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November 2013

INSIDE...
NOVEMBER 2013
FOCUS ON
COMMERCIAL LAW

Advising Businesses on the Hiring of Non-Citizen Employees

By Donald B. Smith

Commercial counsel are often asked to advise clients with respect to the hiring of non-citizen employees, including the hiring of non-citizen employees residing within the United States, and non-citizen employees residing outside of the United States. In either event, employees are required to prove that they are authorized to work in the U.S. and employers are required to verify the identity and eligibility to work for all new employees.

The Homeland Security Act of 2002 created departments within the executive branch of the U.S. Government to which was transferred the authorities of the former Immigration and Naturalization Services (INS). The two DHS immigration agencies most involved with employment matters are the United States Citizenship and Immigration Services (USCIS), which is responsible for most documentation of alien employment authorizations, and the United States Immigration and Customs Enforcement (ICE), which is responsible for the enforcement of the penalty provisions of the Immigration and Nationality Act (INA).

FOCUS ON COMMERCIAL LAW
SPECIAL EDITION

Hiring a non-resident to permanently work in the United States involves a two-step process. First, the employer must obtain a Permanent Employment Certification from the U.S. Department of Labor by filing Form 9089. To obtain this certification, the employer must prove that there

(Continued on page 20)

Photo by Douglas Torres

Suffolk County Bar Executive Director Jane LaCova was honored at the Long Island Hispanic Bar Association gala. Full story on page 6; more photos on page 14

PRESIDENT'S MESSAGE

I Believe in a Better Way

Dennis R. Chase

By Dennis R. Chase

As reported previously, despite the New York State Bar Association's ("NYSBA") nine year opposition to mandatory reporting of pro bono activities by privately practicing attorneys, effective May 1, 2013, a new rule (Rule 6.1 of the Rules of Professional Conduct; for more see http://www.nycourts.gov/rules/jointappellate/index.shtml) requires attorneys to report their voluntary pro bono services and financial contributions to organizations providing civil legal services on their biennial registration forms. Following discussion of the issue at the spring meeting of the House of Delegates, NYSBA President David Schraver forwarded a clear, concise letter to the Chief Judge of the State of New York, the Honorable Jonathan Lippman. In response thereto, NYSBA leaders met with Judge Lippman to discuss the issue. Unfortunately, the end result of that meeting did not address the controversial nature of this new rule, at least not to the point at which the new rule has been abandoned.

While the NYSBA was able to elicit a concession from the Chief Judge that the results of the reporting requirement shall not be made public in the next two years, the Chief Judge has taken a "let's wait and see" approach to whether the data will be released to the public thereafter. Perhaps the *attorney* in me is not exactly comfortable with the "let's wait and see" approach to anything; let alone a controversial new rule that affects every attorney practicing in the private sector *only*.

Recently, our President-Elect and I had the opportunity to meet with Judge Lippman and Judge Prudenti in their New York City office located in the

(Continued on page 27)

BAR EVENTS

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

Retirement Dinner for the Honorable John J.J. Jones, Jr.
Thursday, Nov. 14 at 6 p.m.
Watermill Restaurant, Smithtown
The SCBA's Supreme Court Committee will host the event. For further information, go to, http://www.scba.org/post/jones13.pdf

Council of Committee Chairs
Tuesday, Dec. 3 at 5:30 p.m.
Great Hall
The annual meeting of committee chairs to discuss issues and matters of concern.

Holiday Party
Friday, Dec. 6 from 4 to 7 p.m.
Great Hall
Everybody is welcome to celebrate the start of the holiday season. Reservations required by calling the Bar at (631) 234-5511.

FOCUS ON
COMMERCIAL
LAW
SPECIAL EDITION

Suffolk County Bar Association

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SCBA Calendar

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

OF ASSOCIATION MEETINGS AND EVENTS

OCTOBER 2013

30 Wednesday Judiciary Night, 6:00 p.m., Villa Lombardi's, Holbrook. $85 per person. Sign up on line for call Bar Center.

NOVEMBER 2013

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

8 Friday Military & Veterans Affairs Committee Luncheon, 12 noon, Great Hall, celebrating our veterans. Call Bar Center if you wish to attend.
Retirement Cocktail Party for Hon. Marion McNulty, 6:00 p.m., SCBA Bar Center. Call for reservation.

13 Wednesday Education Law, 12:30 p.m., Board Room
Appellate Practice, 5:30 p.m., E.B.T. Room.
Municipal Law, 5:30 p.m., President's Office.
Professional Ethics & Civility, 6:00 p.m., Board Room.

14 Thursday Retirement Dinner for Justice John J.J. Jones, Jr., Watermill Restaurant, 711 Smithtown Bypass, Smithtown, 6:00 p.m., $65 per person. Register on line or call Bar Center for reservation.

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

18 Monday Board of Directors, 5:30 p.m., Board Room.
Surrogate's Court Committee, 6:00 p.m., E.B.T. Room.

20 Wednesday Elder Law & Estate Planning Committee, 12:15 p.m., Great Hall.

DECEMBER 2013

3 Tuesday Council of Committee Chairs, 6:00 p.m., Great Hall.

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

6 Friday SCBA's Annual Holiday Party, 4:00 p.m. to 7:00 p.m., Great Hall, Bar Center.

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

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

17 Tuesday Surrogate's Court Committee, 6:00 p.m., Board Room

20 Friday Labor and Employment Law, 8:00 a.m., Board Room.

JANUARY 2014

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

13 Monday Annual Judicial Robing & Swearing Ceremony. Further details forthcoming
Executive Committee, 5:30 p.m., Board Room.
Surrogate's Court Committee, 6:00 p.m., E.B.T. Room

15 Wednesday Elder Law & Estate Planning Committee, 12:15 Great Hall.
Education Law, 12:30 p.m., Board Room.
Professional Ethics & Civility, 6:00 p.m., Board Room.

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

13 Thursday Meet-Greet- & Mingle – Complimentary Reception, 6:00 p.m., Polish Hall Riverhead.

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

Our Mission

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

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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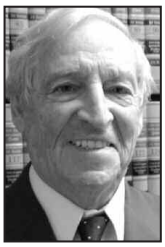
LOOKING BACK

Welcome to Shelter Island!

By Edwin Miller

Background

It was 1960. I was not particularly busy and was closing titles for five title companies simultaneously.



Edwin Miller

The Closing

I received a call from American Title Insurance Company in Riverhead. They had a closing scheduled on Shelter Island and they needed a closer. I had heard of Shelter Island but had never been there. The company vice president told me to go to Greenport and take the ferry to Shelter Island. They promised to pay the ferry fare with my submitted bill. Having nothing better to do, I agreed to do the closing.

The Meeting

It was the middle of winter, January of 1960. There were a few inches of snow on the ground and it was very cold and windy. The closing was scheduled for 2 p.m. I drove to Greenport, and took the ferry to Shelter Island. I found the lawyer's office who represented the seller. He was a Shelter Island resident who was also a justice of the peace. He appeared to me to be very old and somewhat crusty in his demeanor. The purchasers were from New York City. Their attorney was also from New York City. He was a very pleasant young African-American man who a few years later became the first African-American Magistrate in the City of New York. His name was Hubert Delaney, Jr.

The Problem

The purchasers were buying a house and assuming the existing mortgage. This was very common in 1960. However, the attorney from Shelter Island refused to give credit in his adjustments for the amount of the mortgage being assumed in computing the then Federal Transfer Tax. Both the purchasers' attorney and myself could not convince him that he was wrong. The amount at issue was $22. He was absolutely inflexible.

The Escape

The last ferry was leaving for Greenport at 4 p.m. It was now 3:45 p.m. I called the title company in Riverhead and told them the problem. I indicated that unless a solution was found quickly, I would miss the ferry and they would have to pay for my hotel overnight on Shelter Island. I also requested overseas pay!

The title company vice-president quickly said, "Screw it. We'll pay the $22 from our slush fund. You get the hell off the island, we're not going to pay for a hotel!"

We then closed very quickly and we all ran to make the last ferry. It was just pulling out as we arrived but they let us board.

I have only been back to Shelter Island once in the last 53 years, but my wife and I had no trouble making the ferry on that occasion.

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. He is a graduate of Hofstra College, cum laude, and of New York University Law School.

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

We need volunteers to share their experiences. If you would like to contribute an article please contact Laura Lane by e mail at scbanews@optonline.net or Past President John Buonora at jlgoodhour@optonline.net.

We'd love to hear from you and will even help you craft your column if you wish. You probably have so much to share with us.

Meet Your SCBA Colleague

Cornell V. Bouse, a solo criminal defense attorney for the past 24 years, was raised to believe he could do whatever he wanted to do by one of the finest defense attorneys in the state, his father – F. Courts Bouse. He thought they'd practice together, but that was not to be.

By Laura Lane

What type of relationship did you have with your father? I went to court with him all the time when I was a little kid. He was something. My father was a phenomenally talented criminal trial lawyer and every judge in Nassau County knew him.

Your life did not go as planned, right? I thought we were going to be Bouse & Bouse, but my father died when I was in my senior year of law school in 1988.

You always wanted to be an attorney? Yes, ever since I was a young boy, undoubtedly from the influences of my father who brought the practice home with him in so many ways. No other law attracted me except criminal. After law school I decided to go on my own to revive what little practice my father had left.

That's not a typical path for a defense attorney. No and it was a tough beginning in 1989 without him, but I chose to start out on my own not having worked for the DA or Legal Aid as most defense attorneys did. The purchase of a handyman house on a main road in Huntington and my painting of a sign/lawyer shingle which hung into Park Avenue was the beginning. Only a couple of non-paying clients were left of my father's practice at that point and, as a result, the practice was built pretty much from the ground up. I tried to spend each weekday in court as a rule joining the 18B panels in both Nassau and Suffolk.

Do you find that people wonder why you like representing people who they believe may be criminals? I do get tired of the question – how can you represent someone who is guilty? It's all about providing a reasonable doubt. In a perfect world all cases go to that standard. I believe that it is better that 100 guilty men go free than for one man who is innocent be found guilty. It's hard to get a jury to think reasonable doubt. That needs to be proven in court.

Have you always been so passionate about this?
I've always rooted for the underdog and that is anyone who is accused of a crime. I have always been someone who was willing to give a person the benefit of the doubt. The defendant goes in alone with an attorney and the district attorney's office, the police - they have an unlimited amount of resources. It's like a chess game you are privileged to play.

Why do you like it so much? I could do another type of law but I wouldn't enjoy it. The great thing with criminal defense law is you can go at it with a district attorney and then go out in the hallway and almost laugh about it. I've done matrimonials for friends and never want to do them again.

Who have been your mentors? The largest influence was without question my father F. Courts Bouse. Ben Gullo was one too. If you could ever catch him on trial he was a phenomenal defense attorney. And also the late Kenneth Rohl, a judge who was a friend of my fathers. He helped me when I was a young attorney. Dave Besso was for me in later years.

What do you like about being an attorney? I love leaving in the morning with a bunch of files thinking how the day is going to go, servicing all the clients and coming home at night tired because it was work you believe in. That you've done what you set out to do in your mind – it's a good tired.

What are you proud of? I'm proud when I get an acquittal but that doesn't last long. A criminal attorney is only as good as his last verdict. I'm proud when I get calls from people who say they are happy I'm on their side, the cards I get that say thank you. And I'm proud when I can speak or communicate with someone to get them to see what I am trying to convey.

Why would you recommend people join the SCBA? It's not a snooty bar association – you are so welcome. Some bar associations are not like that. The relationship that the SCBA has with the judiciary is second to none. And the SCBA is so connected with Touro.

In what way? The SCBA is always trying to do something to further the profession and always trying to bring law students into the fold. The camaraderie at the SCBA is incredible.

What do you enjoy about being a member? Walking in there and seeing the smiling faces and that everyone knows you. If you have an issue about something it will be addressed and maybe you can get on one of the committees and change something.

Cornell V. Bouse

Has anything changed for you since you've become active at the SCBA? I used to think that any time something changes in court it's against the private practitioner. I don't believe that anymore now that I'm part of the people that make the changes. Being a member and being involved has changed my view.

VIEWS FROM THE BENCH

Landlord's Counsel Held Liable For Erroneous Rent Demand

By Hon. Stephen L. Ukeiley

This month's article addresses liability for erroneous debt collection practices by counsel. The rules and procedures regarding the collection of consumer debts are strictly enforced. Of particular note, liability for noncompliance may be imposed on counsel even where counsel relied on information provided by the creditor.

The case of *Lee v. Kucker & Bruh, LLP* serves as a costly reminder that counsel should confirm information disclosed by the client and implement procedures for verifying its accuracy before sending a rent demand or making other attempts to collect a consumer debt (2013 U.S. Dist. LEXIS 110363 (S.D.N.Y. Aug. 2, 2013)).

Attorney's mistaken rent demand

The facts in the *Lee* case are straightforward. The tenant is 82-year old Rafael Lee who was issued a Senior Citizen Rent Increase Exemption by the Department of Finance which limits his portion of the rent while granting the Landlord a real estate tax abatement.

In March 2012, Mr. Lee's monthly rent was $790.30, of which he was responsible for $400.72. Mr. Lee's portion of the March rent was paid by a private social service agency. Following receipt of the payment, the landlord provided counsel a Delinquency Report stating Mr. Lee was $1,125.23 in arrears. The report reflected the March 2012 payment but did not indicate how the funds were allocated.

Landlord's counsel thereafter prepared, signed and caused to be served upon Mr. Lee a Three-Day Rent Demand. Following service of the Rent Demand, at counsel's request, the Landlord confirmed the debt and provided additional documentation suggesting the arrears had increased to $1,525.95.

Stephen L. Ukeiley

Landlord's counsel thereafter commenced a non-payment summary proceeding. Mr. Lee demanded a verification of the debt, pursuant to 15 U.S.C. § 1692g, commonly referred to as the validation period, which stays collection of the debt until verified. Without inquiring of the landlord, Landlord's counsel provided Tenant with a copy of the Delinquency Report. Upon further investigation, Landlord confirmed the Delinquency Report was in error and further that Mr. Lee was current with his rent.

Not surprisingly, Landlord sought to withdraw the petition. Mr. Lee consented to the withdrawal but only after being awarded attorney's fees (presumably pursuant to Real Property Law § 234). Mr. Lee thereafter commenced federal litigation for damages against Landlord's counsel for violating the Fair Debt Collection Practices Act.

The Fair Debt Collection Practices Act (FDCPA)

The FDCPA, codified at 15 U.S.C. § 1692 *et seq*., was enacted to "eliminate abusive debt collection practices by debt collectors" (*See Leone v. Ashwood Fin., Inc.*, 257 F.R.D. 343 (E.D.N.Y. 2009)). The statute makes it unlawful to engage in any "false, deceptive or misleading" conduct in connection with the collection of a consumer debt.

For instance, a debt collector must initially disclose that it is seeking to collect a debt and that the information obtained may be utilized for this purpose (*see* 15 U.S.C. § 1692e(11)). Section 1692e(A)(2) prohibits a false representation concerning the "character, amount, or legal status" of the debt (*Id*., 15 U.S.C. § 1692e(2)(A))).

Strict Liability Statute

The FDCPA imposes strict liability for violations, and, as such, there is no need to show either a knowing or intentional violation (*See, e.g., Ellis v. Solomon & Solomon, P.C.*, 591 F.3d 130 (2d Cir. 2010); *Lee v. Kucker & Bruh, LLP*, 2013 U.S. Dist. LEXIS 110363 (S.D.N.Y. Aug. 2, 2013)). To assert a *prima facie* claim, the creditor must show (1) he or she is a consumer; (2) defendant is a debt collector; and (3) defendant acted in a manner in violation of the FDCPA (*Katz v. Sharinn & Lipshie, P.C.*, 2013 U.S. Dist. LEXIS 129728 (E.D.N.Y. Sept. 11, 2013)).

Since the non-payment of rent by a natural person is considered a consumer debt, a landlord's rent demand must comply with the FDCPA (*see Romea v. Heiberger & Assocs.*, 163 F.3d 111 (2d Cir. 1998)). The statute defines "consumer" as a "natural person" obligated to pay a debt (15 U.S.C. § 1692a(3)). "Debt collector" is defined more broadly as "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed..." (*Id*., 15 U.S.C. at § 1692a(6)). Parenthetically, a FDCPA violation in the rent demand does *not* automatically result in the dismissal of the summary proceeding (*see Dearie v. Hunter*, 705 N.Y.S.2d 519 (App. Term, 1st Dep't 2000) (Tenant may nonetheless seek damages in a plenary action)).

Counsel can be considered a debt collector

Counsel who performs debt collection as its "principal purpose" or on a "regular" basis may be considered a "debt collector" under the FDCPA (*Lee*, 2013 U.S. Dist. LEXIS at 110363). This applies to Landlord and Tenant proceedings because a consumer debt includes transactions "primarily for personal, family or household purposes" (15 U.S.C. § 1692a(5); *see Heintz v. Jenkins*, 514 U.S. 291 (1995); *Romea*, 163 F.3d at 111; *Lee*, 2013 U.S. Dist. LEXIS at 110363). Parenthetically, an earlier version of the statute exempted counsel (*Heintz*, 514 U.S. at 294).

A debt collector may avail itself of a bona fide error defense where it is demonstrated (1) the violation was unintentional and (2) "procedures [have been] reasonably adapted to avoid any such error" (15 U.S.C. § 1692k[c]). In *Lee*, however, the federal court rejected this defense because landlord's counsel failed to implement procedures to safeguard against computational errors and/or to confirm the accuracy of the information asserted in its rent demand.

As a consequence, the court granted Mr. Lee's motion for partial summary judgment. Mr. Lee and landlord's counsel reportedly subsequently agreed on a set-

(Continued on page21)

BENCH BRIEFS

By Elaine Colavito

SUFFOLK COUNTY SUPREME COURT

Honorable Paul J. Baisley, Jr.

Motion to quash subpoena granted; facially invalid; no special circumstances that warranted taking the testimony, and no showing that information sought could not be obtained from other sources.

In *Danielle Friaglia v. Richard D. Kaplan, Joshi A. John, Philip V. Felice, David Lofti, David Lofti, M.D., P.C., and North Shore University Hospital at Syosset,* Index No.: 23435/2009, decided on November 7, 2012, the court granted plaintiff's motion for an order quashing the subpoena, directing non-party witness William Friaglia to appear for deposition.

