dubow Genser & Cona, LLP, located in Melville. They practice exclusively in the field of Elder Law, including asset protection planning, Medicaid planning, representation at Fair Hearings and Article 78 proceedings, estate planning, trust and estate administration, guardianships and estate litigation. For further information, phone (631) 390-5000 or visit www.genserlaw.com.

Track Was Prologue (Continued from page 22)

reader isn't the principal, he nonetheless becomes a minor stockholder in the outrage, in the wish for revenge. For long years this wish governed a repatriated Zamperini's waking hours. His sleep was typically induced by alcohol and fraught with nightmares, in one of which he was strangling "The Bird," his fingertips penetrating improbably soft flesh; when he awoke to screams, he saw his weeping wife, her neck speckled with angry red dots, incipient bruises.

His oppressor had his own nightmares. With the bombing of Hiroshima, "The Bird" took flight. He abandoned his post, shed his uniform, and, quite literally, headed for the hills. The post-war manhunt for him as a war criminal meant that he was always looking over his shoulder, that is to say, always looking backward.

For Zamperini, his post-war life ultimately was one of looking forward, a true survival. Touched by the words of evangelist Billy Graham, "God says, 'If you suffer, I'll give you the grace to go forward,'" Zamperini became a student of the Bible, and was driven by its admonitions, most significantly by that one set forth in Romans 12:19: "Vengeance is mine; I will repay, saith the Lord." Zamperini forswore alcohol, and came to understand the need to forswear vengeance, whose paradox, states Hillenbrand,

> "…is that it makes men dependent upon those who have harmed them…In seeking 'The Bird's death to free himself, Louie had chained himself, once again, to his tyrant."

Finally unchained, Zamperini made a lasting success of his marriage to Cynthia Applewhite, he begat two children, Cissy and Luke, who grew to adore him, founded the nonprofit Victory Boys Camp, a project supported by a number of businesses, a project which showcased an old man as a physical exemplar to young men. In his 80s and 90s he taught them to skateboard, to ski, to rappel down sheer cliff faces.

On 22 January 1998, at the Tokyo Winter Olympics, Zamperini ran with the Olympic torch held aloft. En route to the stadium,

> "All he could see, in every direction, were smiling Japanese faces…civilians snapping photographs, clapping, waving, cheering Louie on, and 120 Japanese soldiers, formed into two columns, parting to let him pass. Louie ran through the place where cages once held him, where a black-eyed man had crawled inside him. But the cages were long gone, and so was "The Bird." There was no trace of them here among the voices, the falling snow, and the old and joyful man, running."

So ends an outstanding book, one which can still be savored by its subject. As of this writing, a 95-year-old Louie Zamperini remains youthful, vigorous, and, as ever, unbroken.

Note: William E. McSweeney, a member of the SCBA, lives in Sayville. Fifty pounds ago, he was a member of the Sewanhaka High School two-mile relay team that won its event in the South Shore Athletic League Championships of 1957. A higher moment in his life occurred with the birth of his grandson, Ryan Bergen.

Note: Ryan Bergen, a 10th grader in high school, is a starter on the Varsity Wrestling Team. In 2011 he placed third in his weight division in The Suffolk County Wrestling Championships. An essay he submitted in his Honors English Class, entitled "The 1936 Nazi Olympics," an essay marked by clear thinking and excellent writing, kick-started this joint review.

A Dog By Any Other Breed (Continued from page15)

Law Article 7, Section 107 (5), to avoid regulating dogs in accordance specifically by their breed is echoed by New York State case law, which provides that there is no judicial notice of viciousness based on breed or the alleged vicious nature or vicious propensities of pit bulls terriers. *Carter v. Metro N. Associates*, 255 A.D.2d 251, 680 N.Y.S.2d 239 (1998). A dog's breed can be considered as a factor, but is only one factor among many. *Mulhern v. Chai Mgmt.,* 309 A.D.2d 995, 996, 765 N.Y.S.2d 694 (2003). Knowledge of vicious propensities may be established by evidence of prior acts of a similar kind of which the owner had notice. *Benoit v. Troy & Lansingburgh R.R. Co.*, 154 N.Y. 223, 225, 48 N.E. 524 (1897). Evidence that the dog has been known to growl, snap or bare its teeth may also considered by the court. *Collier v. Zambito,* 1 N.Y.3d 444, 446-47, 807 N.E.2d 254, 256 (2004), *See also, Bard v. Jahnke*, 6 N.Y.3d 592, 597, 815 N.Y.S.2d 16, 848 N.E.2d 463 (2006). Also of relevance to the court in determining if the owner had knowledge of the dog's vicious propensities, and which may give rise to such an inference, is whether or not the owner chose to restrain the dog, the manner in which the dog was restrained, and whether the dog was kept as a guard dog. *Hahnke v. Friederich*, 140 N.Y. 224, 226, 35 N.E. 487 (1893), *Collier v. Zambito,* 1 N.Y.3d 444, 446-47, 807 N.E.2d 254, 256 (2004), *See also, Bard v. Jahnke,* 6 N.Y.3d 592, 597, 815 N.Y.S.2d 16, 848 N.E.2d 463 (2006).

Unfortunately, this has not stopped some New York Municipalities from drafting and even passing "breed specific laws" when no one is watching or when the attorney drafting the proposed law and even more so the residents effected by the proposed law are unaware of Agriculture and Markets Law Article 7, Section 107 (5) . For example, right here on Long Island, The Village of Hempstead Code Chapter 57, Article III, §57-13. (C)defines American Staffordshire terriers or pit bulls as vicious and includes any dogs wholly or partly of the breeds known as American Staffordshire terrier, American pit bull terrier, bull terrier and Staffordshire bull terrier.

The Village of Larchmont, Chapter 97, Article IV Section 97-21, goes even further and places a complete ban on pit bulls other than those already owned at the time of the passing of the law. For those unfortunate residents that dare to keep their beloved companion (although it may have never harmed a fly), the owner is subject to a myriad of requirements that range from the ridiculous to the outright bizarre, including but not limited to, being required to obtain a $500,000.00 liability policy; to lock the animal up in a pen when outside; post a sign warning the public of the presence of the dog; muzzle the dog when off its property; (and my all time favorite) a person controlling or walking a pit bull terrier shall not relinquish physical control of the leash and shall have in his possession at all times an implement designed for and capable of prying open the animal's jaws. [Emphasis added] Violators are subject to 6 months jail time or 1,000 fine or both. You really cannot make this stuff up!

There are numerous reasons why breed specific laws do not work and actually wind up hurting animals, the people who love them, and our society at large. A few reasons are as follows; breed specific laws discriminate indiscriminately. In other words, they punish the good along with the bad without any basis or distinction. Dogs that have always been devoted companion animals, and may have never hurt anyone, as well as their responsible law abiding owners, are punished as severely as dogs that have been allowed to become vicious and their negligent irresponsible owners. Breed specific laws punish entire breeds of dogs and their owners, rather than examining the real factors surrounding a specific incident; looking at the actual behavior of the individual dog (and attempting to possibly rehabilitate the dog with proper training); and fails to punish the inaction or irresponsibility of the "individual" owner and thus control and reduce the possibility of future incidents.

Another problem with attempting to place restrictions on a particular breed of dog, for instance the so called pit bull, is that there is no breed designation or AKC acknowledged breed known as the pit bull. The term or classification known as pit bull is a general classification of similar types of breeds of dogs that include several different types of terriers, including the most well known American Staffordshire Terrier, the Bull Terrier, and the Staffordshire Pit Bull Terrier. If there is no AKC recognized breed known as 'pit bull' than laws that attempt to regulate them are meaningless.

Even veterinarians and other experts have difficulty determining whether a particular dog belongs to a particular breed and experts can even disagree among themselves. One method of trying to determine a dog's breed is by subjecting the dog to a DNA test, which currently can be in the form of a cheek swab test or a blood test. These tests can be costly and time consuming, but more importantly, the accuracy among different test manufacturers can vary, and not all tests test for the same number of breeds. The only accurate way to determine a dog's breed is to examine its heredity. This is extremely time consuming, and is impossible if the entire breeding line is not known.

Breed specific laws which target individuals that own a specific breed of dog and automatically deem a dog vicious or dangerous simply based on its breed, without any type of hearing, rob individuals of their due process rights. Moreover, as visually based breed identification is virtually impossible, especially in determining if a mixed breed dog has one of the outlawed breeds within its mixture, any visually based determination of breed made by an animal control officer, or other municipal agent enforcing a breed specific law automatically becomes vague and subjective, leading to arbitrary and discriminatory enforcement. Thus all breed specific laws that use visual identification as a method of determining breed and enforcing the law, are by their very nature, substantively and procedurally defective. Well, then again, maybe a pit bull is like hard-core pornography and the legislature just knows it when they see it!

Rather than instituting breed specific laws that are neither constitutional nor effective, the better way to control dangerous dogs and hold irresponsible owners accountable, is through New York's already existing Dangerous Dog Law under the Agriculture and Markets Law §123. The State Dangerous Dog Law looks at cases on an individual basis, is not breed specific, and adequately provides protection for human, domesticated and companion animal victims. It also provides safeguards to protect the human defendant's due process rights and in turn the accused animal. Agriculture and Markets Law §123 also provides judges with sufficient alternatives to permanent confinement or as a last resort euthanization. The law also lists instances where a dog shall not be declared dangerous if the dog's conduct was justified. See, Agriculture & Markets Law §123 (4). Other effective methods of controlling dangerous dogs, are through the establishment and enforcement of local leash laws, and more importantly, educating the public.

The bottom line is that breed specific laws are not only unfair to both innocent well behaved dogs and the people who love them, but more importantly, they are completely ineffective at reducing the number of dog attacks. The reality is that any dog can choose to inflict injury at any time regardless of its breed, taking into consideration the number of interactions that humans have with dogs of all types of breeds, on a daily basis, all across the nation, it is a testament to the overwhelmingly good nature of the family dog, and the special bond that dogs have with their human companions, that they choose not to.

Note: Amy Chaitoff is a solo practitioner with a practice in Bayport who 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 past co-chair of the Suffolk County Bar Association's Animal Law Committee. Ms. Chaitoff has written numerous articles as well as lectured extensively on animal related legal issues. She can be reached at: (631) 265-0155 or amy@chaitofflaw.com.

Judge Fitzgibbons Retiring (Continued from page 7)

judge has performed not as a supervisor overseeing subordinates but as a team member addressing issues and filling voids as the arise. On a typical day in the morning she may hear "Kendra" hearings and in the afternoon arraignments, always using her versatility like a utility infielder, applying her skills where they are needed the most at any particular time. She has continuously sought to make our system more approachable, always with her eye on the needs of "the people."

Having had the pleasure of working for her since 1998 I can recall many times, often in our Drug Court, where she would put her hand to her head and plead with the defendants to "THINK."

Many did.

When we spoke, Judge Fitzgibbon remarked how, when she graduated with her Baccalaureate degree in education from St. John's University and landed her first job as a first grade teacher in Hauppauge that she never dreamed of the life that would be laid out before her. I suppose we could say that her influence on the District Court all began in 1978 when she spoke with her husband Jerry Fitzgibbon, a sergeant in the Suffolk County Police Department, about returning to St. John's to attend Law School. She entered the accelerated program and was granted her Juris Doctor Degree in 1982.

I had to ask the judge what she found most challenging as Supervising Judge. She sadly remarked that the constraints of government office and the limits to address inefficiencies that are part of "the system." She made it very clear that the District Court does not exist in a vacuum (something that all of us who work here are reminded of on a daily basis) and that the coordination between the courts, police, probation and sheriff's department is a monumental task. She lamented about the constant difficulty in finding adequate funding for Legal Aid and in her classic style empathized with the disadvantaged in our midst and our inability to "do more."

When Judge Fitzgibbon retires at the end of the year I will hold many personal memories of her- the time that she helped me find a supply of clothing for released prisoners in the Winter; being called to her office to explain the lack of prisoner production on a particular day or just the regular inquiry about the health and welfare of our officers in my command.

Upon retirement Judge Fitzgibbon will hang up her robe but will not end her commitment to public service. She plans on working with her parish church and to continue her activities with ZONTA, an organization addressing women's and children's issues. She has been active in the organization since 1983. She will spend more time with her husband Henry (Hank) Dolny and her nine grand children (plus one on the way).

Farewell Judge Fitzgibbon, we will all miss you and wish you a long and healthy retirement.