In rendering its decision, the court noted that the subpoena served on non-party witness William Friaglia (plaintiff's father) was facially invalid, as it did not contain a notice setting forth the circumstances or reasons why such non-party disclosure was sought. Moreover, the court pointed out the defendants' submissions in opposition to the motion failed to establish the existence of special circumstances to warrant taking the testimony of plaintiff's father, or that any information sought from him could not be obtained from other sources. The court additionally added, that the plaintiff had previously been fully deposed and that the defendants thereafter sought and obtained the non-party deposition of plaintiff's mother, who testified that she was present at all relevant times and that she was the principal contact with her daughter's treating physicians. Finally, the court stated that there was no showing that the additional testimony of plaintiff's father was required in order for the defendants to prepare for trial. As such, the motion to quash the subpoena was granted.

Elaine Colavito

Application of petitioner for an order permanently staying the arbitration demanded by respondent; hearing to be scheduled; additional party respondents to be added.

In *In the Matter of the Application of Progressive Northern Insurance Company v. Kenneth Lindsay, Jr., and Praetorian Insurance Company and Andre W. Lomax,* Index No.: 30910/2012, decided on March 4, 2013, the court ordered a hearing to determine the application of petitioner for an order permanently staying the arbitration demanded by respondent on the ground that there was insurance coverage on the alleged offending vehicle. In rendering its decision, the court noted that the respondent was allegedly injured when he was struck while riding a bicycle by a vehicle owned by Andre Lomax, which fled the scene. Respondent served petitioner with a demand for arbitration under the uninsured motorist endorsement of the insurance policy issued by petitioner to respondent. Petitioner commenced this proceeding to stay the arbitration on the grounds that the offending vehicle was insured at the time of the accident by Praetorian Insurance Company. The submissions were insufficient to determine whether or not this policy was in fact canceled, and as such the court ordered a hearing to determine whether or not the policy was properly canceled. Further, the court ordered the petitioner to join Praetorian Insurance Company and Andre Lomax as party respondents in the proceeding.

Honorable Peter H. Mayer

Motion for an extension of time to answer granted; motion for a default denied; public policy favoring resolving cases on the merits

In *Joseph Cruz and Christina T. King, a/k/a Christina Cruz v. Jets Towing, Inc.,* Index No.: 21341/2012, decided on May 7, 2013, the court granted defendant's motion for an extension of time to answer the complaint and denied plaintiffs' motion for a default. In rendering its decision, the court noted that after receiving plaintiffs' summons and complaint, the defendant's president forwarded a copy to defendant's insurance carrier. The defendant believed that the insurance carrier was handling the defense of the matter. Thereafter, the defendant received a call that the company was disclaiming coverage, as such, he contact his attorney, who prepared and served an answer with affirmative defenses, the next day, October 19, 2012. According to plaintiff's attorney, the answer was due by August 30, 2012. Here, the court pointed that in light of the public policy favoring the resolution of cases on the merits, the court may excuse a defendant's failure to timely answer. The court further pointed out that here, the delay in answering was relatively short, there was no showing of prejudice to the plaintiff, a potential meritorious defense existed, and no willfulness on the part of the defendant was shown. Accordingly, the court granted the defendant's motion for an extension of time to answer, and denied plaintiffs' motion for a default judgment.

Cross-motion to disqualify plaintiff's counsel denied; doubts resolved in favor of disqualification, however, party's entitlement to be represented by counsel of his or her choice is a valued right

In *Gus Vattes and Maria Vattes v. Savco Corporation, Savvas Meitanis, Richard Kistela and Quinteros Construction Corp.,* Index No.: 35311/2011, decided on April 29, 2013, the court denied defendant's cross-motion which sought disqualification of plaintiff's counsel. In denying the motion, the court noted that the disqualification of an attorney is a matter that rests within the sound discretion of the Supreme Court. The court further stated that although any doubts are to be resolved in favor of disqualification, a party's entitlement to be represented by counsel of his or her choice is a valued right which should not be abridged absent a clear showing that disqualification is warranted. The party

(Continued on page 20)

PRO BONO

Pro Bono attorney of the month – Val Cherkoss

By Maria Dosso

Nassau Suffolk Law Services (NSLS) is pleased to honor Val Cherkoss of Blumberg, Cherkoss, Fitz Gibbons & Blumberg, LLP as the Suffolk County Pro Bono Attorney of the Month. As a long-standing volunteer with The Suffolk County Pro Bono Project, which operates as a collaboration between NSLS and the Suffolk County Bar Association, Mr. Cherkoss and his firm have been recognized previously for their commitment to providing assistance in matrimonial and family law matters.

Mr. Cherkoss has routinely handled pro bono matters since law school. At Syracuse University Law School he participated in legal clinics. Since law school he has functioned as a law guardian in addition to his work with NSLS. He sees pro bono work "as a part of practicing law" and "a constant in his career." His firm is also a model of the pro bono spirit. All the attorneys at Blumberg, Cherkoss volunteer their time and the senior partners have been individually recognized as Pro Bono Attorneys of the Month. The firm was also honored with a special award for its commitment to pro bono in 1990 and again in 2006.

Mr. Cherkoss joined the firm in 1985 and is now a senior partner where he focuses most of his work in matrimonial and family law litigation. He is admitted to practice in New York and in the U.S. District Court for the Eastern District of New York. He is also a member of the Suffolk County and New York State Bar Associations.

His motivation to do pro bono work is the same as his motivation to become a family law attorney. He wants to give back to the community and to others less fortunate. "There is a tremendous need in our community for family and matrimonial attorneys," he says. Clients are often at the mercy of the more moneyed spouse, and the family issues are often linked to other problems. Cherkoss comments that family law is a difficult area, and in the pro bono context requires a particularly intensive effort and high level of skill. It was not the area he thought he initially would practice in, but is the one he is strongly committed to and it gives him the opportunity to give back to others.

Val Cherkoss

As an example, Mr. Cherkoss related one memorable pro bono case involving a divorcing couple with significant debt. The wife had over $300,000 in unsecured debt in her sole name and a $75,000 lien on her premarital home. With the assistance of pro bono bankruptcy counsel, this client was able to discharge her unsecured debt and negotiate a significant contribution from her husband towards the lien on the house. It was gratifying to be able to help someone in dire straights. Like so many cases, however, it was complicated by the myriad financial and personal problems of the parties. "Matrimonial and Family Law attorneys have to develop a thick skin," he says. "It is a tough practice, highly specialized and contentious, but rewarding."

"The Pro Bono Project could not function without attorneys like Mr. Cherkoss," said Maria Dosso, Director of Communications and Volunteer Services at Nassau Suffolk Law Services. "His generosity of spirit and expertise in this time-intensive and emotional area of the law, easily earns him this distinction in service. He is a person who shares our vision and the pro bono mission."

Congratulations to Val Cherkoss for volunteering his time and expertise to helping families in need. NSLS is proud to recognize these efforts and his consistent support with the Attorney of the Month 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.

The Suffolk Lawyer wishes to thank Commercial Law Special Section Editor Donald B. Smith for contributing his time, effort and expertise to our November issue.

Donald B. Smith

Celebrating the Twelfth Annual Hispanic Heritage Gala

On September 27, the Long Island Hispanic Bar Association celebrated its annual gala at Villa Lombardi's in Holbrook. More than 250 guests participated in this memorable event, which included many distinguished members of the judiciary, members of the bar, businesses, law students and law school faculty and alumni participating. Recently appointed New York State Court of Appeals Judge Jenny Rivera, the keynote speaker and second Hispanic woman to serve on New York's highest court, shared many fond memories about her career and published works encompassing civil rights, defending minorities, women and the underprivileged.

Bethpage Federal Credit Union was honored for their commitment to promoting Hispanic Heritage, and for their generosity in bestowing scholarships to law students. Congratulations went to law students who have received fellowships from Duffy & Duffy, Farrell Fritz, Touro and Hofstra Law Schools and the Suffolk and Nassau DA offices.

A very special award and honor was presented to LIHBA past President Luis Antonio Pagan to his great surprise by Richard Montes. He said that Luis embodies a special warmth and understanding which stems from his deep devotion and care to the members of LIHBA. He went on to say that Luis is a true leader and as genuine and authentic as they come. His legacy would be a new scholarship called Luis Pagan Leadership Scholarship which will be offered to a first year Touro Law student including a summer fellowship at Duffy & Duffy.

The SCBA Executive Director Sarah Jane LaCova was also honored at the gala for her kindness, spirit of inclusiveness and welcoming attitude. Past President Luis Pagan introduced Jane saying her commitment and devotion to the legal community and to the LIHBA precisely, has meant a great deal in their development as an association.

The LIHBA really know how to have a party and the evening ended with "Eat, Drink and Be Merry!"

- LaCova

What to do if Your Case is Removed to Federal Court

By Mona Conway

Removal of actions from State to Federal Court occurs fairly frequently in commercial litigation. If you are a State Court practitioner, who is either not admitted to Federal Court or knows little more about Federal practice than you learned in law school, you should have some basic familiarity with the removal process. This is so because, while you think you have some control over your choice of venue for your plaintiff's case, you may be served with a surprise attack by your adversary in the form of a Notice of Removal to the Eastern or Southern District Court. A defendant's removal of a case from State to Federal Court can catch you off guard. Worse, you might be totally unprepared while Federal time limits are tolling. Suddenly, reliance on your knowledge of the CPLR is virtually useless and you may be forced to quickly dust off your 1999 edition of the Federal Rules of Civil Procedure.

Your opponent may use this process as a legitimate, but arguably somewhat underhanded strategy; or he or she may be properly representing their own client's interests by having a Federal Court hear your case against them. If you represent a defendant and have a legitimate ground for removal, the benefits of litigating in Federal Court include: better-developed case law; greater consistency of procedure; oftentimes, swifter resolution; and, some would say, a more knowledgeable bench. The intent of defense counsel notwithstanding, there are some basic things you need to know even before writing your complaint. If you assert a claim that even resembles a Federal cause of action or if any of your defendants is a citizen (not "resident") of another state, you run the risk of having your case removed to Federal Court.

Mona Conway

FOCUS ON COMMERCIAL LAW
SPECIAL EDITION

Here are two examples of actual cases that were removed to Federal Court, which did not, on the face of the complaints, seem to invoke federal subject matter jurisdiction. In one case, the plaintiff corporation sued a New York insurance company for breach of contract. The insurer promised to pay for health care services and then later refused to reimburse the insured (and assignee). The case was removed from Suffolk County Supreme Court to the Eastern District in Central Islip. How? The insurance policy of the insured was "an E.R.I.S.A. governed insurance plan." Whether or not this breach of contract claim has any legitimate connection to the preemptive force of E.R.I.S.A. (Employment Retirement Income Security Act of 1974), the issue has to be fought out in motion practice in Federal Court.

In another case, the plaintiff brought a dozen causes of action against just as many defendants, naming individual board members of a corporation. In his summons with *notice* (no complaint had been served), he mentioned one cause of action, which may or may not have been a R.I.C.O. (Racketeer Influenced and Corrupt Organizations Act) claim. It was not spelled out correctly as the Federal claim and New York State has its own version of the Federal law. But, this was enough to land all of the parties in Federal Court, if for no other reason than to fight over whether or not the case belonged in Federal Court.

A defendant "desiring" to remove a case to a Federal Court has 30 days after being served with the initial State Court pleading or summons with notice to file a Notice of Removal with the District Court. (See 28 U.S.C. § 1446 [a]). The grounds for removal are typically either federal question (see 28 U.S.C. §§ 1331 and 1441) or diversity (see 28 U.S.C. § 1332) jurisdiction. Once the case has been removed, that is, you are served with the Notice of Removal, your case is now in Federal Court and you are no longer dealing with a State Court action. (See 28 U.S.C. § 1446 [d] ["the State court shall proceed no further unless and until the case is remanded"]).

Whether or not you acquiesce to the case staying in the Federal Court, you must be admitted to practice before the District Court to which the case was removed; be familiar with Federal procedure, Electronic Case Filing (ECF), have a Pacer account; and, most likely, have some familiarity with the Federal Law in question (depending on the claim[s]). You may need a Federal Court practitioner to handle the initial process of removal for you and the attorney hired may be of counsel to your firm.

If, however, you meet the above criteria, as the plaintiff's attorney, you must decide — and decide quickly — whether you want the case to remain in Federal Court or have it remanded back to the State Court. You only have 30 days to make a motion to remand the case back to the State Court on the basis of any defect other than subject matter jurisdiction (see

(Continued on page 21)

SIDNEY SIBEN'S AMONG US

On the move…

Jennifer Hower and **Jacquelyn Mascetti** have joined Herman Katz Cangemi & Clyne, LLP (HKCC) as associates.

Campolo, Middleton & McCormick is celebrating its 5th anniversary by tripling the size of its office space. The expansion will assist in the firm's strategic growth plans while improving daily operations to provide outstanding service that their clients have grown to expect. Now office is located on the fourth floor of 4175 Veterans Memorial Highway in Ronkonkoma, at the entrance to MacArthur.

Announcements, Achievements, & Accolades…

James M. Wicks, an attorney at Farrell Fritz, was selected to receive *Long Island Business News*' "Leadership in Law" Awards. He will be honored at a gala dinner on Nov. 14, at Crest Hollow Country Club.

Elliott Portman, partner at Roe Taroff Taitz & Portman, LLP, will present "5 Clues Your Customer is Not Going to Pay You" at The LI Center for Business & Professional Women (LIC BPW), on Monday, Nov. 5, at 6 p.m. at the Fox Hollow Inn, 7755 Jericho Turnpike, Woodbury.

Sharon N. Berlin, of Lamb & Barnosky, LLP, was selected for inclusion on the New York Super Lawyers list for 2013 in the practice area of employment and labor law.

Scott M. Karson, of Lamb & Barnosky, LLP, was selected for inclusion on the New York Super Lawyers list for 2013 in the practice area of appellate law.

Richard K. Zuckerman, of Lamb & Barnosky, LLP was selected for inclusion on the New York Super Lawyers list for 2013 in the practice area of employment and labor law.

Ilene Sherwyn Cooper, partner at Farrell Fritz, and a SCBA past President, was recently appointed to the Board of Advisors of Touro Law Center's Aging & Longevity Law Institute. Ms. Cooper is an adjunct professor at Touro, where she has been recognized as "Adjunct Professor of the Year" multiple times.

Jennifer Cona, managing partner, Genser Dubow Genser & Cona (GDGC), Melville, organized a group of over 30 staff, friends and family to join in the American Heart Association Annual Long Island Heart Walk at Jones Beach on Sept. 22.

James F. Gesualdi, a sole practitioner in Islip, whose practice is concentrated on animal welfare (relating to zoos and aquariums), participated in the 2013 Annual Conference of the International Marine Animal Trainer's Association (IMATA). Gesualdi, who took part in a Panel Discussion "Sustaining Animal Populations: The Importance of Animal Welfare & Breeding Programs" and spoke about the challenges and the important role of trainers in enhancing animal welfare every day on Sept. 13, in Las Vegas, Nevada.

Jacqueline Siben

Scott Michael Mishkin has been recognized as the 2013 Super Lawyer of the Year for Employment Discrimination Litigation for the New York Metropolitan Area.

Touro Law Center has appointed six members to its newly formed Land Use & Sustainable Development Law Advisory Board. They are: the Honorable Merik Aaron '92, Nassau County Family Court; Daniel Baker '92 and John Farrell '00 of Sahn Ward Coschignano & Baker, PLLC; Keith Brown '94 of Brown & Altman, LLP; Pamela Greene '98, Attorney at Law; and student representative Michael Spinelli, class of 2017.

The advisory board is comprised of leading land use attorneys on Long Island to offer practical land use and sustainability resources that are unique to Long Island.

Speedy Recovery…

Harold A. Shapiro recently had quadruple by-pass surgery and is making a nice recovery. He hopes to be attending committee meetings and seminars in the very near future.

Condolences…

To **Cathy Kash** on the passing of her father John C. Seigneuray.

To the family of long time member **Willis B. Carman, Jr.** who passed away this month. Willis was the son of a judge, and he devoted most of his life to elected office and public service, including 22 years as a Farmingdale village trustee.

To member **Barbara Pizzolato** and her family on the passing of her father, Victor M. Pizzolato.

New Members…

The SCBA extends a warm welcome to its newest members: **Peter D. Baron, Bryan L. Berson, Joseph E. Chicvak, Joseph J. DiPalma, Robert M. Fischette, Deborah A. Gehr, Linda R. Hassberg, Mitchell L. Kaufman, Sean MacDonnell, Blair H. Mathies, Jr., Jules M. Mencher, Tricia A. Moriates, Lauren Osa, Thomas C. Re, Stephen R. Stern, James Symancyk, Yuliya Viola.**

The SCBA also welcomes its newest student members and wishes them success in their progress towards a career in the Law: **Jessica L. Leuci, Michelle Scotto-Lavino, Keri Lynn Timlin.**

The Holder in Due Course Stop Payment Buster

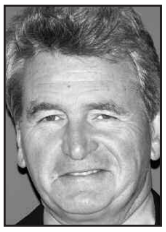
By Sean Campbell

The Holder in Due Course ("HDC") rule is the rule that eviscerates the protection that a drawer relies upon when stopping a check. Consider the case where you have just received an urgent call from a client who tells you that a check went out in error. Section 4-403 of the Uniform Commercial Code creates a right of the customer to stop payment on a check:

> A customer … may stop payment of any item payable for his account but the order must be received at such time and in such manner as to afford the bank a reasonable opportunity to act on it prior to any action by the bank with respect to the item."

Although you do not wish to create additional anxiety for your client, you should note to your client that even with a Stop Payment Order there is a slight possibility that the client may still incur liability for payment of the check under the HDC rule. Although the purpose of the rule is to protect holders subsequent to the payee it does provide a means for the payee to go around the Stop Payment Order and receive value for the check, e.g., cash, UCC § 3-302(1) states:

> A holder in due course is a holder who takes the instrument for value; and in good faith; and without notice that it is overdue or has been dishonored or of any defense against or claim to it on the part of any person.



Sean Campbell

Under the HDC rule your client cannot be forced to pay the payee, but he may be forced to pay someone who takes the check from the payee. When the payee receives the check he may try to obtain payment by placing it into his own bank account with the hope that no Stop Payment Order has been placed. If the Stop Payment Order has been placed in time the check will be marked "Stop Payment" and returned to the payee. Now anyone who sees the check will know there is a problem with this check and the Stop Payment Order will have done its work.

However, if the payee does not deposit the check but instead endorses it over to someone else then the drawer may be forced to pay the new party. Since the original payee has not tried to cash the check himself the drawee bank will not have had the opportunity to reject payment and mark the check "Stopped Payment."