Court Notes (Continued from page 8)

the report. The charges against the respondent alleged, *inter alia*, that he falsely notarized documents and submitting them or causing them to be submitted to the Nassau County Court and Nassau County Clerk. Based on the record, the court granted the Grievance Committee's motion. In assessing the appropriate measure of discipline, the court noted the respondent's prior disciplinary history consisting of two letters of admonition and three letters of caution. However, the respondent also submitted numerous letters reflecting on his good work in the community, and a certificate for a course entitled "Business Skills for attorneys." Accordingly, under the totality of circumstances, the respondent was censured for his misconduct.

Attorneys Suspended:

Christopher P. Hummel: Application by the Grievance Committee to impose reciprocal discipline. By order of the Supreme Court of the State of New Jersey, the respondent was temporarily suspended from the practice of law in that state until further order of the court. A notice was served on the respondent giving him the opportunity to file a verified defense to the suspension, within a time certain. The respondent failed to do so. Accordingly, the motion by the Grievance Committee was granted, and the respondent was suspended from the practice of law in the State of New York.

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

SUFFOLK ACADEMY OF LAW

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LATE FALL CLE

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

REAL TIME WEBCASTS: Many programs are available as both in-person seminars and as real-time webcasts. To determine if a program will be webcast, please check the calendar on the SCBA website (www.scba.org)**.**

RECORDINGS: Most programs are recorded and are available, after the fact, as on-line video replays and as DVD or audio CD recordings.

ACCREDITATION FOR MCLE:
The Suffolk Academy of Law has been certified by the New York State Continuing Legal Education Board as an accredited provider of continuing legal education in the State of New York. Thus, Academy courses are presumptively approved as meeting the OCA's MCLE requirements.

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

NOTES:

Program Locations: Most, but not all, programs are held at the SCBA Center; be sure to check listings for locations and times.

Tuition & Registration: Tuition prices listed in the registration form are for ***discounted pre-registration.*** **At-door registrations entail higher fees.** You may pre-register for classes by returning the registration coupon with your payment.

Refunds: Refund requests must be received 48 hours in advance.

Non SCBA Member Attorneys: Tuition prices are discounted for SCBA members. If you attend a course at non-member rates and join the Suffolk County Bar Association within 30 days, you may apply the tuition differential you paid to your SCBA membership dues.

Americans with Disabilities Act: If you plan to attend a program and need assistance related to a disability provided for under the ADA,, please let us know.

Disclaimer: Speakers and topics are subject to change without notice. The Suffolk Academy of Law is not liable for errors or omissions in this publicity information.

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

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

INQUIRIES: 631-234-5588.

UPDATES

ANNUAL DMV UPDATE

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

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

Presented in Conjunction with the SCBA District Court Committee

LANDLORD-TENANT PRACTICE UPDATE

Tuesday, November 13, 2012

Recent changes in landlord-tenant law and their impact on matters involving both residential and commercial properties will be covered. Hon. Stephen Ukeiley generously donated copies of his book, *The Bench Guide to Landlord & Tenant Disputes in New York,* to the Academy, a 501c-3 organization; the book may be purchased from the Academy at the discounted price of $25 for as long as the supply lasts. Purchasers may have their copies signed by Judge Ukeiley prior to the program.
Presenters: **Hon. Stephen Ukeiley** (Suffolk District Court); **Hon. Scott Fairgrieve** (Nassau District Court); **Victor Ambrose, Esq.** (Nassau-Suffolk Law Services); **Warren Berger, Esq.; Marissa Luchs Kindler, Esq.** (Nassau-Suffolk Law Services); **Michael McCarthy, Esq.; Patrick McCormick, Esq.** (Campolo, Middleton & McCormick, LLP); **Deputy Sheriff Sargent David Sheehan** (Suffolk County Sheriff's Dept.)
Coordinator: **Hon. Stephen Ukeiley** (Academy Advisory Committee)
Time: 6:00 – 9:00 p.m. **Location:** SCBA Center – Hauppaugel **Refreshments:** Light supper
MCLE: 3 Hours (professional practice)

ANNUAL FAMILY COURT UPDATE

Part One: Wednesday, November 28, 2012
Part Two: Wednesday, December 5, 2012

All the latest developments affecting Family Court practice will be covered by an expert faculty in this two-part presentation.
Coordinators: **Hon. John Kelly; Hon. Isabel Buse; Hon. John Raimondi**
Time: 6:00 – 9:00 p.m. **Location:** SCBA Center – Hauppaugel **Refreshments:** Light supper
MCLE: 6 Hours (4 professional practice; 2 ethics)

ANNUAL REAL PROPERTY UPDATE

Thursday, November 29, 2012

This is a must-attend program for lawyers who handle residential or commercial real estate transactions, landlord-tenant disputes, zoning and land-use matters, and the like.
Presenter: **Scott E. Mollen, Esq.** (Herrick, Feinstein, LLP – NYC)
Coordinator: Gerard McCreight, Esq. (Academy Officer)
Time: 6:00 – 9:00 p.m. **Location:** SCBA Center – Hauppaugel **Refreshments:** Light supper
MCLE: 3 Hours (professional practice)

SEMINARS

Evening Seminar

CHOOSING A TRUSTEE & RELATED TOPICS

Thursday, November 1,2012

This program will provide attorneys with valuable strategies for counseling families on managing and sustaining monetary and other potential estate assets. Topics include:
• How to Choose a Trustee (potential candidates; trustee qualities; trust objectives, etc.)
• Fiduciary Liability (Prudent Investor Act; standards of conduct; investment strategies, etc.)
• Family & Wealth Sustainability (wealth trends; defining wealth; family dynamics; children and philanthropy, etc.)
Presenters: **Charles J. Ogeka, Esq.** (Ogeka Associates, LLC); **Kevin H. Rogers** (BNY Mellon Wealth Management) **David J. DePinto, Esq.** (Of Counsel–Lazer Aptheker Rosella & Yedid, PC)
Coordinator: Eileen Coen Cacioppo, Esq. (Academy Curriculum Co-Chair)
Appreciation for Underwriting Support: **BNY Mellon Wealth Management** (Daniel Shaughnessy, Senior Director)
Time: 6:00–9:00 p.m. (Sign-in from 5:30) Location: SCBA Center **Refreshments:** Light supper
MCLE: 3 credits (2.5 professional practice; 0.5 ethics)

Lunch 'n Learn

EXPLORING LITIGATION SOLUTIONS

Friday, November 2, 2012

This low-cost ($10) or FREE (without credit) lunch program will show you how to use **Westlaw Litigator Tools** to build your case. You will learn to organize, analyze, store, communicate, and collaborate on the law, information, and documents generated by a typical case. The program is taught by two attorneys from Thomson Reuters, who are certified CLE instructors and will share valuable tips and tricks.
Presenters: **Greg MacFarlane, Esq.** and **Alison Brady, Esq.** (Certified CLE Instructors–Thomson Reuters)
Coordinator: Marc Savoy, Esq.

Lunch 'n Learn

E-Discovery: RECENT DEVELOPMENTS IN LAW & TECHNOLOGY RELATED TO PREDICTIVE CODING

Monday, November 5, 2012

Predictive coding takes electronic-discovery to a new level. It is a method whereby a human identifies whether or not a random selection of documents are responsive to an e-discovery demand; the computer program then takes these responses, "learns" what to search, and gives each document a "relevance score." The end result is the identification of the documents that need to be produced. This seminar will shed light on the use of predictive coding, which has been adopted as an acceptable method of obtaining ESI (electronically stored information), and examine the ground-breaking decision by Judge Peck in *Monique Da Silva Moore v. Publicis Groupe*.
Presenters: **Experts from DOAR Litigation Consulting**
Glenn P. Warmuth, Esq. (Stim & Warmuth, PC)
Coordinator: **Glenn P. Warmuth, Esq.** (Academy Officer)
Appreciation for Underwriting Support: **Doar Litigation Consulting**
Time: 12:30–2:10 p.m. (Sign-in from noon) Location: SCBA Center **Refreshments:** Lunch
MCLE: 2 credits (professional practice)

Lunch 'n Learn

Presented in Conjunction with the SCBA Immigration Law Committee & the Long Island Hispanic Bar Association

HELPING OUR IMMIGRANT YOUTH: DACA; Views from the Bench on Guardianship & Special Immigrant Juvenile Status

Thursday, November 8, 2012

This program will explore two important areas of law related to immigrant youth: Deferred Action for Childhood Arrival (DACA), which aims to benefit many young immigrants brought to the United States as children; and the Special Immigrant Juvenile (SIJ) program, which helps immigrant children who have been abused, abandoned or neglected by one or both parents to obtain legal permanent residence. After this seminar, you will:
• Be able to determine if a young immigrant qualifies for DACA and submit an application for DACA to USCIS with required evidence
• Have the information you need to submit a petition for Guardianship for Immigrant Youth and bring a Motion for "Special Findings" in Family Court
• Know the requirements to submit the SIJ application and take steps to help the immigrant juvenile to receive legal permanent residence
Presenters: **Victoria Campos, Esq.** (Huntington Station and Bay Shore; Chair–SCBA Immigration Law Committee); **Chartrisse Adlam, Esq.** (Hempstead; Former Chief Counsel for DHS); **Hon. John Kelly** (Suffolk County Family Court);
Coordinator: Aniella Russo, Esq. (Afran & Russo, PC)
Time: 12:30–2:10 p.m. (Sign-in from noon) Location: SCBA Center **Refreshments:** Lunch
MCLE: 2 credits (professional practice)

Half Day Seminar
Presented in Conjunction with the New York State Bar Association's Lawyer Assistance Program

LAWYERS HELPING LAWYERS: Volunteer Training

Friday, November 16,2012

Developed for ALL lawyers, this program will provide vital information on how to recognize problems and help themselves, colleagues, family members, and clients who may be suffering from addiction, depression, or other mental health issues. Participants will learn about the challenges facing the profession today, life changing skills, and how to intervene and support those in need. Ethical implications surrounding the duty to report will also be discussed. Topics include:
• Dealing with Stress through Meditation (Maureen Kessler, Esq.)
• Necessary Skill Set: Getting to the Real Issues & Providing Effective Assistance (Patricia Spataro–Director, NYSBA Lawyer Assistance Program; Henry Kruman, Esq.–Chair, NYSBA Lawyer Assistance Committee)
• Gambling: Chasing Losses (Peter Schweitzer, Case Manager; Rep of SCBA Lawyer's Assistance Committee)
• Vicarious Trauma and Burnout in the Legal Profession (Patricia Spataro)
• Depression & Suicide: Prevention, Intervention & Treatment (Stephanie Arcella–Development Consultant, David Nee Foundation; Rosemarie Bruno, Esq.–NYSBA & SCBA Lawyer Assistance Committees)
• Substance Abuse & Addiction: Prevention, Intervention & Treatment (Ellen Travis–Director, NYC Bar Association's Lawyer Assistance Program; Arthur Olmstead, Esq.–NYSBA & SCBA Lawyer Assistance Committees)
• Ethical Considerations, including the Responsibility to Intervene (Deborah Scalise, Esq.)
Coordinator: Sheryl Randazzo, Esq. (Past SCBA President)
Time: 10:00 a.m.–4:00 p.m. (Sign-in from 9:30 a.m.) Location: SCBA Center **Refreshments:** Continental Breakfast and Lunch

SUFFOLK ACADEMY OF LAW

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MCLE: 5 credits (3 law practice management; 2 ethics)

Six Hour CLE Presented in Two-Parts

WHO'S BEHIND THE CURTAIN? – Advanced Standing Issues in Securitized Mortgage Foreclosure

Monday, November 19,2012, and
Monday, January 14, 2013

Recent discoveries regarding the foreclosure process indicate severe abuses of the legal system and the land record recording system. This course will provide a theoretical and practical understanding of the RMBS (Residential Mortgage Backed Security) transaction and explain the contractual interrelationships between and among the parties to the transaction. The course will also explain how and why the RMBS transaction calls plaintiff's standing into question in RMBS foreclosures. The complexity of the RMBS transaction is created by the confluence of securities law, tax law, bankruptcy law, real property law, contract law, agency law, and trust law such that the party claiming an interest in a loan's cash flow may have no legal standing to enforce the promissory note contract in a foreclosure against the person who actually borrowed the money. Topics include:

- A Brief Introduction to Structured Finance
- What Is a Securitized Mortgage Transaction?
- Document Flow in a REMIC ((Real Estate Mortgage Investment Conduit) Transaction
- Document Flow in a GSE (Government Sponsored Entity) Transaction
- The Polling and Servicing Agreement
- Recordable & Possessory Interests in the Loan
- Statutory and Case Law Requirements for Foreclosing a Mortgage in New York