When the new holder endorses the check and deposits it into his account it will be returned to him without payment. If the new holder meets the requirements of the HDC rule, your client will be obligated to pay this new holder who is a complete stranger to your client. The subsequent holder of the check need only plead: value given; good faith; and no knowledge of any defenses to the claim, dishonor or that the instrument is overdue.

It is also important to note that the UCC definition of good faith is not what would be reasonable to the rest of the world, but rather what is the actual knowledge of the subsequent holder. UCC § 1-201 (19) defines good faith as "honesty in fact in the conduct or transaction concerned."

Assuming that you remember to counsel your client that there is a HDC rule, you now have to explain it in non-legalese, or you run the risk that your client will perceive your words of counsel as simple rubbish or hyperbole. The example that seems to work best with my clients is that of the Butcher and the Landscaper and your client, the Candle Stick Maker. Your client is the maker or drawer of the check and has an agreement with his Landscaper that the Landscaper will cut his lawn every week for $50 and pay the Landscaper $100 in advance every two weeks. Your client sends the Landscaper a $100 check and leaves for vacation.

Your client returns home after a two-week vacation and sees that the lawn has not been cut. Your client is upset and puts a Stop Payment Order on the check before the check is deposited.

The Landscaper decides to order $100 of barbecue meats from his Butcher and signs the back of the check and gives it to his Butcher. The Butcher knows the Landscaper and deposits the item in his bank. The Butcher has now become a Holder in Due Course. He had provided value, acted in good faith and has no knowledge that your client has reason not to pay the check. Shortly thereafter the Landscaper vacates his apartment and leaves no forwarding address.

The check is then presented to the drawee bank on Wednesday. Before midnight of the next day the drawee bank refuses payment and the check is returned to the Butcher's bank with a Stop Payment notice on the check. In this situation your client is obligated to compensate the Butcher for the full amount of the check.

In addition to the HDC requirements the following two unusual circumstances must also occur for a situation to arise where a drawer will be liable to a HDC. First, there must be a subsequent holder that is willing to accept a check that is payable to someone other than himself. The second circumstance that must exist for our dishonest payee to get around the Stop Payment Order is that there must be a bank that is willing to accept a check for deposit into a bank account holder's account where the payee on the check is someone other than the bank's account holder.

The Holder in Due Course problem does not occur with any great frequency nor are the checks that are involved likely to be of any great amount. Nevertheless, it is always much better for counsel to explain what could possibly go wrong before this problem occurs rather than trying to remedy it thereafter.

Note: Sean Campbell is a principal of the Law Offices of Sean Campbell in Huntington, N.Y. He can be reached at SeanCampbell@CampbellsLawNY.com

FOCUS ON COMMERCIAL LAW
SPECIAL EDITION

Corporate Officer Held Personally Liable to Unpaid Subcontractor

By Karl Silverberg

Suffolk County Supreme Court Justice Thomas Whalen recently ruled that a general contractor's corporate officer was personally liable to an unpaid subcontractor. The basis for the ruling was New York State's Lien Law Article 3-A, known as the trust fund statute. The case is, *Marcor Construction v. Bil-Ray Aluminum Siding and Charles LePorin*.

The subcontractor, Marcor, installed roofs for a general contractor, Bil-Ray. The general contractor went out of business leaving an unpaid balance owed to the subcontractor.

The subcontractor brought a lawsuit to hold the general contractor's owner, Charles LePorin, personally liable under the trust fund statute.

The trust fund statute is a powerful tool, and not all states have a trust fund statute. Under the trust fund statute, any funds that a general contractor ("GC") receives from a project owner are considered trust funds. The GC is required to hold the trust funds in trust for the trust fund beneficiaries. The beneficiaries are the subcontractors and material suppliers. Only after all trust fund beneficiaries have been paid do any remaining funds vest in the trustee-GC.

Karl Silverberg

The key aspect of the trust fund statute is that it opens the door to hold corporate officers personally liable for breach of trust. As stated by Justice Whalen: "Officers and directors of a corporate trustee are under a duty to the beneficiaries of a trust administered by the corporation not to cause the corporation to misappropriate trust property and will be personally liable for participation in a breach of trust. Corporate officers may thus be held liable for trust funds otherwise diverted by their corporation provided that the corporate officer charged knowingly participated in the diversion by the corporation."

Without the trust fund statute, Marcor's only remedy would have been to sue a defunct business.

The court analyzed the facts to determine if Bil-Ray's owner, Charles LePorin, knowingly diverted trust funds. The court noted: "Such proof included the affidavits submitted by . . . a former employee of defendant Bil-Ray detailing the existence of trust assets in the hands of the corporate defendant and the voluntary diversion thereof on the part of its officer, director and/or employee, Charles LePorin, who failed to pay the plaintiff out of such trust assets [the] amount due for work it performed under the terms of its subcontract." Further: "[T]he opposing papers submitted by the defendants . . . included nothing but innuendo, surmise and self-serving conclusory assertions that someone other than defendant LePorin was responsible for the diversion of trust assets. These assertions were insufficient to raise a question of fact regarding an absence of knowing participation on the part of defendant LePorin in the conduct constituting the improper diversion of trust assets."

This case shows New York's trust fund statute in operation. It is a powerful tool for New York's subcontractors and material suppliers.

This author represented Marcor Construction in the above matter.

Note: Karl Silverberg focuses his practice on construction law at Silverberg P.C. Prior to law school Mr. Silverberg worked as a civil engineer for eight years on public sector transportation projects, and is a licensed professional engineer. Mr. Silverberg can be reached at (631) 778-6077 or ksilverberg@silverbergpclaw.com.

FOCUS ON COMMERCIAL LAW
SPECIAL EDITION

Useful Online Commercial Law Resources

By Glenn P. Warmuth

Glenn P. Warmuth

The Internet is a great source of information for the commercial law attorney. In this article I am going to touch on some online resources to help you conduct research and keep up to date and also to see how other firms are promoting themselves through the use of blogs.

The Commercial Division Law Report is a digest of New York State Commercial Division cases, which is available, online at www.nycourts.gov/courts/comdiv/lawreport.shtml. The Report typically contains summaries of about 20 cases on topics including breach of contract, calculation of damages, burden of proof, piercing the corporate veil, e-discovery rules, etc. The summaries are particularly useful in pinpointing the issues involved in each case. The digest is scheduled to be printed quarterly and although no issues have yet been published in 2013, the editor advises that a new issue is in the works.

The New York Official Reports website has two useful online Commercial Division resources. First, Commercial Division decisions are available online by going to www.courts.state.ny.us/reporter and clicking on the Commercial Division link under the heading "most recent decisions." This will bring you to a list of recent Commercial Division cases listed in chronological order. Second, and even more useful, is the searchable Commercial Division Database found at iapps.courts.state.ny.us/lawReporting/Search. When using this advanced search you simply change the "search by court" setting to "Commercial Division." This limits the results of your search to only Commercial Division decisions.

A Google search for "New York Commercial Law Blog" yields many results for blogs, which are run by commercial law attorneys. These blogs vary in the type of content they present as well as the way in which they present it. These blogs create an online forum for discussion of various topics and may be helpful to you if you find an entry on a topic you are researching.

Warshaw Burnstein, LLP's blog, www.newyorkbusinesscommerciallawblog.com, is an easy to navigate blog, which categorizes entries by topics including mergers and acquisitions, business litigation and commercial litigation. The entries tend to focus on recent cases and developments in the law.

Craig Delsack, Esq. operates www.nyc-counsel.com/blog.html which is a video blog. The videos cover general information about practicing commercial law including "Negotiating the Terms of Buying a Business" and "How do I Remove Rogue Member or Manager from My LLC?" The videos are high quality and well produced.

Kravet & Vogel, LLP maintain a Business & Commercial Litigation Law blog at www.kravetvogel.com/blog. The blog focuses on business torts, commercial real estate and contract disputes. The entries are detailed and easy to read and contain tags which allow the user to find more entries on a particular topic.

Finally, no article on online resources would be complete without a discussion of Google Scholar. Google Scholar is a service provided by Google which allows the user to search case law online for free. To access Google Scholar you go to scholar.google.com then click "legal documents" and enter your search. A Google Scholar search for New York cases with the term "pierce the corporate veil" yields 798 cases, with the Court of Appeals decisions listed first. You can then narrow these results by adding additional search terms.

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SPECIAL EDITION

Note: Glenn P. Warmuth is a partner at Stim & Warmuth, P.C. where he has worked 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.

TAX LAW

'Wandry-ing' About Defined Value Clauses?

By Lou Vlahos

Taxpayers sometimes employ so-called "defined value clauses" in connection with gifts of property that are difficult to value, such as an equity interest in a closely-held business. In the case of such a gift, the value of the business interest – the amount of the gift – is never really "established" for tax purposes unless the IRS audits the gift tax return. Defined value clauses ("DVC") are aimed at such audits.

What is it?

A DVC may be used where the donor seeks to keep the value of the gift at or below his remaining gift tax exemption amount. It provides, in the event the IRS successfully determines that the value of the shares of stock (or partnership units) gifted by the taxpayer exceeds the taxpayer's available exemption amount, that some of these shares or units would be "returned" to the taxpayer, as if they had never been transferred.

The IRS has challenged DVCs as being against public policy, on the grounds that they enable the donor-taxpayer to retroactively adjust the number of shares transferred, depending upon an IRS challenge years after the transfer.

However, a number of courts have found that DVCs are acceptable where the "excess" amount was not returned to the donor but, rather, was redirected to a charity. (Alternatively, some taxpayers have directed that the excess be used to fund a zeroed-out GRAT.)

Lou Vlahos

Wandry

More recently, however, the Tax Court in *Wandry,* T.C. Memo. 2012-88, approved a DVC where the "excess" was returned to the donor, and not to a charity. In that case, the taxpayers gifted LLC interests to their issue, but instead of stating the number of LLC units being transferred, they phrased the gift in terms of "that number of units which had a value equal to the taxpayers' remaining exemption amount" (in other words, a fixed dollar amount). If the appraised value of the LLC interests was successfully challenged by the IRS as too low, then the number of units originally calculated as having been gifted (on the basis of the taxpayer's appraisal) would be adjusted downward, to reflect the greater value per unit determined by the IRS, and the donor's relative interest in the LLC (post-gift) would increase. The Tax Court ruled that what the taxpayers had gifted was LLC units having a specific dollar value — the exemption amount — and not a specific number of LLC units.

Other consequences

The *Wandry* decision may encourage more taxpayer-donors to employ DVCs, notwithstanding that the IRS did not acquiesce in the decision. Before doing so, however, it is important that taxpayers look beyond the immediate transfer tax consequences of such an arrangement. They also need to consider various income and other gift tax consequences that may result from an adjustment triggered by a DVC.

The closely-held businesses, the transfers of which are the usual target of DVCs, are often formed as pass-throughs, such as partnerships, LLCs or S corporations. A gift transfer of an interest in such an entity carries with it certain "tax attributes." For example, every member, including the recipient of the gift, must include his allocable share of the partnership's income on his income tax return, whether or not the entity distributes such income. If the donor-member had contributed built-in gain property to the partnership, a portion of the donor's income tax liability as to such built-in gain shifts over to the donee-member as a result of the gift; on a subsequent sale of the property, a portion of the built-in gain would be taxed to the donee. In addition, if the pass-through entity makes cash distributions to its owners, the donor and the donee would each receive an amount in accordance with their respective pro rata shares (before any *Wandry*-adjustment). What if the original transfer was treated as a part-sale/part-gift because it resulted in a reallocation of partnership debt among the members?

It is unclear how the operation of a DVC interplays with these tax rules. In other words, what happens if the IRS successfully challenges the valuation of the gifted business interest? Pursuant to the DVC, a lesser number of units or shares is deemed gifted than was initially thought; the donor-taxpayer only gifted a value amount, not a percentage or number of units. The income tax consequences to the members of the entity were based on this initial figure. Now, a couple of years later, how are they to be "corrected" where the donor-taxpayer, in retrospect, may have been allocated too little of the entity's net income and may have received too little in the way of distributions.

How should these inconsistencies be planned for or addressed? For example, should the gift transfer be made in trust for the benefit of the donee-family members, with the trust structured as a grantor trust? In the case of a grantor trust, the donor-taxpayer is treated as the owner of the trust property for income tax purposes and, so, is taxed on the income and gains therefrom, regardless of whether the ultimate number of shares is adjusted.

If a grantor trust is not feasible, the donees will have reported the income or gains allocated to the equity and paid the tax thereon though, by operation of the

(Continued on page 21)

HEALTH AND HOSPITAL

Is Your Firm a HIPAA "Business Associate?"

By James G. Fouassier

A word to the wise for attorneys who represent HIPAA "Covered Entities" as well as to attorneys who represent business entities that work for, or with, such attorneys.

In a relevant and timely analysis presented in the August, 2013, edition of "AHLA Connections," a publication of the American Health Lawyers' Association (www.healthlawyers.org), Jonathan Tomes, Esq. of Tomes & Dvorak in Overland Park, Kansas, asks whether the recently enacted corollary to the Health Insurance Portability and Accountability Act ("HIPAA"), which is known as the "HITECH Act" (the Health Information Technology for Economic and Clinical Health Act) **1**, effectively creates a federal regulation of attorneys who provide legal services for "Covered Entities." "Covered Entities" include all providers of clinical services, health plans and prescription drug sponsors. HIPAA strictly controls the use, storage and disclosure of PHI by "Covered Entities" (it is individually identifiable health information that is the essence of "protected health information"). Whenever a person or entity performs a business service for a Covered Entity that involves the use or disclosure of PHI, that business entity becomes what HIPAA defines as a "business associate." Since the advent of HIPAA, legal services have been "business associate" services if they involve PHI; *i.e.,* individually identifiable health information derived from or on behalf of a "Covered Entity" *client*. (A personal injury plaintiff attorney who obtains PHI from a hospital to use in litigation is not a "business associate" of the hospital because the hospital is not the client. Counsel for the hospital is.)

James G. Fouassier

Until HITECH, an entity acting in a way so as to meet the definition of "business associate" was required to enter into a "business associate agreement with the Covered Entity. That agreement contractually bound the business associate to the same HIPAA privacy rules as obligated the Covered Entity, but it was the Covered Entity, not the business associate, that was liable for any HIPAA violations by the business associate if the Covered Entity had knowledge of a "pattern and practice" of unlawful conduct by the business associate. In brief, what HITECH has done is to regulate the access to and disclosure of PHI to a much greater degree than does HIPAA itself. Now, under HITECH, a "business entity" may be found directly liable for HIPAA privacy violations by the Covered Entity if the business associate is aware of the Covered Entity's "pattern or practice" of unlawful activity.

Mr. Tomes queries whether, other than simply confronting the client, the attorney may do more to avoid such liability without running afoul of canons of ethics requiring the preservation of client confidences. Yet certain HIPAA provisions may deem the failure of a business associate to disclose such patterns and practices to be a crime. In addition, under HITECH the concept of a legal "business associate" contemplates more than simply the role of passive advisor and counselor: at what point does an attorney's work for the Covered Entity arguably constitute "aiding and abetting" an unlawful pattern or practice, or co-conspiracy, or accessory after the fact?

To complicate matters even more, Mr. Tomes points out that attorney business associates also face liability for HIPAA breaches by *their* subcontractors, known in HIPAA parlance as "downstream business associates," many of whom may not be bound to the attorney by their own business associate agreements. When a business associate delegates to any third person any activity that the business associate has agreed to perform for a Covered Entity that involves the use or disclosure of PHI the business associate assumes direct liability for violations by the assignee or delegate based on the same standards. Even more, HITECH holds that the *subcontractors* face the same criminal and civil liabilities as do Covered Entities and "upstream" business associates!

Lastly, HITECH makes Covered Entities and their business associates liable for any actions of their agents which violate the HIPAA privacy rules, on a common law agency theory and independent of any business associate agreement the principal may have with the agent. Previously HIPAA permitted such liability only upon a showing that the principal knew of the conduct and did nothing to address it.

Mr. Tomes concludes by observing some practical effects of the HITECH changes, including significant costs of increased compliance and security, and the likelihood that malpractice carriers will respond by heightening scrutiny of such compliance and security with concomitant increases in premiums.

All in all the article presents a sobering and somewhat disconcerting analysis of the practical effects of the HITECH regulations which leaves one wondering "when," rather than "if," an attorney business associate will run afoul of these traps. Is all of this an example of the "law of unintended consequences" or did the regulators truly intend to expand potential HIPAA liability to such a degree?

* * * * * * * * *

On a different HIPAA note, from time to time this writer updates readers on the effects of HIPAA on the evolution of the common law right to privacy. It is well settled that HIPAA does not create a private right of action. Congress has vested all HIPAA enforcement in the Office of Civil Rights of the Department of Health and Human Services; the OCR investigates complaints, assesses fines and implements enforcement activities. At the same time the common law of privacy (like all common law) evolves to meet the prevailing mores, customs and needs of a community, as reflected in court decisions and jury verdicts.

In furtherance of my earlier speculation that HIPAA, while not independently actionable, nevertheless could become a part of the common law standards of privacy, is a recent verdict in an Indiana case. A jury awarded $1.4 million to a plaintiff who complained that a pharmacist accessed her prescription information and shared it with her husband — who allegedly had fathered a child with the plaintiff — so the husband could use the information to intimidate the plaintiff

(Continued on page 21)

EDUCATION

School District Residency for Students of Divorced Parents

By Candace J. Gomez

Candace J. Gomez

The New York State Commissioner of Education has determined that when a child's parents live apart, the child can only have one legal school district of residence. *Appeal of Dennis*, Decision No. 16,298 (2011). Where a court awards custody to only one parent, the analysis is fairly simple as the child's residence is presumed to be that of the custodial parent. *Appeal of Petrie*, Decision No. 13,842 (1997).

However, where a court awards joint custody, the analysis is often more complex. The child continues to have only one legal school district of residence, but determining the appropriate school district of residence in circumstances where one parent lives in the school district and the other parent does not, demands an examination of several factors. A key factor is whether the child's time is "essentially divided" between the two households. In cases where a child's time is essentially divided between two separate households and the parents both assume day-to-day responsibility for the child, the determination of the child's school district of residence rests ultimately with the family. *Appeal of O'Brien,* 13,460 (1995). In such cases, the custodial parents may designate the child's school district of residence as either the school district where the mother lives or the school district where the father lives. *Id.*

Appeal of Finnell and Morgan, Decision No. 16,295 (2011) examines the issue of whether a child's time is "essentially divided" between two households where petitioner parents were divorced and shared joint legal custody of their son. According to two court-approved custody agreements, the parents shared physical placement of their son but they designated the school district where the child's mother resided as the district where their son would attend school. However, at some point, their son began to reside primarily with his father outside the district. Therefore, the school district's superintendent notified the parents that a determination had been made that their son was not a resident entitled to a tuition-free public education in the mother's school district pursuant to Education Law § 3202.

Education Law § 3202(1) provides, in pertinent part, that "[a] person over five and under twenty-one years of age who has not received a high school diploma is entitled to attend the public schools maintained in the district *in which such person resides* without the payment of tuition." (emphasis added)

The Commissioner of Education has explained that the "purpose of this statute is to limit the obligation of school districts to provide tuition-free education to students whose parents or legal guardians reside within the district." *Appeal of Finnell and Morgan*, Decision No. 16,295 (2011). "Residence for purposes of Education Law § 3202 is established by one's physical presence as an inhabitant within the district and intent to reside in the district. *Id.; Longwood Cent. School Dist. v. Springs Union Free School Dist.*, 1 N.Y.3d 385, 388 (2004).

In *Appeal of Finnell and Morgan*, *supra*, despite the parents' arguments that their child was only temporarily living with his father outside the district, the parents did not produce any proof to support that argument. They also claimed that their child's time was "essentially divided" between the parents, but the Commissioner noted that the parents could have submitted an affidavit from the counselor working with the family to support that claim, however they failed to do so. A school district's residency determination will not be set aside by the Commissioner unless it is arbitrary and capricious. *Id.* In an appeal to the Commissioner regarding residency determinations, the petitioner has the burden of demonstrating a clear legal right to the relief requested and the burden of establishing the facts upon which the petitioner seeks relief. *Id.* Since the parents were not able to satisfy their burden of proof, the Commissioner found in favor of the school district and dismissed the parents' appeal. *Id.*

By way of contrast, *Appeal of Cortes*, Decision No. 13,818 (1997) serves as a reminder that although the Commissioner will look to whether the child's time is "essentially divided" between the parental households, this does not mean that the child's time must be "equally divided" between the parental households. Here, where divorced parents shared joint legal custody of their three sons and designated the father's school district as their children's school district of residence, the school district hired a private investigator to conduct surveillance and determined that the children resided with their mother nearly 70 percent of the time. Accordingly, the school district determined that the children were not residents entitled to a tuition-free public education from the father's school district. The school district argued that divorced parents were allowed to "designate their children's district of residency only in cases where the children spent equal time between the parental households and the parents both assume day to day responsibility for the children." *Id.*

However, the Commissioner found that the school district's argument was flawed in two respects. First, the school district incorrectly concluded that divorced parents may designate their child's school district of residence only in cases where their child divides his or her time *equally*. Nothing requires that the child's time be divided exactly equally between the parents. Second, the school district miscalculated the time the children lived with their father. The Commissioner determined that, during the school week, the children's time was essentially equally divided between the mother and the father, each parent having the children for two school days one week and three school days the next week. *Id.*

This begs the question, how much time is enough time to constitute being "essentially divided" between parental households? Since the Commissioner has made it clear that it is not a test of whether the child is in the district at least 50 percent of the time, what if the child is only in the dis-

(Continued on page 21)

WHO'S YOUR EXPERT

Expert Witnesses in Surrogate's Court Proceedings

By Hillary A. Frommer

In probate proceedings, parties objecting to a will on the grounds that the testator lacked testamentary capacity to make the instrument, will frequently present testimony at trial from an expert psychiatrist to establish the lack of testamentary capacity. It is also often the case that that psychiatrist never saw or treated the testator, and develops his or her expert opinion solely by reviewing various documents, including the testator's medical records. If you are the proponent of the instrument, your gut reaction is probably to move to preclude that psychiatrist from testifying. Good thought; but unfortunately not likely a winning motion.

The case law suggests that such expert psychiatric testimony is admissible. That does not mean however, that the objectant carries the day. The courts have routinely and consistently held that such testimony is afforded very little weight, if any, and is unreliable. For example, in *Matter of Swain*,[1] a will probate contest, the objectant's expert psychiatrist testified that based solely on an examination of the medical records, which notably did not include the month when the will was executed, the testator was so impaired by a stroke that she could not have known the nature and extent of her assets or the natural objects of her bounty.[2] The jury returned a verdict denying the will to probate on the grounds, *inter alia*, that the testator lacked testamentary capacity. The Second Department reversed. Although the expert psychiatrist's testimony was admissible, the court found that it was purely speculative, was contradicted by the testimony of the testator's treating physician, and was entitled to no weight. Thus, it concluded that the objectant failed to rebut evidence that the testator was alert, lucid, and of sound mind when she executed the will—*i.e.*, that she possessed testamentary capacity.

Hillary A. Frommer

Similarly, in *Matter of Buchanan*,[3] during the jury trial of the contested probate proceeding, the objectants presented testimony from a psychiatrist who was a longtime acquaintance of the testator but had never treated him. Based on the medical records, that psychiatrist testified that due to the decedent's advanced stage of dementia, it was unlikely that he could have had a lucid interval during the execution of the will. However, that testimony conflicted with that from the treating physicians, offered by the proponent, who testified that the decedent possessed reasonable cognitive function and testamentary capacity. The jury determined that the will was valid, and it was admitted to probate. Affirming the decree of the Surrogate's Court, the Third Department stated that the testimony from the objectants' expert psychiatrist was "the weakest and most unreliable type of evidence," and did not establish that the decedent lacked testamentary capacity.[4] The Second Department rendered a similar decision in *Matter of Delcatto*.[5] In that turnover proceeding pursuant to New York Surrogate's Court Procedure Act § 2012, the petitioner alleged that the decedent lacked testamentary capacity to execute a trust and deed. At the jury trial, the petitioner presented testimony of expert psychiatrists who never examined, treated, or knew the decedent, but who relied solely on the decedent's medical records. The jury found that the petitioner failed to satisfy his burden of proof that the decedent lacked capacity. Affirming the decree, the Second Department stated that the testimony of the psychiatrists "is considered speculative and entitled to little, if any weight."

Notably, courts afford little weight to this type of testimony regardless of which party relies on it. In *Matter of Slade*,[6] the proponent of the will relied on a psychiatrist's testimony that the testator possessed testamentary capacity. That witness had never examined the testator, nor discussed her condition with any treating physicians. He simply reviewed her medical records. At the close of the proponent's case, the objectant's moved for a directed verdict pursuant to CPLR § 4404, which the court granted on the issue of lack of testamentary capacity, because the proponent failed to meet his burden. Affirming that decision, the Fourth Department stated that "such testimony is the weakest and most unreliable kind of evidence," and noted that it contradicted the facts — which must prevail.[7]

Given that such expert testimony is afforded very little weight by the courts, a party relying exclusively thereon will likely not prevail at trial. That is exactly what occurred in *In re Estate of Carver*.[8] There, the objectants relied solely on the testimony of an expert psychiatrist, who was not a treating physician, never examined the testator, and was never involved in the medical history of the case, that the testator was not competent when he executed the will due to the decedent's physical condition and drug therapy. The court allowed that testimony yet stated that it

(Continued on page 21)

CONSUMER BANKRUPTY

HOA Dues in Bankruptcy Cases — Debts Not Treated Like Ordinary Debts

By Craig D. Robins

Consumers who own co-ops and condos have monthly obligations to a homeowner's or community association. What happens when a consumer seeks bankruptcy relief? Can the consumer discharge HOA dues?

Although consumers can easily discharge many types of debts, discharging HOA dues is somewhat more complicated. In general, HOA dues that exist at the time of the bankruptcy filing can be discharged, but dues that arise after the date of filing cannot.

Let's look at some history. Prior to the 2005 Bankruptcy Amendment Act (BAPCPA), there was a great deal of confusion regarding dischargeability of HOA dues. A Bankruptcy code section that was added in 1994 in an effort to simplify things, actually made HOA dischargeability issues more unclear.

As a practical matter, prior to 2005, most homeowners were able to walk away from their units and not worry about HOA fees because the lender or new owner would ultimately have to pay the HOA arrears when the unit was eventually resold. This approach no longer works.

When Congress overhauled the laws with BAPCPA, it decided that, based on public policy, HOA associations deserved a certain amount of protection. Since HOAs are comprised of fellow homeowners, as opposed to being a for-profit corporation, Congress determined that it would be an unfair burden for one bankrupt homeowner to severely hurt the other homeowners. The fact that HOAs had a strong lobbying effort at the time certainly helped. Accordingly, Congress decided to promulgate a new statute making some HOA dues dischargeable, and others non-dischargeable.

HOA dues that a consumer owes pre-petition are dischargeable. That means a consumer can discharge HOA arrears in a Chapter 7 case. However, HOA dues that arise post-petition are not dischargeable. See Bankruptcy Code section 523(a)(16).

This becomes a very delicate issue with many of my clients. A great number of homeowners are "underwater" and have no equity in their homes. A common strategy for these folks who find it difficult to make the monthly mortgage payments or have an unmanageable amount of arrears is to discharge their mortgage obligation in a Chapter 7 case and eventually walk away from the home. However, this approach does not work so smoothly for those with co-ops and condos.

In a bankruptcy proceeding, the homeowner can discharge the HOA arrears and any condo mortgage or co-op loan obligations. However, as long as the consumer remains the owner of the property, any post-petition HOA charges continue to accrue and they are non-dischargeable. This creates a dilemma for the homeowner. They can't easily walk away because they will remain on the hook for the HOA fees. In addition, the consumer can't just surrender the property.

To add to potential misery, banks are usually in no hurry to foreclose co-op and condo units because they know that once they obtain title, they will be on the hook for future HOA dues. Some consumers and HOAs in other jurisdictions have even brought suit against slow-moving lenders, alleging that they deliberately delayed the foreclosure proceedings.

This gridlock in moving forward can result in a large buildup of nondischargeable debt for the beleaguered consumer. Unfortunately, there are no magic answers. The best approach in helping your Chapter 7 clients who have HOA dues is to explain how the law works. Sometimes a short sale will solve the problem, but this requires a cooperative lender.

Another approach is to negotiate some kind of surrender to the HOA combined with a deed-in-lieu of foreclosure, although some HOAs may not be interested in cooperating.

Of course, the obvious but undesirable option is for the homeowner to continue to pay the post-petition HOA dues until the property is no longer in the homeowner's name — either as the result of foreclosure or other means.

Homeowners who intend to keep their property after a Chapter 7 proceeding should be aware that HOA dues may or may not be secured debts. Whether they are would be governed by the contract entered into with the HOA when the unit was purchased. If the HOA has a lien, then the dues must be paid as a condition to remain in the property. If there is no lien, the debtor can discharge the pre-petition dues and remain in the property.

In Chapter 13 proceedings, if the homeowner is surrendering the property, the pre-petition HOA dues are treated as unsecured debt. However, the post-petition dues continue to be an obligation until ownership changes.

Some attorneys used to indicate in the Chapter 13 plan that the debtor is surrendering and/or abandoning the property in the hope of escaping post-petition HOA liability. However, this no longer works. Generally, when a debtor surrenders property, it gives the lender increased ability to take certain action but it does not result in a transfer of legal title.

For homeowners in Chapter 13 who intend on keeping the property, the HOA arrears may be an unsecured debt if they are subordinated by the mortgage and the property is underwater. In that case, the HOA lien can be stripped off by bringing a motion pursuant to code section 522. Of course, this only benefits the debtor if the plan pays significantly less than 100 percent to unsecured creditors. In any event, any HOA arrears would be paid through the plan either as secured or unsecured debt.

Unfortunately, like Chapter 7 cases, homeowners cannot discharge post-petition HOA dues in Chapter 13 filings.

The most important aspect in representing homeowners with HOA dues is to explain how post-petition obligations may not be dischargeable and to assist them with a reasonable strategy that takes this into consideration. It would be wise to prepare a letter to the client explaining the nondischargeability of post-petition HOA dues and have the client sign it.

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

REAL ESTATE

Movements in LGBT Discrimination Laws

By Andrew Lieb and Michelle E. Phillips

In the wake of the U.S. Supreme Court's June 26 same-sex marriage decisions in *United States v. Windsor* and *Hollingsworth, et al. v. Perry*, pressure has increased to expand protections under federal, state and local legislation regarding sexual orientation, gender identity and gender expression in the context of employment and housing.

In the employment area, the Senate Health, Education, Labor and Pensions ("HELP") Committee has approved a bill, ENDA (the Employment Non-Discrimination Act), that would prohibit employers from discriminating against employees on the basis of sexual orientation or gender identity. After S. 815 passed, Committee Chairman Senator Tom Harkin said, "I think society is there and the things that have happened in the Supreme Court show we're ready to move on in a way we haven't moved on in the past." According to the annual Out & Equal Workplace Survey on Workplace Culture conducted by Harris Interactive, "74% of voters believe that employees should be judged on their work, not their sexual orientation or gender identity."

ENDA would amend Title VII of the Civil Rights Act to prohibit "covered entities" and employers with at least 15 employees from discriminating against employees on the basis of sexual orientation or gender identity. "Covered entities" means an employer, employment agency, labor organization or joint labor-management committee. Corporations, associations, educational institutions or societies exempt from the religious discrimination provisions of Title VII are exempt from ENDA.

Andrew Lieb

Michelle E. Phillips

Unlawful employment practices include: a) failing or refusing to hire or discharging or otherwise discriminating against an individual regarding the compensation, terms, conditions or privileges of employment because of the individual's actual or perceived sexual orientation or gender identity; b) limiting, segregating or classifying employees or applicants in any way that would deprive or tend to deprive an individual of employment or otherwise adversely affecting the status of the individual as an employee because of the individual's actual or perceived sexual orientation or gender identity; c) retaliating against an individual for opposing an unlawful employment practice, making a charge, testifying, assisting or participating in an investigation, proceeding or hearing under ENDA.

In the housing area, the U.S. Housing and Urban Development (HUD) enacted regulations, called the Equal Access to Housing HUD Programs, "to ensure that HUD's core housing programs are open to all eligible persons, regardless of sexual orientation or gender identity" back in 2012. According to Secretary Shaun Donovan, "With this historic rule, the Administration is saying you cannot use taxpayer dollars to prevent Americans from choosing where they want live on the basis sexual orientation or gender identity."

Unlawful housing practices include: a) owners and operators failing to make HUD-assisted housing, or housing whose financing is insured by HUD, available without regard to the sexual orientation or gender identity of an applicant for, or occupant of, the dwelling, whether renter- or owner-occupied; b) lenders using sexual orientation or gender identity as a basis to determine a borrower's eligibility for FHA-insured mortgage financing; c) owners and operators of HUD-assisted housing or housing insured by HUD asking about an applicant or occupant's sexual orientation and gender identity for the purpose of determining eligibility or otherwise making housing available.

However, the dichotomy between Federal and State law remains confusing for both employers and landowners/operators of housing. While federal employment law does not explicitly protect gender identity and gender expression, 17 states (California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont and Washington) and the District of Columbia include gender identity and/or gender expression in their employment non-discrimination statutes. Moreover, in housing, while the rights of LGBT individuals are somewhat protected by HUD's regulations, sexual orientation and gender identity are not protected classes within the federal Fair Housing Act, but there are approximately 21 states and the District of Columbia that prohibit discrimination against LGBT individuals.

In addition, the Equal Employment Opportunity Commission has stated that as part of its latest Strategic Enforcement Plan it is committed to investigating "emerging" issues, including "utilizing Title VII of the Civil Rights Act to protect members of the LGBT community."

As David Kilmnick, the Chief Executive Officer of The Long Island GLBT Services Network put it, "folks need clarity to understand that Federal Laws are just one piece of the puzzle when looking at laws and legislation that protect the rights of our communities. Some states and local governments can afford us even greater protections against discrimination. We need to be knowledgeable about all of these and find where the maximum protection lies and enforce from that perspective and angle."

We must be prepared to advise our clients; employers, landowners and property operators should understand local and state laws that protect the rights of LGBT individuals. Moreover, with the advent of the post-*Windsor* federal regulations and guidances, a trend continues on the federal level to grant protection for LGBT individuals. Our job as counselors at law is to ensure that our clients are fully apprised as to the ever-changing employment and housing laws.

Note: Michelle E. Phillips is partner in the White Plains office of Jackson Lewis, and Andrew M. Lieb is Managing Attorney of Lieb at Law. P.C.

COURT NOTES

By Ilene Sherwyn Cooper

APPELLATE DIVISION-SECOND DEPARTMENT

Attorney Resignations

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

Mellany Alio
Edmund P. Bergan, Jr.
Patricia M. Cavanaugh
Joseph J. Charleman
Elizabeth Ann Chen
Christine Cullen
Lisa M. Dawson
Anthony C. Donofrio
James Gerard Fennessy
Rebecca Beth Fisher
Sansan Symone Fung
Tara A. Gellman
Joshua Eric Johnson
Danielle F. Knight
Ronald Joseph Leinen
Bert Padell
Arthur J. Powers
Lothlorien Sol Redmond
Linda Marie Ricci
Monica Marquardt Riederer
Morton Rivkind
Mandy Rothsam
Ford Douglas Ruud
Andrew John Rub
Susan Frances Spiro
Glenn L. Stephenson
Dana E. Wordes

Attorney Reinstatements Granted

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

David Craig Weiss

Attorney Resignations Granted/Disciplinary Proceeding Pending:

Ilene S. Cooper

Scott Forcino: By affidavit, respondent tendered his resignation on the grounds that he engaged in illegal conduct as evidenced by his conviction of criminal facilitation, a Class A misdemeanor. He stated that he could not successfully defend himself on the merits against charges predicated upon the foregoing. Further, he stated his resignation was freely and voluntary rendered, that he was fully aware of the implications of submitting his resignation, and that he was subject to an order directing that he make restitution and reimburse the Lawyers' Fund for Client Protection. In view of the foregoing, the respondent's resignation was accepted and he was disbarred from the practice of law in the state of New York.

Michael Stewart Lazarowitz: By affidavit, respondent tendered his resignation on the grounds that he is currently the subject of an investigation pending against him by the Grievance Committee predicated upon allegations that he failed to safeguard funds entrusted to him as a fiduciary. He stated that he could not successfully defend himself on the merits against charges predicated upon the foregoing. Further, he stated his resignation was freely and voluntary rendered, that he was fully aware of the implications of submitting his resignation, and that he was subject to an order directing that he make restitution and reimburse the Lawyers' Fund for Client Protection. In view of the foregoing, the respondent's resignation was accepted and he was disbarred from the practice of law in the state of New York.