Faculty: **Hon. Jeffrey Arlen Spinner** (Suffolk)**; Hon. Dana Winslow** (Nassau)**; Hon. Arthur Schack** (Kings)**; Hon. Peter Mayer** (Suffolk)**;Charles Wallshein, Esq.** (Macco & Stern)
Coordinator: **Richard Stern, Esq.** (Macco & Stern)
Appreciation for Underwriting Support: **Title Resources Guaranty Company**
Time: 6:00–9:00 p.m. (Sign-in from 5:30 a.m.) each evening **Location:** SCBA Center **Refreshments:** Light supper
MCLE: 6 credits (4 professional practice; 2 ethics)

Evening Seminar at the Nassau Bar
Presented with the Nassau Academy and the
Bankruptcy Law Section of the Federal Bar Association

THE NATIONAL MORTGAGE SETTLEMENT AND BANKRUPTCY

Wednesday, November 28, 2012

This program will address the $25 Billion National Mortgage Settlement, the largest joint federal and state civil settlement ever. The settlement, which makes available monetary and other types of relief for borrowers, involved the United States Department of Justice, various federal agencies, the attorneys general of 49 states, and the nation's five largest banking institutions. You will learn about:

- the relief available to borrowers in a bankruptcy proceeding
- the continuing obligations and servicing requirements that this settlement imposes on mortgage service providers

Presenters: **Kenneth M. Abell** (United States Attorney's Office); **Guy A. Van Baalen, Esq.** (Assistant U.S. Trustee for the Northern District of New York); **Christine H. Black, Esq.** (Assistant U.S. Trustee for the Eastern District of New York); **Tracy Hope Davis, Esq.** (United States Trustee, Region 2); **Burton T. Ryan** (United States Attorney's Office)
Moderator: **Hon. Alan S. Trust** (United States Bankruptcy Judge, Eastern District of New York)
Suffolk Liaison: **Richard Stern, Esq.** (Past Academy Dean)
Time: 6:00–8:00 p.m. (Sign-in from 5:30 a.m.) Location: Nassau Bar (15th & West Streets–Mineola)
MCLE: 2 credits (professional practice)

Morning Seminar

IRA GUIDE TO IRS AUDIT ISSUES

Friday, November 30, 2012

This program will address mistakes made by IRA account holders from an IRS compliance point of view. Noncompliance comes primarily from taxpayers who make excess contributions to IRA accounts and from those who fail to receive timely required minimum distributions. The IRS plans to expand its examination program involving IRA account holders, and a violation of the rules can result in significant tax sanctions and penalties. Program topics include:

- Excess contributions to IRAs
- Excess contribution penalties
- Required minimum distribution penalties
- Statute of limitations on IRA penalties
- IRA trust issues
- Waiver of required minimum distribution penalties
- Personal liability of fiduciary for tax debts
- Much more. . . .

Presenter: **Seymour Goldberg, CPA, MBA, JD** (Goldberg & Goldberg, PC)
Coordinator: **Eileen Coen Cacioppo, Esq.** (Curriculum Co-Chair)
Time: 9:00–11:45 a.m. (Sign-in from 5:30 a.m.) Location: SCBA Center Refreshments: Light breakfast
MCLE: 3 credits (professional practice)

Afternoon Seminar

EFFECTIVE DEPOSITIONS

Friday, November 30, 2012

The deposition is an important component of civil litigation and often evolves into a key evidentiary document. This program, presented by a highly skilled faculty, will utilize both lectures and demonstrations to impart strategies for deposing witnesses (lay and expert), for gaining the information you need, and for using a deposition at trial. Topics will include:

- Discussion and demonstration of a lay witness in a personal injury case
- Discussion and demonstration of an expert in a medical malpractice case
- Use of video depositions
- How the rules of civility apply
- Determining the questions to be asked at a deposition
- Initial and follow-up questions
- The role of relevance and hearsay at a deposition
- Objecting at a deposition
- When to call the judge
- Much more....

Faculty: **Hon. Thomas Whelan** (Supreme Court)**; A. Craig Purcell, Esq.** (Glynn, Mercep & Purcell, LLP)**; Daniel Tambasco, Esq.** (Russo, Apoznanski & Tambasco)**; Guido Gabriele, Esq.** (Geisler & Gabriele)**; W. Russell Corker, Esq.** (Huntington)
Coordinator: **Patricia M. Meisenheimer** (Past Academy Dean)
Time: 1:00–4:30 p.m. (Sign-in from 12:30 p.m.) Location: SCBA Center Refreshments: Lunch
MCLE: 4 credits (3 skills; 1 ethics)

NOVEMBER 2012 REGISTRATION FORM

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

Sales Tax Included in recording & material orders

COURSE	SCBA Member	SCBA Student Member	Non-Member Attorney	Season Pass	12 Sess. Pass	MCLE Pass	New Lawyer MCLE Pass	DVD	Audio CD	Course Book
ANNUAL UPDATES										
DMV Update □ East End □ SCBA	$100	$75	$125	Yes	Yes	2 cpn	2 cpn	$110	$100	$20
Landlord-Tenant Practice	$ 90	$75	$100	Yes	Yes	3 cpn	3 cpn	$110	$100	$20
Family Court Update	$150	$100	$200	Yes	2 uses	5 cpn	5 cpn	$200	$190	$35
Annual Real Property Update	$150	$100	$175	Yes	Yes	3 cpn	3 cpn	$175	$165	$45
NOVEMBER PROGRAMS										
Choosing a Trustee	$95	$65	$110	Yes	Yes	3 cpn	3 cpn	$110	$100	$20
Exploring Litigation Solutions	$10	Free	$15	Yes	N/A	N/A	N/A	N/A	N/A	N/A
E-Discovery: Predictive Coding	$50	$25	$65	Yes	Yes	2 cpn	2 cpn	$95	$85	$15
Helping Immigrant Youth	$50	$25	$55	Yes	Yes	2 cpn	2 cpn	$95	$85	$15
Lawyers Helping Lawyers	$60	$35	$60	Yes	Yes	4 cpn	4 cpn	TBA	TBA	TBA
Securitized Mortgage Foreclosures	$150	$75	$180	Yes	2 uses	5 cpn	5 cpn	$180	$170	$45
National Mortgage Settlement...	$50	$50	$50	Yes	Yes	2 cpn	2 cpn	TBA	TBA	TBA
IRA Guide to IRS Audit Issues	$95	$95	$95	Yes	Yes	3 cpn	3 cpn	N/A	N/A	N/A
Depositions	$100	$50	$125	Yes	Yes	4 cpn	4 cpn	$125	$100	$50

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

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Views from the Bench (Continued from page 4)

The Court concluded after its review of the record that there was no reasonable or strategic basis for defense counsel to refrain from objecting to these "[h]ighly prejudicial instances of prosecutorial abuse." As a result, the court reversed the conviction on the grounds of ineffective assistance of counsel and ordered a new trial. *Id.* at 967.