Howard Marc Sklar: By affidavit, respondent tendered his resignation on the grounds that he is currently the subject of a disciplinary action pending against him predicated upon allegations, *inter alia,* that he failed to timely cooperate with the Grievance Committee, neglected a legal matter, and engaged in a conflict of interest. He stated that he could not successfully defend himself on the merits against charges predicated upon the foregoing. Further, he stated his resignation was freely and voluntary rendered, that he was fully aware of the implications of submitting his resignation, and that he was subject to an order directing that he make restitution and reimburse the Lawyers' Fund for Client Protection. In view of the foregoing, the respondent's resignation was accepted and he was disbarred from the practice of law in the state of New York.

Jacquelyn Todaro: By affidavit, respondent tendered her resignation on the grounds that she is the subject of an investigation by the Grievance Committee arising from her indictment in the United States District Court for the Southern District to one count of conspiracy to commit bank fraud and wire fraud. She stated that she could not successfully defend herself on the merits against charges predicated upon the foregoing. Further, she stated her resignation was freely and voluntary rendered, that she was fully aware of the implications of submitting her resignation, and that she 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 she was disbarred from the practice of law in the State of New York.

Attorneys Censured

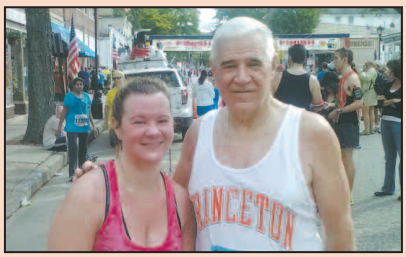
Dean Weber: Motion by the Grievance Committee to impose reciprocal discipline upon the respondent based upon disciplinary action taken against him by the United States District Court for the Southern District of New York which suspended him from the practice of law before that court for a period of one year in connection with the mishandling of a bankruptcy matter. The respondent responded to the application setting forth mitigating circumstances and requested leniency. Inasmuch as no defenses were set forth or a hearing requested, reciprocal discipline was imposed, and the respondent was publicly censured.

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

Hispanic Bar Honors SCBA's Jane LaCova

Photos by Douglas Torres

FREEZE FRAME



When State Supreme Court Justice W. Gerard Asher recently ran his 35th Great Cow Harbor 10K race he became one of just three men who have completed the race every year it has been run. The others are Huntington attorney Marc Kreig, 70, and Billy Oerhlein, 48. Justice Asher, who is 72, tries to keep his time the same as his age, and was within minutes of that goal this year. He's at the finish line with daughter and fellow runner Lana Asher Manuzza, above.

FREEZE FRAME

Acting County Court Judge Gigi Spelman (class '84) was honored as the St. John's University School of Law Suffolk Chapter Distinguished Alumni Dinner at the Irish Coffee Pub on October 9, 2013.

Ira P. Block Lawyer Assistance Foundation Golf Outing

PERSONAL INJURY

Validity of Medical Insurance Liens on Personal Injury Settlements

By Paul Devlin

In 2009, the New York Legislature enacted N.Y. Gen. Oblig. Law § 5-335 (hereinafter "§ 5-335") to protect personal-injury and wrongful death plaintiffs from subrogation or reimbursement claims by health insurers. The statute provides that upon the plaintiff's settlement of a personal injury or wrongful death case the insurer's right to seek subrogation is extinguished. It is important to note § 5-335 only applies where there is a settlement. Accordingly, an insurer may intervene as a subrogor in pending tort litigation and recover if the case goes to verdict or judgment. *See Rink v. State*, 901 N.Y.S.2d 480 (Ct. Cl. 2010), *aff'd* 929 N.Y.S.2d 903 (2011).

The statute also specifies it does not apply to a subrogation claim for recovery of additional first-party benefits provided pursuant to statute (i.e., APIP benefits). *See* N.Y. Gen. Oblig. Law § 5-335(b) (McKinney)

Perhaps the most significant obstacle to gaining the protection offered by § 5-335 is preemption. The statute provides that it shall not apply where there is a statutory right of reimbursement. A case in point is *Trezza v. Trezza*, 957 N.Y.S.2d 380 (N.Y. App. Div. 2012). The *Trezza* Court decided the issue of whether General Obligations Law § 5-335 is preempted by the Medicare Act. The personal injury plaintiff in *Trezza* received medical treatment, a portion of which was paid by her Medicare secondary payer organization, Oxford Health Plans (hereinafter "Oxford"). The Rawlings Company, LLC, on behalf of Oxford contacted the plaintiff's attorney to assert a claim for reimbursement of amounts Oxford paid for the plaintiff's accident-related medical care. By Order to Show Cause, the plaintiff moved to extinguish Oxford's purported lien or claim for reimbursement based upon the protection provided by § 5-335. The court held that § 5-335, insofar as applied to the Medicare Advantage organizations, is preempted by federal law because it restricts the contractual reimbursement rights to which those organizations are entitled pursuant to the Medicare Act. As such, § 5-335 was inapplicable and Oxford's lien was valid.

Paul Devlin

Most recently, in *Kohl's Dep't Stores v. Castelli*, 2013 WL 4038723 (E.D.N.Y. Aug. 8, 2013), the court decided the issue of whether ERISA preempts § 5-335. In this case, the beneficiary was injured in a motor vehicle accident and received medical treatment for her injuries. She received benefits regarding those injuries from a self-funded employee welfare benefits plan governed by ERISA. The health plan administrators sought reimbursement of paid benefits after the beneficiary recovered from a third party in a personal injury action. The court held that § 5-335 is preempted by ERISA. The court reasoned that § 5-335 contains an exception to its applicability when there is a statutory right of reimbursement. Here, the health plan was governed by ERISA, which created the statutory right of reimbursement. *See* 29 U.S.C.A. § 1144 (West). As such, § 5-335 was inapplicable and preempted by ERISA.

Another issue decided by *Kohl* is whether the health plan administrators had the legal authority to assert an equitable lien on the legal fees earned by the attorneys who represented the beneficiary in the underlying personal injury action. The court held that although the attorneys were not a party to the agreement between the beneficiary and the health plan, the attorneys could be liable under ERISA's § 502(a)(3), the focus of which is to redress practices or acts that violate ERISA. Applying this principle the court reasoned that an attorney can be a proper defendant if the attorney exercises proper control over funds identified in the complaint, such as by choosing to pay attorneys' fees with those funds instead of reimbursing the ERISA regulated plan. Here, the health plan administrators plead that the beneficiary's personal injury attorneys helped the beneficiary recover the settlement and took a fee for legal services out of the settlement proceeds. The court held the attorneys were properly named defendants because there was a plausible allegation in the pleadings that the attorneys exercised sufficient control over the settlement funds. Accordingly, the health plan administrators had the authority to assert an equitable lien on those attorneys' fees.

Despite the decisions discussed above, the principal benefit of § 5-335 remains in effect. When a personal injury or wrongful death case is settled the right of an insurer to reimbursement or subrogation is extinguished. When attorneys are put on notice of a purported health care lien they should first investigate whether any of the exceptions to this statute apply. Specifically, it should be determined whether this is an APIP lien or whether another statute such as ERISA or the Medicare Act preempts § 5-335.

Note: Paul Devlin is an associate at Russo Apoznanski & Tambasco where his practice concentrates on personal injury litigation. Additionally, he volunteers his time to the Suffolk Academy of Law. He can be reached via telephone at (516) 229-4522.

LAND TITLE LAW

Admissibility of Online Land Records

By Lance R. Pomerantz

A poorly-reasoned opinion out of the New York City Housing Court provides an opportunity to reflect on the issues of admissibility of online land records. *LCD Holding Corp. v. Velez,* 2013 NY Slip Op 51530(U) (Civil Ct., Kings Cty., August 21, 2013) was a summary eviction proceeding concerning a vacant lot in Brooklyn.

While the judge ruled at the outset that the court lacked subject matter jurisdiction and dismissed the complaint accordingly,[1] he went on to opine at length about the admissibility of the petitioner's evidence as well as the merits of the respondent's defense.[2]

What is an "Original?"

As part of his prima facie *case,* petitioner's counsel presented a copy of his client's deed. He asserted at trial that he had viewed the deed for the premises "on the 'ACRIS' database maintained by the New York City Department of Finance."[3] He then certified the copy as true and complete pursuant to CPLR §2105.[4] The court rejected the validity of the certification, stating that

> "*viewing a document on ACRIS is not akin to viewing the original document* [emphasis supplied]. … [D]espite common practice, the ACRIS version is not the original deed, but *only a presumptive image of the original document* [emphasis supplied]. Because the ACRIS deed is not the original document, petitioner [*sic*] cannot certify that he compared his copy to the original deed to satisfy the requirements of [CPLR §2105]."[5]

No authority was cited for this proposition. It appears that the court is saying that the only "original" for purposes of §2105 is the *actual* document submitted for recording. Such a standard would present an insurmountable burden to certification in almost every case. Obviously, even recording office personnel can only certify a copy by comparing it to the recorded version, not the actual one. And, the fact that a recorded document is stored electronically makes no difference to the analysis.

Lance R. Pomerantz

Evidence 101:

The court is confusing two basic requirements of admissibility: authentication and accuracy. This confusion becomes apparent when we consider the two cases that the Court cited as contrary authority.

Both *Miriam Osborn Memorial Home Assn. v. Assessor of City of Rye,* 9 Misc 3d 1019 [Sup. Ct. Westchester Co., 2005] and *Scarsini Interiors, Inc. v. Just In Time Furniture Warehouse, Inc., et al.,* 2009 NY Slip Op 31702[U] [Sup. Ct. NY Co., 2009], primarily addressed concerns about hearsay (*i.e.* accuracy). The *Scarsini* Court dismissed the authentication issue as a "technicality" and summarily pronounced that "[s]ince the uncertified copy [of a corporation filing] was printed from a government maintained website, *it is exempt from CPLR hearsay rules*" [emphasis supplied].

Miriam Osborn, in fact, wrestled mightily with the authentication issue precisely because the proffered statistical compilation was not certified. The court concluded that the proffered document, albeit uncertified, was properly authenticated through live testimony as a "true and accurate representation" of a public record, thus bringing it within the hearsay exception for public records afforded by CPLR §4518(a).

Authentication of Recorded Documents

County clerks are actually prohibited by statute from producing as evidence in an action any filed or recorded paper that forms part of the public land records. CPLR §8021(e) (subject to limited exceptions irrelevant here). Instead, §8021(e) requires that a "certified copy" of the document "be produced in evidence as provided in [CPLR] section 4540…"

CPLR §4540(a), in turn, provides that a copy of an "official record," "attested as correct by an officer … having legal custody" thereof, is prima facie evidence of such record. Note that this language only speaks to a showing that the record exists, and is in the custody of the attesting officer. The method of "attestation" called for in §4540(a) is determined by the status of the officer in whose custody the record resides. In the case of a county clerk, the "attestation" consists of the signature of the clerk, with the county seal affixed thereto. *See* CPLR §4540(b).

The Status of Electronic Documents

Any "governmental entity" of the state of New York[6] is authorized and empowered to "produce, … record … and store information by use of electronic means." An "electronic record"[7] has the same force and effect as those records not produced by electronic means.[8] The State Technology Law also provides that an electronic record is admissible into evidence pursuant to the provisions of CPLR article 45, including CPLR §4539, the statutory version of the "best evidence rule."[9] The final piece of the puzzle is found in CPLR §4518(a), which provides that an electronic record, as defined in the State Technology Law, "shall be admissible in a tangible exhibit that is a *true and accurate representation* of such electronic record" [emphasis supplied].

The bottom line

The clear language of §2105 gives an attorney the authority to act in the stead of a county clerk when certifying electronic records of deeds.

Pursuant to CPLR §8021(e), "a certified copy of a paper is required by law" when introducing a recorded instrument into evidence.

A deed found on the *official* ACRIS website is an "electronic record" "produced" by a "governmental entity," "stored by electronic means" and entitled to the same force and effect as those records not produced by electronic means (Technology Law §§302, 305 and 306).

Hence, a copy of a deed printed from the ACRIS website is a "tangible exhibit" of an "electronic record" (CPLR §4518(a) that is entitled to be used in place of the original, *when satisfactorily identified* (CPLR §4539).

The method used to satisfactorily identify an electronically stored, recorded deed for admission into evidence is a "certification" that the tangible exhibit is a "true and accurate representation" of the recorded copy. Since a clerk is empowered to do so pursuant to CPLR §4540(a), an attorney can offer the certification with the "same effect as if made by a clerk."

(Continued on page 26)

ESTATE PLANNING

Family Limited Partnerships – Part II

By Alison Arden Besunder

Last month's article explored the fundamentals of family limited partnerships ("FLP"). An FLP is a sophisticated technique that resembles any other limited partnership but has family members (spouses, children, grandchildren and/or siblings) as its partners. The benefit of an FLP is removal of assets from a taxpayer's estate. The assets are transferred at a valuation discount, and removes the appreciation and generated income from the taxpayer's estate while facilitating the distribution to the taxpayer's family.

Like plants, an FLP requires constant care and attention. Compliance with partnership formalities and operation of the FLP like a business are a must. FLP's proliferated in the past few decades but have fallen prey to increased IRS scrutiny. This article focuses on pitfalls in formation, implementation, and operation of FLP's, and how the IRS exploits those pitfalls to claw assets back into the taxpayer's gross estate and collect a tax.

The Turner Case, T.C. Memo 2011-209

Mr. and Mrs. Turner formed a Georgia limited partnership; each retaining a 0.5 percent general partner interest and 49.5 percent limited partner interest. They contributed cash, CD's, stock, and bonds to the FLP, retaining $2 million of assets in their individual names including their personal residence, investment real estate, cash, CD's, and stock. Their individual assets and social security were sufficient to pay their living expenses.

The Turners gifted FLP interests to their children and grandchildren. Mr. Turner died 2 ½ years after forming the FLP. The IRS audited and deemed the value of the transferred assets to be includable in his gross estate under Section 2036.[1] Transfers to an FLP are "bona fide" with actual evidence of a legitimate and significant nontax reason that was a significant factor motivating the creation of the FLP. The nontax reason must have been an actual, not theoretical, motivation.

Alison Besunder

The court rejected the Turners' protests. The Turners argued that the FLP facilitated management by consolidating assets and allowing someone other than the Turner family to maintain and manage the family's assets for future growth. The court held that to qualify as a legitimate nontax purpose, "consolidated asset management" involves active management or special protection, not CD's and fixed-income investments. The Turners argued that the FLP facilitated and prevented family disputes; the court acknowledged this as a legitimate tax purpose but pointed to an absence of evidence that the Turner family's disharmony was connected to family disagreements. There was also the evidence of the lack of negotiation in the formation of the FLP agreement; Mr. Turner's commingling of personal and partnership funds; and the eight-month delay in transferring assets to the FLP.

The Court then found that Mr. Turner retained control, possession, and enjoyment from the transferred property. For example, the Turners paid themselves a $2,000 monthly "management fee" that had no basis for its calculation. The FLP agreement allowed Mr. Turner the right to amend the agreement without the consent of the other partners. There was also the above-noted commingling. Ultimately, the court found the FLP was not a business or investment activity conducted for profit, but rather an investment account from which withdrawals could be made at will. The Court applied Section 2036 and the IRS recovered its tax.

Doctor Liljestrand, T.C. Memo. 2011-259

Dr. Liljestrand, a Harvard Medical graduate, was a general practitioner and surgeon at a Hawaiian plantation community hospital. The plantation closed; the hospital's closure was imminent. Dr. Liljestrand leased the building from the plantation's owners, opened a medical practice there, and formed a non-profit hospital. He later bought the underlying real estate. At retirement the doctor sold the hospital and bought a multi-state portfolio of commercial properties through a revocable trust with himself as the sole beneficiary. His son Robert earned a $100,000 salary for managing the real estate portfolio.

The Doctor later formed an FLP. The attorney never consulted any of the doctor's five children – the future FLP partners – during the drafting process. The trust transferred all the properties, worth $5.9 million, in exchange for a 99.98 percent interest. Robert was given a 0.02 percent interest in exchange for his $362 contribution — which he never contributed.

The FLP never opened a bank account or got a Tax ID number (which might have tipped them off that a Form 1065 tax return was required). The accountant — unaware of the FLP — continued to report the doctor's income on his personal return. When the error was discovered two years later, the FLP filed tax returns, but did not amend the prior years. The doctor transferred almost all of his income-producing assets, retaining insufficient assets to pay his living expenses. The FLP made disproportionate distributions to the doctor's revocable trust and also directly paid many of his personal expenses.

After the doctor died, the accountant found errors in the general ledger account used to track the FLP assets and capital account, and the disproportionate distributions to partners and personal expense payments. The partners never repaid those personal expenses.

The court rejected these attempts to rectify the accounting errors as "a belated attempt to undo Dr. Liljestrand's receipt of disproportionate distributions. After-the-fact paperwork by Dr. Liljestrand's accountant does not refute the implied understanding that Dr. Liljestrand could continue to use and control the partnership

(Continued on page 26)

PRACTICE MANAGEMENT

Five Ways to Use Evernote as a Legal Marketing Tool

By Allison C. Shields

Evernote is a digital notebook application with both desktop and mobile versions, all of which easily synch so that your information is available on any of your devices at any time. Evernote is a cross-platform application, which means that you can use it and information will synch to all of your devices, even if you have a Windows desktop, an iPad and an Android phone.

Although many consider Evernote to be a productivity app, it can also be a helpful marketing and business development tool to help lawyers capture marketing and business development ideas, keep track of notes on prospective clients, and develop content, among other uses. You can send Evernote information via email, create audio notes, text-based notes or images.

Capture ideas

Marketing and content ideas can strike anywhere, any time. A discussion with a client or colleague may spark an idea for a blog post or a case study to add to the firm's website. A radio advertisement or news article may prompt an idea for a potential new service to offer clients. A change in the law might create a reason to reach out to existing and former clients.

In the past, when these kinds of ideas or inspiration would strike, you would probably make a 'mental note' to try to remember the item later, scribble a note to yourself on a scrap of paper, send yourself an email, or bookmark the website or article. But those methods were rarely searchable, often forgotten, and were very likely to get lost. With Evernote you can capture those ideas all in one place. Create a new note or add to an existing list or note on the fly. Using Evernote will also help you stay focused on current projects while ensuring that you won't lose track of ides for future ones.

Allison C. Shields

Use Evernote's tagging features to add multiple tags to make notes easier to find and organize, without having to recall the title you originally gave to the note.

Create content

Whether you create content completely from your own ideas, share content created by others, or research ideas and information to develop your marketing and business development content, Evernote can be a huge help.