The Dissent – failing to object did not rise to the level of ineffective assistance of counsel

In a scathing dissent, Justice Smith highlighted the absence of any case law supporting the court's ruling. He further stated that although it may have been error to not object to the prosecutor's misstatements, he speculated counsel might have intentionally done so due to the minimal resistance he received during his closing. He further opined it was feasible defense counsel may have believed the jury would have had a negative view to any such interruption.

Although both the majority and dissent speculated as to the thought processes of defense counsel, the record revealed defense counsel "excoriated" the victims' mother and jailhouse informant during his closing and forewarned the jurors that the prosecutor might resort to "theatrics" and attempt to "play on your sympathies of these poor little kids." *Id.*, at 969-70. Counsel further reminded jurors to base their verdict on the facts and the evidence, and not what the prosecutor says or does.

Justice Smith concluded the decision to not object may have been "the right one," and, if it was a mistake, it did not come close to the level of ineffective assistance of counsel. Specifically, he deemed it reasonable to "sit quietly and appear unconcerned when the prosecutor did what he had told the jury she would do." *Id.* at 970. He further noted other factors may have resulted in the conviction including the testimony of the victims, their older brother and their mother and the damaging testimony that the defendant responded to an innocuous statement by the victims' mother that "*I'm not a child molester*" when he was not accused of being such at the time.

The impact of *Fisher* remains to be determined. However, the strategy of not objecting during summation – whether due to possible retribution or fear of offending the trier of fact – may result in an ineffective assistance of counsel claim. Perhaps defense counsel will be compelled to object even where he or she may otherwise not be so inclined. Regardless, the alternative is a result that neither the prosecutor nor defense counsel desires.

Note: The Honorable Stephen L. Ukeiley is a Suffolk County District Court Judge. Judge Ukeiley is also an adjunct professor at the New York Institute of Technology, a member of the Board of Directors of the Suffolk County Women's Bar Association, and a member of the Executive Committee of the Alexander Hamilton American Inn of Court. He is also a frequent lecturer and author of numerous legal publications, including The Bench Guide to Landlord & Tenant Disputes in New York© (available to the public). In January 2013, Judge Ukeiley will be joining the faculty at the Touro College Jacob D. Fuchsberg Law Center as an adjunct professor.

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

1. Unlike the New York standard, the federal standard for an ineffective assistance of counsel claim requires a showing of prejudice; to wit, that defense counsel failed to render reasonably competent assistance and there is a reasonable probability that but for defense counsel's inadequate representation, the outcome of the trial would have been different. *See Strickland v. Washington*, 466 U.S. 668 (1984).

Plead Laches (Continued from page 12)

Jay Realty's expenditure of funds to acquire the property gave rise to an equitable estoppel against Stein.

While Jay Realty prevailed on its laches claim, the Appellate Division panel also held that Stein had adequately "raised a triable issue of fact as to whether the deed transferring the shopping center property from Claire Stein to Telcor was forged." The net result is that while the deed to the alleged forger may ultimately be overturned, the alleged forger's purchaser can keep the property, to the detriment of the record owner![1]

Among other cases cited by the court (including the *Wilds* case) is *Kraker v. Roll*, 100 A.D. 2d 424 (2nd Dept., 1984). *Kraker,* however, had held that "where title by adverse possession has not been made out, the true owner's inequitable conduct must essentially amount to a fraud to result in a deprivation of legal title. [T]here must be shown ... either actual fraud, or fault or negligence, equivalent to fraud on his part, in concealing his title, or that he was silent when the circumstances would impel an honest man to speak...." The *Doukas* Court does not state that the plaintiff's behavior was fraudulent, negligent or dishonest, or when in the course of events he was "impelled to speak." The change of position prejudicial to Jay Realty that formed the basis of the estoppel was held to be the consideration paid for the deed, but there is nothing in the decision to indicate that Stein knew of the impending sale to Jay Realty and failed to take action to prevent it.

In addition, the court's allusion to delay of more than one year in bringing suit conflates two different concerns. Although Stein had waited more than a year to sue Telcor, his claim against Telcor was allowed to proceed. His suit as against Jay Realty was commenced only a little more than seven months after the deed to Jay Realty was recorded. Yet, that delay was sufficient to invoke laches. In any case, since the payment for the Jay Realty deed itself was determined to be the only change of position by which Jay Realty was "prejudiced," should it matter how long the plaintiff waited to sue? By the court's reasoning, even the day after the sale would have been too late.

In 2010, the Second Department was called upon to decide whether a *seven-year* delay before bringing suit was sufficient to support a laches defense. *Bank of America, N.A. v 414 Midland Ave. Assoc., LLC*, 78 AD3d 746 (2nd Dept., 2010).

One tenant-in-common had delivered a deed that purported to convey the entire property to a third party buyer in 1996. The buyer also borrowed over $1,000,000 secured by mortgages on the property. The other tenant in common became aware of the deed in 2001, but failed to bring an action to quiet title until 2008.

The buyer and the lender asserted, *inter alia*, the affirmative defense of laches. The court declined to recognize the defense, stating that delay in addressing a known defect in title does not, by itself, give rise to laches. It requires "inexcusable delay" coupled with knowledge that "the opposing party has changed his position to his irreversible detriment."

The court noted that the buyer and lender "made no allegation" that the owner both 1) knew of the sale and 2) did nothing to prevent it. Hence, their defense of laches was dismissed.

At a minimum, it is difficult to reconcile the holdings in *Wilds* and *Doukas* with *Bank of America*. Nevertheless, if you are defending an RPAPL Article 15 action in the Second Department, consider whether laches might be a viable defense to plead.

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

1. There is abiding precedent stating that a forged deed is void, but the *Doukas* opinion does not address the implicit contradiction it creates with those cases.

Consumer Bankruptcy (Continued from page 19)

advertising. This is to prevent them from misleading the public into thinking that they are authorized to practice or render legal advice.

If a BPP prepares a petition, the BPP must sign it (there is a special area of the petition form devoted to this) and print his or her name, address and Social Security number. The BPP must also disclose, under penalty of perjury, any fee or compensation received for preparing the documents, and the BPP is obligated to file a declaration attesting to this within ten days of the filing of the petition.

Code section 110 also provides for the assessment of various penalties for BPPs who act negligently or with intentional disregard for the Bankruptcy Code and Rules, or if the BPP commits any fraud, or unfair or deceptive act. In such instances the court can award actual damages, and the greater of $2,000 or twice the amount paid to the BPP and reasonable attorney's fees and costs.

In addition, each failure to comply with a particular subsection of the statute, such as failing to sign the petition, include the Social Security number, disclose the fee, etc., is punishable by a fine of not more than $500. The statute also requires the court to triple the fines if the BPP failed to disclose his or her identity. As you will see, it was this provision that really socked Mollo and Pevzner big time.

After Mollo was sanctioned in March, potential clients were still contacting him from his advertising, which he failed to discontinue. Rather than turn them away, he had Pevzner, his paralegal of six years, meet with them, and in some instances, he met with the clients as well. She then prepared the bankruptcy petitions and rendered legal advice in doing so. She had the debtors sign a retainer agreement which contained the name of a different attorney who did not have anything to do with these cases.

At the hearing, Pevzner admitted that she prepared the petitions and claimed that she was not an employee of Mollo and worked strictly as a "volunteer" for him without salary. Pevzner testified that she was familiar with Bankruptcy Code section 110. Although Code section 110 required the BPP to sign the petition and provide a declaration as to legal fees, she did not do that either, claiming that this was an "honest mistake."

Judge Craig stated that both Mollo and Peyzner were not credible witnesses and concluded that Pevzner repeatedly violated a number of subsections of the statute and that they both engaged in the unauthorized practice of law. The judge pointed out that Mollo continued to hold himself out as a bankruptcy attorney, despite his suspension, and despite his representations to the court in the earlier case.

It was clear to Judge Craig that Peyzner was the BPP, as she prepared the petitions. However, the judge applied an unusual theory and held that Mollo was vicariously liable for Peyzner's violations. The judge rejected Peyzner's claim that she was a volunteer; instead concluding that she continued to be a compensated employee under Mollo's direction. Thus, the court found that Mollo also violated the same provisions of section 110 under the doctrine of vicarious liability.

As for punishment, Judge Craig directed both of them to disgorge all fees received ($3,100), and in addition, fined them jointly and severally $15,000. However, it did not stop there. Because Peyzner failed to disclose on the petitions that she was the BPP, Judge Craig stated that she was required to triple the fine to $45,000 as provided by the statute. Hopefully, this deceitful duo has finally learned their lesson.

As with many things, consumers get what they pay for. A BPP cannot give legal advice and at most, can only act as a data entry clerk. There are no requirements that a BPP take any courses or be certified. Yet, bankruptcy is a highly complex area of the law. There are many horror stories about consumers who lost valuable assets, believing that they were exempt, because a bankruptcy petition preparer drafted the petition.

The Office of the U.S. Trustee takes BPP improprieties very seriously. Last year they brought 504 actions against BPPs across the country.

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

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Cultural Competence In Law *(Continued from page 23)*

Psychologists and Code of Conduct. These standards are mandatory and provide for minimal competencies. The *Specialty Guidelines for Forensic Psychology* released on August 3, 2011, on the other hand, delineate a broad spectrum of ambitious guidelines for psychologists who perform work in forensic contexts. These principles and guidelines as a whole carve out basic ethical boundaries that psychologists are expected not to cross.

There also are well-defined cultural and diversity-based components. Psychologist must, for instance, be familiar with cultural differences and be aware of nuances stemming from age, gender, gender identity, race, ethnicity, culture, national origin, religion, sexual orientation, disability, language, and socioeconomic status. They must employ culturally sensitive and valid methods in their assessments and be aware of their own limitations.

The *Guidelines on Multicultural Education, Research, Practice, and Organizational Change for Psychologists* also are not mandatory. Like the *Specialty Guidelines for Forensic Psychology*, these may be viewed as ambitious. They may be looked upon as a work-in-progress that will evolve over time. Cultural competence, in this vein, is a lifelong process of self-search, education, and practice.

The *Code of Ethics of the National Association of Social Workers* (NASW) similarly emphasizes cultural competence. The 2008 NASW Delegate Assembly approved several cultural and diversity-related revisions to the Code of Ethics on behalf of their clients including understanding the nature of social diversity and not practicing, condoning, facilitating, or collaborating with any form of discrimination on the basis of race, ethnicity, national origin, color, sex, sexual orientation, gender identity or expression, age, marital status, political belief, religion, immigration status, or mental or physical disability.

These revisions are in keeping with the primary mission of enhancing human wellbeing, recognizing the needs of vulnerable people, and being sensitive to cultural and ethnic diversity that appears in the Preamble of the NASW Code of Ethics.

Several other mental health care professions also emphasize the need to understand the diverse cultural backgrounds of the clients they serve. To name a few: American Psychiatric Association; American Counseling Association; American Association of Marriage and Family Therapy; and American Association of Pastoral Counselors. The Ethical Codes of these associations are accessible on the Internet.

The DSM-IV-TR is the "bible" relied on by mental health practitioners in the U.S. in educational, clinical, and forensic settings. Several places pertain to race, culture, and gender and the manual furnishes an outline for cultural formulation designed to assist the clinician in systematically evaluating and reporting the impact of the individual's cultural context.[10]

Note: Roy Aranda is Secretary of the Long Island Hispanic Bar Association and is on the Editorial Board of Noticias, the official publication of the Hispanic National Bar Association. Dr. Aranda is a psychologist who holds a law degree and has a forensic psychology practice with offices in Long Island and Queens.