Email newsletters, feed readers, links from social media all can lead to articles that can be sources for your own content or simply further education about your clients, their industries, legal topics, etc. But when you come across those articles, you may not have time or be in the best place to read and digest them thoroughly. Evernote lets you capture those articles to read later, either by integrating with your email program, allowing you to send email newsletter articles directly to Evernote, or by using the Evernote web clipper to quickly capture web pages and articles and send them to Evernote.

Save questions from clients and prospects to use for blog posts, articles, case studies, and FAQs in Evernote as well.

If you create your own content, you can draft, can blog posts or articles, or craft an update to your firm's bio, etc. within Evernote wherever you are, and pick up right where you left off later on another device. When complete, simply cut and paste into the applicable program or site.

Some lawyers contribute their content to multiple publications — their own website or blog, trade industry publications, bar association newsletters, CLE programs, etc. Each of these publications or platforms is likely to have its own posting checklists or guidelines that you'll need to follow. Gather those in Evernote for easy reference, or use Evernote's checklist feature to ensure that you've included all of the necessary information and complied with all applicable rules, standards and deadlines. This will make it much more likely that your article is accepted for publication and that you don't miss a publication date.

If you create your own content, you'll want to keep your own Editorial Calendar within Evernote, along with a post-publication checklist to help you to publicize and spread the word about your latest article on social media and other sites.

Evernote is also a great place to keep lists of published posts and their web locations for easy future reference.

Maintain client and prospect information

Meeting with a new client or prospect? If you take notes, even if you take them on paper, Evernote is a handy way to store and save them so that you have access even when you aren't in the office. If you take notes electronically, you can save them to Evernote directly, but if you create handwritten notes, simply snap a photo with your smartphone or tablet and save the photo to Evernote. You'll be able to search the text in the note even if it is contained within an image, whether that text is typed or handwritten.

Often client or potential client information is received via email, but if it stays within your email program, it can be difficult to find. Evernote can be a good place to store that information so that you can stay on top or follow up, which is the most difficult aspect of developing new relationships or maintaining existing ones. Let Evernote help you. Keep your list of client calls to make or prospects to follow up with in Evernote. If you've got their information in Evernote as well, you'll have all of the information you need to make a quick call or send a personalized follow up email or LinkedIn invitation when you're on the go or when you have some unexpected downtime.

The Evernote Hello app, also by Evernote, can make this process even easier. If you're using iOS, you can take a photo of

(Continued on page 26)

TRUSTS AND ESTATES

By Ilene Sherwyn Cooper

Retaining lien denied

In a contested probate proceeding, application was made by counsel for the objectants to withdraw, due to a conflict of interest among its clients, the failure of its clients to cooperate, and significant fees owing to the firm. Counsel also requested that it be granted a retaining lien for all property, documents, monies or securities belonging to its clients in its possession, until its legal fees were paid in full, as well as a charging lien.

In view of the fact that the application was unopposed, the firm's request to be relieved as counsel was granted. The court further granted counsel's request for a charging lien, but denied the firm's request for a retaining lien. The court held that a retaining lien is confined to property in the possession of an attorney and is entirely distinct from the lien of an attorney created by Judiciary Law §475. Specifically, the court noted that a statutory lien, as compared to a retaining lien, could be enforced by an order of the court, directing that it be satisfied out of moneys or property to which the lien attached though not in the possession or control of the attorney. As such, the retaining lien sought by counsel, being a possessory right only, could not form the subject of a court order.

On the other hand, the court found that a charging lien was available to counsel, but that the firm had failed to submit any proof in the form of a retainer agreement, time records or an affirmation of services for the fees alleged to be owing. The court opined that when an attorney engaged under a contract for a definite purpose and not when a general retainer is discharged, such attorney is entitled to recover in quantum meruit the fair and reasonable value of the services rendered. Accordingly, while the court granted counsel a charging lien, it ordered that the amount of such lien would be determined in a separate application, pursuant to SCPA 2110, or in an appropriate action in another court for payment of its fees for services rendered.

Ilene S. Cooper

***In re Galfano,* NYLJ, July 19, 2013, at 33 (Sur. Ct. Suffolk County).**

Three year/two year rule

In a contested probate proceeding, an application was filed with the Surrogate's Court, New York County (Mella, S.) by the objectant, who requested that the scope of discovery be extended beyond the three year/two year period set forth in Uniform Court Rule 207.27, and the court's discovery order. Specifically, the objectant sought expansion of the rule in connection with the examinations before trial of four witnesses, the decedent's prior physician, the decedent's former employer, the decedent's prior attorney and draftsman of three prior wills, and the decedent's companion. The objectant alleged that a broader discovery period was needed in order to prove her claims of lack of testamentary capacity and undue influence by the decedent's companion over the course of many years.

In denying the relief requested by the objectant, the court held that deviation from the three year/two year rule would only be allowed upon a showing of special circumstances, based upon facts evidencing a scheme to defraud or a continuing course of conduct of undue influence. The court found that the objectant had failed to make such a showing, and that at most, the facts proffered demonstrated a long-term relationship between decedent and his companion. In addition, the court noted that medical records for the period covered by the rule and the examinations of the decedent's prior physician, his prior counsel and his companion were available to the objectant to explore her claim of lack of capacity and undue influence.

***In re Macguigan,* NYLJ, July 3, 2013, at 22 (Sur. Ct. New York County)(Mella, S.).**

Alterations to will

Before the court was an uncontested application to admit a certain instrument to probate containing multiple handwritten alterations and interlineations. The instrument in its typed form left the decedent's entire estate to his wife, who was also the nominated fiduciary.

In reviewing the instrument the court noted that two of the alterations contained precatory language of no effect. Another alteration contained two lines through the name of the decedent's daughter, with the word "predeceased" written beneath, and another had the name of the decedent's daughter written in as an alternate residuary taker. Although none of the alterations were of consequence, the court was inclined to examine the will for its genuineness before admitting it to probate.

The court opined that alterations made to a will after its execution, which do not revoke the instrument, are to be given no effect. Moreover, because there is no presumption as to when an alteration is made, the court must look either to extrinsic evidence or intrinsic evidence for that purpose. Citing *Crosson v. Crosson,* 95 NY 145, the court noted that such intrinsic evidence may include handwriting, the color of the ink, and the manner of the interlineation.

The record before the court provided no extrinsic evidence of when the alterations were made. The attorney draftsman was deceased and none of the attesting witnesses to the instrument could be located. The instrument itself however revealed that while the changes that were made were in the decedent's handwriting, they were in blue ink rather than in the same black ink with which the instrument was signed. This fact, combined with other indicia in the instrument, caused the court to conclude that the alterations to the instrument had been made after it was signed.

Accordingly, the court admitted the instrument as originally prepared to probate.

***In re Alston,* NYLJ, Aug. 1, 2013, at 28 (Sur. Ct. Queens County).**

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

PUBLIC HEALTH

Legal Possession of Syringes and Drug Residue

By Maxine Phillips and Mary Ellen Cala

Note: This article was originally published in the Winter 2012 edition of the Empire State Prosecutor, a publication of the New York Prosecutors Training Institute.

In New York State, the legality of syringe possession and sale is addressed by the Penal Law and by the Public Health Law (PHL). The purpose of this article is to convey a better understanding of both, particularly in light of recent changes to the Penal Law which specifically incorporate by reference the section of PHL which covers syringe legality. Three important public health initiatives in which syringes — and drug residue, which may be on or in the syringes — are legal under New York law are described. They include Syringe Exchange Programs (SEPs), the Expanded Syringe Access Program (ESAP); and the Opioid Overdose Prevention Program.

The Penal Law

Penal Law § 220.45 makes it a Class A misdemeanor when an individual "knowingly and unlawfully possesses or sells a hypodermic syringe or hypodermic needle." This law was amended by Chapter 284 of the 2010 Laws of New York to clarify what constitutes lawful possession or sale. The following sentence was added: "It shall not be a violation of this section when a person obtains and possesses a hypodermic syringe or hypodermic needle pursuant to section thirty-three hundred eighty-one of the public health law." (Provisions of the PHL 3381 are described below).

Maxine Phillips

The same legislation amended Penal Law § 220.03 which addresses criminal possession of a controlled substance in the seventh degree, also a Class A misdemeanor. The amended language states "it shall not be a violation of this section when a person possesses a residual amount of a controlled substance and that residual amount is in or on a hypodermic syringe or hypodermic needle obtained and possessed pursuant to section thirty-three hundred eighty-one of the public health law."

The Public Health Law

A working knowledge of the PHL treatment of syringes is integral to applying the two Penal Law sections mentioned above. PHL § 3381 defines three broad categories in which syringe sale and furnishing, as well as possession and obtaining, are lawful: 1) pursuant to a written prescription of a practitioner; 2) when it is to persons or entities that have been authorized by the Commissioner of Health to obtain and possess syringes; and 3) where syringes are provided without prescription by specifically registered pharmacies, health care practitioners or health care facilities. Each of the public health initiatives briefly described below falls within the scope of one of these three categories.

Mary Ellen Cala

Syringe Exchange Programs (SEPs)

In 1992, the New York State Department of Health adopted regulations authorizing the creation of SEPs under the authority of PHL § 3381. With minor revisions, these are currently embodied in § 80.135 of Title 10 of the State of New York Official Codes, Rules and Regulations (10 NYCRR 80.135). Under these regulations, community-based organizations and government entities may apply for authorization by the State Health Commissioner to conduct syringe exchange programs. After a plan for SEP operations has been approved by the Commissioner, employees and trained volunteers of the SEP may "obtain, possess and furnish hypodermic syringes and hypodermic needles, without prescription, when authorized by the Commissioner in connection with [these programs]." This corresponds to the "authorized by Commissioner" category mentioned in PHL § 3381. Similarly, 10 NYCRR 80.135 also authorizes participants in these SEPs to "obtain and possess" syringes from staff and volunteers of the approved programs.

Syringe Exchange Programs provide drug injectors who are unable or unwilling to abstain from drug use with new, sterile syringes. The SEPs also accept used syringes for safe disposal. The rationale for these programs is to eliminate the sharing and re-use of injection equipment, thereby preventing transmission of bloodborne infections, including HIV and Hepatitis B and C. There are currently 21 SEPs in New York State, of which 14 are in New York City. The success of SEPs and of the other syringe access program, ESAP has been dramatic. In 1992, the year syringe exchange first became legal in New York, 52 percent of the State's AIDS cases were attributable to injection drug use; by 2008, only 5.4 percent of new HIV cases were linked to drug injection.

In addition to syringe distribution, collection and disposal, SEPs in New York State offer a wide variety of other services, including HIV counseling and testing and referral to drug treatment. SEPs may also be the only contact with health services for many drug injectors.

There is no set limit in the regulations on the number of syringes which may be exchanged, nor are there age restrictions for participants in the SEPs. Policies and procedures of each of the SEPs, however, consistent with guidance provided by the NYS Department of Health, require additional assessment in the enrollment of minors as well as intensified efforts at making referrals for them to various services, including drug treatment.

Although syringe exchange program participation is anonymous, the programs do issue identification cards with unique codes for purposes of tracking SEP transactions. There is no requirement that these identification cards be carried; participants, however, are encouraged to have these cards with them when they are either acquiring new syringes

(Continued on page 26)

VEHICLE AND TRAFFIC

DMV Point System and Administrative Action

By David A. Mansfield

The establishment of the Suffolk County Traffic and Parking Violations Agency provides an opportunity to review the Department of Motor Vehicles point system and administrative actions which can be found at 15 NYCRR Part §131.

All traffic violations are two points unless otherwise designated as per Part §131.3(a). Violations may be assigned up to 11 points for speeding more than 40 miles per hour over the limit under §131.3(b) (1).

Newly designated "high-point driving violations" as per Part§ 132.1 (c) are five or more points such as six and eight point speeding offenses, as well as the following five point violations of reckless driving, passing a stopped school bus, improper cell phone use and using a portable electronic device. These offenses require special attention by defense counsel because their clients could be subject to lifetime record review under Part §132.2 and license revocation.

Your clients are now subject to separate Department of Motor Vehicles administrative action as the closure of the Suffolk Traffic Violations Bureau has lead to separate administrative actions or hearings under Part §131.4 that were formerly handled as part of the adjudication at the Traffic Violations Bureau. The actions range from warning letters for the accumulation of four to six points Part §131.4(a), to mandatory attendance at a driver improvement clinic for the accumulation of 7 to 10 points within an 18-month period, Part §131.4(b).

David A. Mansfield

Your client may be required to appear at a formal hearing to investigate persistent or habitual violations of the Vehicle and Traffic Law as per Part §131. 4 (c).

The standards are 11 or more points with an 18-month period as per subdivision (1). The accumulation of nine or more points from speeding violations within the 18-month period as per subdivision (2). The accumulation of four or more additional points within a 12-month period after attendance at a formal Department of Motor Vehicles hearing.

The most common hearing notices that you will see in your practice will be for the accumulation of 11 or more points. Your client may be offered a waiver of hearing with the acceptance of a 31-day suspension. The waiver will not be considered by the administrative law judge at the hearing. The waiver may make sense if your client is substantially over the 11-point limit and does not want to risk a longer suspension. Advise your client not to accept the suspension if the point total is borderline or they have a commercial driver's license and are ineligible in commercial class to use a restricted-use license for work §530(5).

You may advise your client to forego application restricted-use license §530 for a 31-day suspension. Your client is generally eligible only once every three years and may wish to preserve eligibility in the event for further more severe administrative sanctions.

Defense counsel should advise their clients to successfully complete an approved accident prevention courses under Part §131.5. These courses can reduce up to four points from your client's driving record Part §138.3.

The most serious administrative hearing is to investigate any speeding conviction based upon single violation of 11 points under Part §131.4(e) had outside the Department of Motor Vehicles Administrative Adjudication or Traffic Violations Bureau. Your client will not be offered a 31-day suspension and the hearing will be held.

Defense counsel should try to avoid 11-point speeding convictions where possible. Should your client get convicted of the 11 point violation it is important to advise that there will be a mandatory Department of Motor Vehicles Hearing to determine if their license will be suspended or revoked, which will be a separate legal fee should they wish to retain your services. This contingency should be addressed in your written fee agreement.

Defense counsel's knowledge of the point system and administrative actions are more important in light of the new regulations regarding dangerous Repeat Alcohol or Drug Offenders and the closure of the Suffolk Traffic Violations Bureau.

This closing note is an appeal to members of the Bar and the Bench to work together in District Court to allow "simple applications" to be taken ahead of increasingly complex and time consuming dispositions. A "simple application" should not require a conference at the bench. Cooperation will help the attorneys and the courtrooms function more efficiently.

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

Advising Businesses on the Hiring of Non-Citizen Employees (Continued from page _1)

are not sufficient US workers able, willing, qualified, and available to accept the job opportunity in the area of intended employment and that employment of the foreign worker will not adversely affect the wages and working conditions of similarly employed US workers. When and if the certification is approved, the employer will then need to seek immigration authorization from the USCIS by filing a Petition for Immigrant Worker (Form 140) and paying the requisite fees.

Additionally, there are several processes to petition for the employment of non-immigrant workers. The USCIS website (www.uscis.gov) contains the petition process overview and relevant forms applicable to a petition for non-immigrant workers in several different categories.

Employers must verify that individuals whom they hire or continue to employ are authorized to work in the U.S. The key verification requirement that employers must satisfy is the accurate and timely completion of the USCIS Form I-9. Every employer must complete an

I-9 for every new employee hired after November 6, 1986, regardless of citizenship. An employer may not begin the Form I-9 process until after the employer offers an individual a job and the job offer is accepted by the employee. The I-9 must be completed within three business days of the employee's hire.

Section 1 of the I-9 is the Employee Information and Attestation and is completed and signed by the employee. Section 2 is the Employer Review and Verification and is the section most fraught with potential problems and liability for the unwary employer. The section contains three lists of approved documents: List A – Identity and Employment Authorization documents; List B - Identity only documents; and List C - Employment Authorization documents. The employee must present to the employer, and the employer must examine and record information concerning either a List A document, or, a List B and List C document together. The employee is required to present original documents and must be allowed to choose which documents to present from the lists of acceptable documents. The employer must physically examine each original document and determine if it reasonably appears to be genuine and relates to the person presenting it. Upon completion of the original documents review and the I-9, the original documents must be returned to the employee.

The employer may only accept unexpired documents and cannot continue to employ an employee who cannot produce proof of current employment authorization. However, the existence of a future expiration date on a document should not be considered in determining whether an individual is qualified for a particular position. Employers must retain an employee's completed I-9 for as long as the individual works for the employer. Upon the termination of a worker's employment, an employer must retain the I-9 for either three years after the date of hire, or one year after the date employment is terminated, whichever is later. The I-9 forms may be retained in paper form or electronically, provided the electronic recordkeeping, attestation and retention system complies with DHS standards.

The Department of Justice's Office of Special Counsel enforces the anti-discrimination provisions of the INA including, but not limited to, unfair documentary practices during the Form I-9 process (document abuse) against all employers with four or more employees. The USCIS broadly categorizes Employer document abuse as: 1) Improperly requesting that employees produce more documents than are required by Form I-9 to establish the employee's identity and employment authorization; 2) Improperly requesting that employees present a particular document to establish identity and/or employment authorization; 3) Improperly rejecting documents that reasonably appear to be genuine and to relate to the employee presenting them; and 4) Improperly treating groups of applicants differently when completing Form I-9.

Counsel should advise their employer clients to avoid discrimination when verifying employment authorizations and identity during the I-9 process. Employers should not: set different employment eligibility verification standards or require that different documents be presented by employees because of their national origin and citizenship status; request to see employment eligibility documents before hire and before completion of the I-9; refuse to accept a document, or refuse to hire an individual because a document has a future expiration date; or request that, during verification, an employee present a new unexpired employment authorization document if one was presented during initial verification; or 5) limit jobs to US citizens unless US citizenship is required for the specific position by law, regulation, executive order, or federal, state or local government contract.

DHS may impose civil penalties if it is determined that the employer knowingly hired or knowingly continued to employ unauthorized aliens. If DHS issues a Notice of Intent to Fine an employer may request a hearing before an ALJ if such request is made within 30 days. If the request for a hearing is not received within said time period, DHS will impose the penalty and issue a final order, which cannot be appealed. An employer found to have knowingly hired or continued to employ unauthorized aliens may be subject to civil money penalties up to the following maximums per unauthorized worker: First offense –$3,200; Second offense –$6,500; Subsequent offenses –$16,000.

Criminal penalties may be imposed upon persons or entities who are convicted of having engaged in a pattern or practice of knowingly hiring unauthorized aliens, or continuing to employ aliens knowing that they are or have become unauthorized to work in the US. Such criminal penalties include fines of up to $3,000 per employee and/or six months imprisonment.

Employers are also subject to civil money penalties for failure to comply with the I-9 requirements in an amount of not less than $100 and not more than $1,100 for each violation. DHS will consider such factors as the size of the business being charged; the good faith of the employer; the seriousness of the violation; whether or not the individual was an authorized alien; and any history of previous violations of the employer.

Counsel must advise their commercial clients to be diligent in complying with their lawful obligations to insure the identity of new employees and to verify that they are legitimately authorized to work in the United States. Employers must be aware of the importance of not only fully and accurately complying with the Department of Homeland Security mandates, but also that the performance of such employer obligations is not exercised in an unlawfully discriminatory manner.

Note: Donald B. Smith is the principal attorney of the Law Office of Donald B. Smith, PLLC in Hauppauge, NY. He is the current Chair of the SCBA's Corporate and Commercial Law Committee.

Bench Briefs (Continued from page 4)

seeking disqualification bears the burden on the motion. Here, the court found that the defendants failed to meet their burden.

Honorable Arthur G. Pitts

Motion to compel deposition denied; defendant conceded to negligence, and as such, plaintiff would not be aided by deposition testimony.

In *Maria Brosnahan v. Gruenberg & Kelly, P.C.,* Index No.: 2558/2011, decided on August 13, 2013, the court denied that branch of plaintiff's motion which sought an order compelling the defendant to appear for an examination before trial. In rendering its decision, the court noted that the defendant conceded that it was negligent in that it failed to timely file a summons and complaint within the applicable statute of limitations. The court further pointed out that in this matter which sounded in legal malpractice, there were three essential elements to the cause of action: negligence of the attorney, the negligence was the proximate cause of the loss sustained; and proof of actual damages. To establish proximate cause of the loss sustained, the court cited that the plaintiff must show that she would have been successful in the underlying personal injury case. Here, notwithstanding the defendant's concession of negligence, the plaintiff still sought the defendant's examination before trial. In denying plaintiff's application, the court said that although CPLR 3101(a) required the "full disclosure of all information that is material and necessary to the defense or prosecution of an action," it was undisputed that the defendant acknowledged negligence and the remaining elements to be established by the plaintiff would not be aided by any deposition testimony of a member of the defendant firm. Accordingly, the motion was denied.

Motion to direct plaintiffs to provide supplementary responses to defendant's interrogatories and combined demands and for a protective order staying the party and non-party depositions until plaintiffs provide "proper" responses to interrogatories and discovery demands denied; demands overly broad and unduly burdensome.

In *GMC Realty, Inc. and Mr. G's Pizzeria, Inc. v. North Country Insurance Company,* Index No.: 2432/2011, decided on January 5, 2012, the court denied defendant's motion to direct plaintiffs to provide supplementary responses to defendant's interrogatories and combined demands and for a protective order staying the party and non-party depositions until plaintiffs provide "proper" responses to interrogatories and discovery demands. In rendering its decision, the court noted that plaintiffs had responded to 31 interrogatories and all but nine of the responses were claimed to be deficient by the defendant and of 15 combined discovery demands, defendant alleged responses to seven were inadequate or incomplete.

With regard to the demands, the court found same to be overly broad and unduly burdensome, and thus, improper. The court pointed out that a trial court's broad authority to supervise discovery included the discretion to direct the priority in which the parties may use disclosure devices and if it found, under the particular circumstances that the action would be expedited by the use of one device prior to another. The court stated that here, after deposing the plaintiffs, the defendant may be entitled to further documentation and more complete responses to some of defendant's interrogatories and combined discovery demands, depending upon the testimony elicited at the examination. However, at this juncture in the discovery process, the court found that the interrogatories and combined discovery demands were overly broad and burdensome, and thus improper.

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

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

Views From The Bench (Continued from page 4)

tlement of $130,000, which included an award of $108,000 in counsel fees to Mr. Lee as permitted under the FDCPA (*see Eviction Case Settlement Worries Landlord Lawyers*, Wall Street Journal, http://online.wsj.com, Aug. 20, 2013).

Conclusion

Counsel in Landlord and Tenant matters, as well as other consumer debts, should take note of the FDCPA's strict liability provisions and further that counsel may be liable for a client's unverified mistakes. As a result, landlord's counsel may be inclined to implement measures to verify the accuracy before serving any such debt collection notices. The consequences for noncompliance may be long-standing and severe.

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

** 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.*

Defined Value Clauses (Continued from page 10)

DVC, these should have been reported by, and taxed to, the donor. Should amended returns be filed? Should the donees file protective refund claims for the "excess" income taxes paid, pending the resolution of the gift tax matter? Failing these, have the donees, themselves, made a gift to the donor by satisfying his income tax liability?

What about distributions made to the donees in respect of the equity interests that were later "returned" to the donor pursuant to the DVC? Presumably, these amounts should have been paid by the entity to the donor. Must they be returned by the donee? If so, should they be returned with interest (as in the case of a loan)? If the distributions are retained by the donee, it may be that the donor has made gifts thereof. What if the distribution itself were taxable to the donee-recipient?

What if the gifted equity interests carried voting rights, and the gift caused the donor's equity in the family business to fall below 50 percent? This is not an uncommon reason for the donor's having made the gift in the first place. Assume the donor then passes away owning, he believed, a minority interest. In valuing this interest for estate tax purposes, a lack of control discount is applied. During the course of the estate tax audit, the IRS challenges the earlier gift valuation and, consequently, part of the gifted equity ends up back in the donor's estate, causing him to hold more than 50 percent of the business. In the resulting revaluation of the donor's equity for purposes of the estate tax, a premium may be applied, rather than the discount he had intended to achieve by virtue of the gift.

The foregoing highlights some of the issues that need to be considered before embarking on a gifting program which depends upon the use of DVCs. While a DVC is a useful estate planning tool, it does not lessen the need for a solid appraisal. Moreover, as with all estate planning in the context of a closely-held business, the donor and his beneficiaries have to consider the possible ancillary consequences of their gifting decisions.

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

HIPAA 'Business Associate' (Continued from page 10)

when she demanded that he pay child support. The complaint also alleged theories of negligent training, supervision and retention against the employer, Walgreen's. Conceding that HIPAA did not create a private right of action the plaintiff argued that she was not seeking relief under HIPAA but, instead, that HIPAA may be considered by the trier of fact in establishing the standard of care that should apply, and whether that standard was breached in this case. Just what the jury did, apparently. While the outcome of any appeal is uncertain what seems clear is that HIPAA (and maybe HITECH as well) will continue to define the parameters of the right to privacy of health information. *Hinchy v. Walgreen Co, et al*; 49D06-1108-CT-029165 (Superior Ct, Marion Co, Indiana).

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

FOOTNOTE

1. 42 U.S.C.17931 – 39. HITECH legislation was enacted on February 17, 2009 as part of the American Recovery and Reinvestment Act of 2009 (ARRA), the so-called "economic stimulus" bill. One of its purposes is to stimulate the adoption by health care providers, insurers and other interested constituencies of electronic health records and supporting technology. Under HITECH healthcare providers are offered financial incentives for demonstrating "meaningful use" of electronic health records. Incentives will be offered until 2015, after which time penalties may be assessed against providers, insurers and others who do not comply with the "meaningful use" requirements.

Case Removed to Federal Court (Continued from page 6)

28 U.S.C. § 1447). A claim of lack of subject matter jurisdiction may be raised at any time; a federal court simply cannot hear a case unless it has subject matter jurisdiction.

The first thing to consider is whether the Notice of Removal was proper. 28 U.S.C. §§ 1441 -1453 set forth the procedural requirements for removal of civil cases. The Notice of Removal may be vacated based on grounds such as untimeliness or "lack of unanimity." This rule requires that all defendants join in or evidence consent to the removal. In a diversity removal, evidence of the monetary threshold of $75,000 must be demonstrated. This is a heavy burden placed on the defendant if the plaintiff has not specified an amount of monetary damages. Any defect in the defendant's Notice of Removal may be grounds for remand. Since the Federal Courts generally require strict compliance with removal procedure, a judge may remand an action *sua sponte*.

If you decide that your case belongs where you initiated it, bring your motion to remand as quickly as possible. The case will remain in the same "posture" as it was left in State Court. If you win on your remand motion, the case simply goes back to where it came from. If you lose, however, you may have to litigate the remainder of your case in Federal Court.

Note: Mona Conway is business law and commercial litigation practitioner in Huntington. Her practice involves both State and Federal cases. She is a former Chair of the SCBA Commercial and Corporate Law Committee and remains an active member. www.conwaybusinesslaw.com

School District Residency (Continued from page 11)

trict 10 percent or 20 percent of the time? Is that enough to be considered "essentially divided?" Unfortunately, there is no hard and fast rule (or percentage) that school districts can use to delineate how much time in the district is enough time to constitute residency. However, when parents claim joint custody but do not produce proof of their child's time being divided between both households, residency is to be determined by the traditional tests of physical presence in the district and intent to remain there. *Appeal of T.P.,* Decision No. 15,288 (2005).

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.

Expert Witnesses in Surrogate's Court (Continued from page 21)

was "the weakest and most unreliable kind of evidence," and it did not contradict the facts presented by the petitioner establishing the testator's competency. The court then dismissed the objections and admitted the will to probate. The objectants in *Matter of Vukich*,[9] were equally unsuccessful in denying the will to probate based solely on the testimony of an expert psychiatrist who formed his opinion by reviewing the testator's medical records and medications. The jury found that the will was properly executed, but that the testator lacked testamentary capacity and that the will was procured by undue influence. The Fourth Department reversed the decree denying probate. It noted not only that the expert psychiatrist's testimony was contradicted by the testimony of the testator's personal physician, but also that other courts have "rejected such speculative expert testimony and directed probate as a matter of law."

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

1 125 AD2d 574 (2d Dept 1986).

2 A proponent of a will bears the burden of establishing that the testator had testamentary capacity by showing, to wit: (1) that he understood that he was making a will and the scope of its dispositive provisions, (2) that he knew and understood the nature and extent of his assets, and (3) that he knew those who would be considered the natural objects of his bounty and his relations with them (*see Matter of Kumstar*, 66 NY2d 691, 692 [1985]).

3 245 AD2d 642 (3d Dept 1997).

4 Several other decisions indicate that testimony from an expert psychiatrist who never saw or treated the testator is admissible at trial (*see, e.g., In re Rosen*, 296 AD2d 504 [2d Dept 2002] [court noting that there was expert psychiatric testimony at trial]; *In re Chiurazzi*, 296 AD2d 406 [2d Dept 2002] [in affirming the Surrogate Court's decision admitting the will to probate following a non-jury trial, the court noted that the objectants put forth testimony of an expert psychiatrist who had never treated the decedent, but concluded that such testimony was not entitled to weight on the issue of capacity]; *Matter of Tracy*, 221 AD2d 643 [2d Dept 1995]; *Matter of Callahan*, 155 AD2d 454 [2d Dept 1989]).

5 98 AD3d 974 (2d Dept 2012).

6 106 AD2d 914 (4th Dept 1984).

7 *Id.* at 915.

8 2007 WL 3407748 (Sur Ct, Essex County, 2007).

9 53 AD2d 1029 (4th Dept 1976), *aff'd* 43 NY2d 668 (1977).

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NOVEMBER CLE

The Suffolk Academy of Law, the educational arm of the Suffolk County Bar Association, provides a comprehensive curriculum of continuing legal education courses. For the most part, CLE courses listed here will be presented during February and early March. For information on other courses to be offered during Winter 2008, please see the Academy's Winter Catalog.

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.

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

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.

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(c)(3) organization, the Academy can accept your tax deductible donation. Please take a moment, when registering, to add a contribution to your tuition payment.

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

INQUIRIES: 631-234-5588.

UPDATES

ANNUAL DMV UPDATE

Thursday, November 7, 2013, on the East End
Tuesday, November 12, 2013 at the SCBA Center

This update by SCBA's own "DMV guru" is presented in two locations for your convenience. Gain insights into the important developments about which motorists are likely to seek legal counsel in this information-packed presentation.
Faculty: **David A. Mansfield, Esq.** (Islandia)
East End Time: 5:00 – 7:30 p.m.
Location: Seasons of Southampton (15 Prospect St)
Refreshments: Light supper from 4:30
Hauppauge Time: 6:00 – 8:30 p.m. **Location: SCBA Center** – Hauppauge **Refreshments:** Light supper from 5:30
MCLE: 2.5 Hours (professional practice) [Transitional or Non-Transitional]

ANNUAL REAL PROPERTY UPDATE

Tuesday, November 19, 2013

This detailed update – by a highly respected presenter – will cover new developments affecting residential transactions, commercial transactions, landlord-tenant relations, zoning, land use, mortgage foreclosures, real estate litigation, and more.
Faculty: **Scott E. Mollen, Esq.** (Herrick Feinstein, LLP)
Moderator: Gerard McCreight, Esq. (Matrix Realty Group // Academy Officer)
Time: 6:00 – 9:00 p.m. **Location:** SCBA Center – Hauppaugel **Refreshments:** Light supper from 5:30
MCLE: 3 Hours (professional practice) [Transitional or Non-Transitional]

ANNUAL FAMILY COURT UPDATE

Two Part Program: Wednesday, November 20, and Wednesday, December 4, 2013

Part One: Emphasis on Significant Case Law and Litigation
- Judge's View
- Custody & Visitation
- Spousal Maintenance vs. Spousal Support

Faculty: **Hon. James F. Quinn; Professor Lewis A. Silverman; Diane Carroll, Esq.**
MCLE: 3 Hours (1.5 professional practice; 1 skills; 0.5 ethics) [Transitional or Non-Transitional]

Part Two: Emphasis on Child Support and Family Offense Issues
- Judge's View and Update on Family Offenses
- NYS Family Court Improvement Project
- Family Court Child Support Update
- Defending Clients in Support Matters and Family Offense Proceedings

Faculty: **Hon. John Kelly; Hon. Theresa Whelan; Hon. Isabel Buse; Jose Canosa, Esq.**
MCLE: 3 Hours (1.5 professional practice; 1 skills; 0.5 ethics) [Transitional or Non-Transitional]
Each Program:
Time: 6:00 – 9:00 p.m.
Location: SCBA Center – Hauppaugel **Refreshments:** Light supper from 5:30

SEMINARS & SERIES

Evening Seminar

REAL ESTATE BROKERAGE LAW FOR THE TRANSACTIONAL PRACTITIONER

Monday, November 4, 2013

This program will teach you what you need to know about the real estate broker or agent and help you avoid problems that could quickly sidetrack or derail any real estate deal. Topics include:

- NYS Licensing Law and Regulations
- Types of Agency
- Fiduciary Duties and Disclosure Requirements
- Collecting Commissions
- Exclusive Buyer's / MLS / Co-Brokered / and Other Kinds of Listings
- The Broker Employment Contract: Who, What, When and How
- Recent Case Law Developments

Faculty: **Andrew Lieb, Esq., MPH** (Managing Attorney–Lieb at Law, PC); **P. Edward Reale, Esq.** (Senior Managing Director–Brown Harris Stevens)
Program Coordinator: **Lance Pomerantz, Esq.** (Land Title Law)
Time: 6:00 – 9:00 p.m. **Location:** SCBA Center – Hauppaugel **Refreshments:** Light supper from 5:30
MCLE: 3 Hours (2 professional practice; 1 skills) [Transitional or Non-Transitional]

Trial Practicum: Fifth Lecture

CLOSING ARGUMENTS

Wednesday, November 6, 2003

In this last presentation of the Academy's 2013 Trial Practicum, a stellar faculty imparts advice – through lectures and demonstrations (civil and criminal) – on using summation to persuade jurors that the evidence supports a verdict in favor of your client. This seminar also includes an ethics segment on avoiding charges of ineffectiveness of counsel and other key issues.

Presenters: **Harvey B. Besunder, Esq.** (Bracken, Margolin, Besunder, LLP); **Hon. James P. Flanagan** (District Court – Suffolk); **Michael G. Glass, Esq.** (Rappaport Glass Levine & Zullo, LLP); **Richard D. Haley, Esq.** (Haley, Weinblatt & Calcagni, LLP); **Maureen S. Hoerger, Esq.** (Perini & Hoerger); **Hon. Emily Pines** (NYS Supreme Court – Suffolk); **Robert G. Sullivan, Esq.** (Sullivan, Papain, Block, McGrath, & Canavo, PC)
Program Coordinator: **Robert Harper, Esq.** (Academy Officer)
Series Coordinator: **Cheryl Mintz, Esq.** (Academy Advisor)
Time: 5:30–9:15 p.m. **Location:** SCBA Center – Hauppauge
Refreshments: Light supper from 5:00
MCLE: 4 credits (1 professional practice; 2 skills; 1 ethics) [Transitional or Non-Transitional]

Lunch 'n Learn

TRUST CONTESTS

Wednesday, November 13, 2013

Trust contests are similar to will contests, but as those who have handled them know, they are also more challenging in a number of significant ways. This program, featuring an experienced faculty, will show you how to draft trusts that hold up against objections and how to handle trust contests – from both sides – when they do occur.

Presenters: **Robert Harper, Esq. (**Farrell Fritz, LLP0; **Lori Sullivan, Esq.** (Law Secretary to the Honorable Edward W. McCarty, III, Surrogate of Nassau County); **Jennifer F. Hillman, Esq.** (Ruskin Moscou Faltischek, P.C.)
Coordinator: **Robert Harper, Esq.** (Academy Officer)
Time: 12:30–2:10 p.m. (Sign-in from noon) Location: SCBA Center **Refreshments:** Lunch
MCLE: 2 credits (1.5 professional practice; 0.5 ethics) [Transitional or Non-Transitional]

Two-Seminar Series

2013 ALLEN SAK MUNICIPAL LAW SERIES

Wednesday, November 13, and Thursday, December 5, 2013

You may enroll in either session of this two-part series or SAVE by registering for both. The program is financially supported by the Academy's Municipal Law Scholarship Fund, which was endowed by a bequest from the estate of the late Allen I. Sak, former Brookhaven Town Attorney. Through the scholarship fund, new municipal lawyers (admitted10 years or less) may request a 50 percent tuition discount; municipalities or firms sending two or more attorneys who are not eligible for the new municipal lawyer "scholarship" may also take the discount.