1. *Hispanic Heritage Month 2011: Sept. 15 - Oct. 15*, CB11-FF.18 Aug. 26, 2011
2. *What is Cultural Competency?*, U.S. Department of Health and Human Services, Office of Minority Health, October 19, 2005.
3. *ORS § 418.975*.
4. *Guidelines on Multicultural Education, Research, Practice, and Organizational Change for Psychologists*, APA, 2002.
5. Deborah Waire Post, *Cross-Cultural Readings of Intent: Form, Fiction, and Reasonable Expectations*, 1 Wake Forest L. Rev. Online 94 (2011).
6. *National Standards on Culturally and Linguistically Appropriate Services (CLAS) in Health Care*, *Final Report*, U.S. Department of Health and Human Services, Office of Minority Health, March 2001.
7. *The International Bill of Human Rights, Fact Sheet No. 2 (Rev. 1)*, United Nations, Geneva, June 1996.
8. Resolution adopted by the General Assembly, 107th plenary meeting, September 13, 2007.
9. Stephen L. Pevar, *The Rights of Indians and Tribes, Fourth Edition*, Oxford University Press, 2012.
10. *Diagnostic and Statistical manual of Mental Disorders, 4th Edition, Text Revision*, American Psychiatric Association, 2000

ACADEMY OF LAW NEWS

CLE Course Listings on pages 28-29

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Under the OCA rules, attorneys admitted more than two years may fulfill their MCLE requirements in non-traditional formats, including on-line CLE. If you fall into that category, we urge you to try the Academy's on-line seminars, one of the largest such collections anywhere.

Bill Gates said, "The Internet is becoming the town square for the global village of tomorrow." For many a busy lawyer, tomorrow has come. While there may be nothing better than joining colleagues for CLE at the actual, "brick and mortar" SCBA Center, sometimes it is just too hard to do that. The Internet provides access to the virtual "town square" of shared expertise and ongoing professional enlightenment.

– Dorothy Ceparano

ACADEMY Calendar of Meetings & Seminars

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

NOVEMBER

1	Thursday	**Choosing a Trustee; Fiduciary Liability; Family & Wealth Sustainability.** 6:00–9:00 p.m. Light supper from 5:30.
2	Friday	Meeting of Academy Officers & Volunteers. 7:30–9:00 a.m. Breakfast buffet. All SCBA members welcome.
2	Friday	**Litigation Solutions: Thomson Reuters Presentation.** 12:30–1:30 p.m. Lunch from noon.
5	Monday	**E-Disclosure: Recent Developments in Law & Technology Related to Predictive Coding.** 12:30–2:10 p.m. Lunch from noon.
7	Wednesday	**DMV Update–**East End Presentation**.** (David Mansfield, Presenter). 5:00–7:30 p.m. at The Seasons in Southampton. Light supper from 4:30 p.m.
8	Thursday	**Immigration Law: Deferred Action & Special Juvenile Cases.** 12:30–2:10 p.m. Lunch from noon. **(Note change from evening to lunch program.)**
13	Tuesday	**Landlord-Tenant Update** (with book sighing). 6:00–9:00 p.m. Light supper from 5:30.
14	Wednesday	**DMV Update–**SCBA Center Presentation. (David Mansfield, Presenter) 6:00–8:30 p.m. Light supper from 5:30.
15	Thursday	Academy Curriculum Planning Meeting. 5:00 p.m. All SCBA members welcome.
16	Friday	**Lawyers Helping Lawyers.** 10:00 a.m.–4:00 p.m.
19	Monday	**Advanced Standing Issues in Securitized Mortgage Foreclosures.** Part I 6:00–9:00 p.m. Light supper from 5:30. (Part II on January 14)
28	Wednesday	**The National Mortgage Settlement & Bankruptcy**. 6:00–8:00 p.m. at the Nassau County Bar Association (Mineola). Sign-in from 5:30 p.m.
28	Wednesday	**Annual Family Court Update** (Part I). 6:00–9:00 p.m. Light supper from 5:30.
29	Thursday	**Annual Real Property Update** (Scott Mollen, Presenter). 6:00–9:00 p.m. Light supper from 5:30.
30	Friday	**IRA Guide to IRS Audit Issues.** 9:00–11:45 a.m. Breakfast from 8:30 a.m.
30	Friday	**Effective Depositions.** 1:00 p.m.–4:30 p.m. Lunch from 12:30 p.m. **(Note change of date. Also, change of time from full- to half-day program.)**

DECEMBER

3	Monday	**Annual School Law Conference.** 9:00 a.m.–3:00 p.m. Hyatt Regency Wind Watch Hotel. Continental breakfast; lunch buffet.
4	Tuesday	**Asset Purchase Agreements.** Noon–3:00 p.m. Lunch from 11:30 a.m.
5	Wednesday	**Annual Family Court Update** (Part II). 6:00–9:00 p.m. Light supper from 5:30
6	Thursday	**Appealing Health Care & Long-Term Disability Insurance Denials.** 12:30–2:10 p.m. Lunch from noon.
7	Friday	Meeting of Academy Officers & Volunteers. 7:30–9:00 a.m. Breakfast buffet. All SCBA members welcome.

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

NEED FLORIDA CLE CREDITS?

SCBA members who are admitted in Florida may borrow the Florida Bar's "2012 Survey of Florida Law" audio compact disk set through the Academy. The disks provide twelve hours of general CLER credit, including four hours of ethics.

This year's disks cover malpractice avoidance; a public records and Sunshine Law overview, ethics and technology; ethical advertising; Social Security benefits; Bert Harris issues and property rights cases; presenting evidence from an iPad; hearsay; wills, trusts and estates case law update; privacy issues and probate law; mediation of probate disputes; and ethical rules for drafting attorneys.

To borrow the CDs, call the Academy at 631-234-5588. The recordings will be loaned out on a first-come, first served basis. A waiting list will be established, and members are asked to return the disks promptly so that others who need them may be accommodated. There is no charge to borrow the Florida recordings, but a refundable fee may be charged at the Academy's discretion.

DPC

More than 120 attorneys turned out for the Academy's October 11 program on **Commercial Litigation in New York State Courts.** A prestigious panel of four judges and sixteen experienced litigators disseminated advice for all the stages of litigation, from case evaluation through appellate advocacy. As a bonus, the attendees received a six-volume commercial litigation treatise published by Thomson Reuters. The program is now available on-line as a video replay or for purchase as a DVD.