Seminar One: How to Get a Building Project Approved – November 13
- Gain insights into the key perspectives that come into play in the quest for building project approvals:
- Town Attorney's Perspective **John Zollo, Esq.** (Smithtown Town Attorney)
- Zoning/Planning Board's Perspective **Christopher Modelewski, Esq.** (Huntington Town Board of Zoning Appeals)
- Building Project Applicant's Perspective (Emphasis on East End Projects) **Matthew E. Pachman, Esq.**

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(Ackerman, O'Brien, Pachman & **Brown, LLP)**
- Building Project Applicant's Perspective (Emphasis on West End Projects) **William Bonesso, Esq.** (Forchelli, Curto, Deegan, Schwartz, Mineo, Cohn & Terrana, LLP)
- SEQRA Issues Raised in the Approval Process **Carrie O'Farrell, AICP** (Nelson, Pope & Voorhis, LLC)

Moderator **Brian T. Egan, Esq.** (Egan & Golden, LLP)

Seminar Two: Hot Issues in Land Use & Municipal Law – December 5
- Cutting-edge issues are addressed by a prestigious panel.
- Land Use / Municipal Case Law Updates **Dean Patricia E. Salkin** (Touro Law Center)
- Cell Tower Issues & Cases **A. Thomas Levin, Esq.** (Meyer, Suozzi, English & Klein, PC)
- Religious Land Use and Institutionalized Persons Act (RLUIPA Issues and Cases **Lance R. Pomerantz, Esq.**
- (Land Title Law)
- Non-Conforming Zoning Uses: Issues and Cases **Vincent J. Messina, Esq.** (Sinnreich, Kosskoff & Messina, LLP)
- DEC Permitting Issues (including Hurricane Sandy rebuilding permits) **Craig L. Elgut, Esq.** (Acting Regional Attorney, Region One, NYS DEC)

Moderators **Hon. Thomas F. Whelan** and **Hon. John Leo** (Justices, NYS Supreme Court–Suffolk)

Program Chair: **Edward J. Gutleber, Esq.** (Meyer, Suozzi, English & Klein, PC // Former Academy Dean)
Program Committee: **Dean Patricia Salkin; Hon. Thomas Whelan; Hon. John Leo; Lance Pomerantz; Stephen Beyer; Brian Egan; Christopher Modelewski; John Zollo; Cheryl Mintz; William Bonesso; Matthew Pachman; Carrie O'Farrell**
Each Seminar:
Time: 6:00 – 9:00 p.m. **Location:** SCBA Center – Hauppauge **Refreshments:** Light supper from 5:30
MCLE: 3 Hours (professional practice) [Transitional or Non-Transitional]

Evening Seminar

AVOIDING CONTRACT DISPUTES THROUGH EFFECTIVE DRAFTING

Monday, November 18, 2013 – Rescheduled Date

Many contracts that are disputed in court might have held up – saving the parties time and money – had the contracts been clearly drafted in the first place. In this program, you will gain insights into the kinds of contract disputes that come before the court and clear advice on how effective drafting might have precluded the need for litigation. You will learn solid principles for drafting, analyzing, and interpreting contracts and for avoiding ambiguities, inconsistencies, and unintended imprecision.

Faculty: **Hon. Thomas Whelan** (NYS Supreme Court–Suffolk); **Vincent R. Martorana, Esq.** (Reed Smith–NYC)
Time: 6:00 – 9:00 p.m. **Location:** SCBA Center – Hauppauge
Refreshments: Light supper from 5:30
MCLE: 3 Hours (1.5 professional practice; 1.5 skills) [Transitional or Non-Transitional]

Evening Seminar

THE FAMILY LIMITED PARTNERSHIP: DISTRIBUTIONS & OTHER ISSUES

Thursday, November 21, 2013

The Family Limited Partnership (FLP) is a commonly used investment and estate planning tool. In general, a FLP is funded by a parent with business or investment assets. Interests in the FLP are then transferred (typically by gift, but sometimes by sale) to various family members. In most cases, the FLP is created to provide centralized management, economic efficiencies, and succession planning. Taxpayers and their families considering the creation of a FLP need adequate knowledge and insight to understand both the benefits of the FLP and associated risks. This program will cover, in summary fashion, key issues in creating, funding, transferring, and operating a FLP. The main focus, however, will be on some serious gift, estate, and income tax consequences that may arise out of subsequent partnership distributions.

Faculty: **Louis Vlahos, Esq.** (Partner & Lead Tax Attorney–Farrell Fritz, PC)
Time: 6:00 – 9:00 p.m. **Location:** SCBA Center – Hauppauge
Refreshments: Light supper from 5:30
MCLE: 3 Hours (1.5 professional practice; 1.5 skills) [Transitional or Non-Transitional]

NOVEMBER 2013 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 orde

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 Center	$100	$75	$125	Yes	Yes	2 cpn	2 cpn	$100	$ 95	$30
Real Property Update	$100	$75	$150	Yes	Yes	3 cpn	3 cpn	$150	$125	$50
Family Court Update ☐ Both Sessions ☐ Session One ☐ Session Two	 $150 $80 $80	 $90 $50 $50	 $200 $105 $105	 Yes	 Yes	 6 cpn 3 cpn 3 cpn	 6 cpn 3 cpn 3 cpn	 $190 $100 $100	 $170 $90 $90	 $35 $20 $20
SEMINARS & SERIES										
R.E. Brokerage Law	$75	$50	$100	Yes	Yes	3 cpn	3 cpn	$100	$95	$25
Closing Arguments	$90	$50	$100	Yes	Yes	3 cpn	3 cpn	$100	$95	$25
Trust Contests	$50	$25	$75	Yes	Yes	2 cpn	2 cpn	$95	$85	$20
Allen Sak Municipal Law Series ☐ Both Sessions ☐ Session 1 - Building Permits ☐ Session 2 - Hot Topics	 $150 $85 $85	 $75 $42.50 $42.50	 $150 $85 $85	 Yes	 2 uses 1 each	 3 each	 3 each	 $190 $100 $100	 $170 $90 $90	 $35 $20 $20
Scholarship Prices ☐ Both ☐ Session 1 - Building Permits ☐ Session 2 - Hot Topics	 $75 $42.50 $42.50	 $75 $42.50 $42.50	 $75 $42.50 $42.50							
Contract Disputes	$90	$50	$100	Yes	Yes	3 cpn	3 cpn	$100	$95	$50
Family Limited Partnerships	$90	$50	$100	Yes	Yes	3 cpn	3 cpn	$100	$95	$30

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

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ACADEMY OF LAW NEWS

CLE Course Listings on pages 23-24

If You Have Real Property Questions, the Academy Has the Answers!

By Dorothy Paine Ceparano

Location, location, location . . . so goes the ubiquitous real estate guideline. For lawyers seeking not to buy real estate, but to enhance their insights into the law-related issues surrounding real estate transactions, location may also be a factor: i.e., choosing the best place to go for needed skills and knowledge. We think there's no better place than the Suffolk County Bar Center, where the ambience is pleasant, the company is collegial, and the Academy's real estate CLE's are filled with practical content.

This year, the real estate lawyer will find a number of attractive educational choices at the SCBA Center. From comprehensive updates through highly focused treatments of a specific topic, the CLE offerings cover new developments and new ways to look at the tried-and-true. And for those who prefer the location of their own homes and offices, many are also available as real-time webcasts, on-line video replays, and DVD/CD recordings.

November begins with a thorough program on **"Real Estate Brokerage Law for the Transactional Lawyer."** Scheduled for Monday, November 4 (6:00–9:00 p.m.), the seminar features two knowledgeable lawyers in the field: Andrew Lieb , managing attorney of Lieb Law, P.C., and Edward Reale, senior managing director of Brown, Harris, Stevens. Academy volunteer Lance Pomerantz, attorney with Land Title Law, is the program coordinator. The seminar will address many of the questions practitioners have about the role of the broker in a real estate transaction. Topics will include licensing law and regulations; types of agency; fiduciary duties and disclosure requirements; unauthorized practice; collecting commissions; the broker employment contract, and recent case law developments.

The Academy's **Annual Real Property Update** also takes place in November. Scott Mollen, partner in the prestigious New York City law firm Herrick Feinstein and a regular columnist for the *New York Law Journal*, will visit Suffolk County on Tuesday, November 19 (6:00–9:00 p.m.), and once again cover all the significant statutory and decisional developments affecting residential transactions, commercial transactions, zoning, environmental disputes, landlord-tenant transactions, mortgage foreclosure, and real estate litigation of all kinds. The program moderator, Academy Officer Gerard McCreight, attorney with the Matrix Realty Group, will contribute to the program with a quick overview of local developments.

Though not billed as a real estate offering, per se, the Academy's **2013 Allen Sak Municipal Law Series** will provide much information for those who practice in the real estate field. Scheduled for Wednesday, November 13, and Thursday, December 5, the series covers "How to Get a Building Project Approved" on the first evening and "Hot Topics in Land Use and Municipal Law" on the second. The first program's prestigious faculty includes Brian Eagan (Egan & Golden, LP), John Zollo (Smithtown Town Attorney), Christopher Modelewski (Huntington Town Board of Zoning Appeals), Matthew E. Pachman (Ackerman, O'Brien, Pachman & Brown, LLP), William Bonesso (Forchelli, Curtis, Deegan, Schwartz, Mineo, Cohen and Terana, LLP), and Carrie O'Farrell (Nelson, Pope and Voorhis), who will cover various perspectives on land use projects, matters relevant to both the east and west ends of Suffolk County, and issues related to SEQRA . The second evening features Hon. Thomas Whelan and Hon. John Leo (New York Supreme Court Justices), Dean Patricia E. Salkin (Touro Law Center), A. Thomas Levin (Meyer, Suozzi, English & Klein, P.C.), Lance Pomerantz (Land Title Law), Vincent J. Messina (Sinnreich, Kosakoff & Messina, LLP), and Craig L. Eigut (Acting Regional Attorney, New York

(Continued on page 25)

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

DECEMBER

4 Wednesday	**Family Court Update–Part Two.** 6:00–9:00 p.m.; light supper from 5:30 p.m.
5 Thursday	**Allen Sak Municipal Series: Part Two–Hot Topics in Land Use & Municipal Law**, 6:00–9:00 p.m.; light supper from 5:30 p.m.
6 Friday	Meeting of Academy Officers & Volunteers. 7:30–9:00 a.m. Breakfast buffet. All SCBA members welcome
9 Monday	**Annual School Law Conference.** Full day at Nassau Bar Association in Mineola
10 Tuesday	**Inherited IRAs** (Sy Goldberg). 9:00 a.m.–Noon. Breakfast buffet.
10 Tuesday	**Traffic & Parking Violations Agency** 6:00-9:00 p.m. Light supper from 5:30 p.m.
11 Wednesday	**The Affordable Care Act** (SCBA Health & Hospital Law Committee). Lunch 'n Learn. 12:30-2:10 p.m.; lunch from noon.
12 Thursday	**Pro Bono Foreclosure Training.** 1:00–4:00 p.m. Lunch from 12:30 p.m.

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

Free Foreclosure Training in December

On Thursday, December 12, the Academy, in conjunction with Nassau-Suffolk Law Services and the SCBA Pro Bono Foundation, will present a free, three-credit foreclosure training intended to help volunteer attorneys help those they serve. The program runs from 1:00 to 4:00 p.m., with complimentary lunch from 12:30.

The program is mandatory for attorneys currently participating in the SCBA Foreclosure Settlement Project. Other lawyers may also attend the program at no cost and will be awarded the MCLE credits if they agree to handle a foreclosure matter on a volunteer basis.

The program will cover, among other things:

- Foreclosure Trends in Suffolk County
- The Settlement Process
- The SCBA's Foreclosure Settlement Project
- Foreclosure Litigation Trends

Invited presenters include experienced foreclosure lawyers Michael Wigutow**,** Barry Lites, Ray Lang, Eric Sackstein, and Glenn Warmuth. Barry Smolowitz, the program coordinator, will explain participation in the Association's Settlement Project, and Nassau Suffolk's Maria Dosso will be present to recruit new volunteers.

To register for the program, attorneys may call the Academy at 631-234-5588.

ACADEMY OF LAW NEWS

CLE Course Listings on pages 23-24

If You Have Real Property Questions, the Academy Has the Answers! *(Continued from page 24)*

State DEC), who will address issues related to land use, cell tower cases, religious land use, the Institutionalized Persons Act, non-conforming zoning uses, and DEC permits (including Hurricane Sanding rebuilding permits). Headed by past Academy Dean Edward Gutleber, the program planning committee includes Dean Salkin, Justice Whelan, Justice Leo, Stephen Beyer, Messrs. Pomerantz, Egan, Modelewski, Zollo, Bonesso, and Pachman; Cheryl Mintz, and Ms. O'Farrell. Through a bequest from the estate of the late Brookhaven Town Attorney Allen I. Sak, the program offers discounted tuition for new municipal lawyers and for municipalities or firms sending more than one registrant to the program.

Mortgage Foreclosure is still of significant concern in Suffolk County, and the need for volunteer lawyers to help individuals in danger of losing their homes continues. In December, under the direction of Barry M. Smolowitz, the Academy will once again present a program for the pro bono volunteers who participate in the SCBA Foreclosure Settlement Project. Scheduled for Thursday, December 12, from 1:00 to 4:00 p.m., the program will cover foreclosure trends, the settlement process, foreclosure litigation, and more. The program is free and mandatory for those who participate in the Settlement Project. Others willing to handle matters on a volunteer basis may also attend. See the sidebar in this publication for more information.

Another topic of ongoing interest in today's economy is the **Reverse Mortgage.** The Academy recently presented a program outlining the process for obtaining a reverse mortgage and pinpointing important caveats to keep in mind. Presenters were Gerald McCreight (attorney and chief financial officer with Matrix Investment Group), Salvatore Petrozzino (president, Worldwide Capital Mortgage Corp.), and Ann-Margaret Carrozza (practicing attorney and former NYS Assemblywoman). The program is now available as an on-line video replay or as a DVD or CD recording. In addition, the Academy plans to offer a second program on the topic to address a soon-to-be-enacted requirement that homeowners seeking a reverse mortgage demonstrate their financial ability to remain in the home. Watch for that CLE in early winter.

Finally, Academy Officer Lita Smith-Mines will organize the Academy's **First Annual Adolph Siegel Real Estate Seminar** for presentation in early February. Dolph Siegel, who died last year, was a highly respected and much consulted real estate attorney in Suffolk County and beyond. The program promises to do justice to his memory and to be filled with much important information for real estate practitioners.

As the Academy's administrative year continues, additional real property seminars – including a few programs on life-estates and related tax issues – will be added to the syllabus.

For more information about any of the Academy's CLE offerings or to request a program on a particular topic, attorneys are invited to call the Academy Office at 631-234-5588.

Note: The writer is the executive director of the Suffolk County Bar Association.

BOOK REVIEW

Journey Explores Supreme Court Under Roberts

By Imtiaz Jafar

Marcia Coyle, Chief Washington correspondent for *The National Law Journal*, in her book *The Roberts Court: the Struggle for the Constitution,* takes the reader on a detailed and in-depth journey through the Supreme Court under the leadership of Chief Justice John Roberts. The sophisticated depiction of Supreme Court dynamics and the thorough analysis of the relationship and interplay between the justices of the Court satisfy the intellectual demands of the trained legal mind. The readability of the book as it tackles a world so highly influential and yet so unknown to so many adds enjoyment to this intellectual pursuit.

Through her 25 years of experience covering the Supreme Court, Ms. Coyle - as both a lawyer and a journalist - demonstrates that she has a mastery of both disciplines. With fair and balanced storytelling, she guides us through the intricacies in the life of a case as it makes its way to the high Court, and how it plays out once there. Focusing on four landmark decisions all the while recognizing other noteworthy decisions that help define the Roberts Court's place in Supreme Court history, Coyle shares with her audience the lives and thought processes of not only the decision makers but also the mastermind attorneys who planned and executed the road to Supreme Court review. In summary, the four landmark decisions utilized by Ms. Coyle to bring the Court to life are:

Imtiaz Jafar

Parents Involved in Community Schools v. Seattle School District; Meredith v. Jefferson County Board of Education (a challenge to race-based assignments in the public school systems in Seattle and Louisville - revolving around a discussion of the 14th Amendment and affirmative action) ("The use of race in the assignment of students to public schools violates the 14th Amendment.");

District of Columbia v. Heller (a challenge to a ban on hand guns in Washington, DC - revolving around the Second Amendment's right to bear arms and the debate of "originalism" versus "living constitutionalism) ("The Second Amendment guarantees an individual right to possess a gun in the home for self-defense;"

Citizens United v. Federal Election Commission (a challenge to the limits on corporate campaign spending—revolving around the First Amendment and freedom of speech) ("The federal ban on corporations and unions using their treasury funds for independent campaign spending violates the First Amendment."); and

National Federation of Independent Business v. Sebelius (and other related cases) (a challenge to The Patient Protection and Affordable Care Act—revolving around discussions of the scope of the Commerce Clause and of Congress' power to tax) ("The Affordable Care Act's requirement that individuals purchase health insurance or pay a penalty is a constitutional exercise of Congress's authority to levy taxes.").

Throughout the book, Ms. Coyle deliberately and strategically takes us into the minds of the respective justices that make up the Court (remembering the unprecedented number of times this Court changed composition). Judicial philosophies, voting patterns, expected and unexpected alignments are all examined in an understandable fashion. Also, the lives, ideologies and motivations of the counselors and moneymen who planned, spearheaded, and brought to fruition their day before the highest Court is presented. "All four landmark Roberts Court decisions had at their inception very smart and talented conservative or libertarian lawyers who, when necessary, handpicked the most sympathetic clients for their lawsuits, strategized over the best courts in which to file, and with an eye toward their ultimate target — an increasingly friendly and conservative Supreme Court — framed the winning arguments."

In her acknowledgements, Marcia Coyle mentions communications with her audiences throughout the years wherein "they [(the audiences)] were eager to know more about this institution that is so critical a player in our democracy. The late Justice Harry Blackmun [ ] told me that he did not think the Supreme Court should be a great mystery to the American people. I think this book makes it less mysterious to all who read it."

Although an attorney for nine years, and while also admitted to practice before the Supreme Court of the United States, this author confesses that he was both exhilarated and intimidated when he picked up Marcia Coyle's book. Always wanting to but never previously actually taking the time to understand the dynamics of the Roberts Court or the relationship and interplay between the justices, the book represented hope. Upon conclusion of the book, which did a lot more than make the Court less mysterious, I felt empowered. I recommend this book to the lawyer, the law student, undergraduate students and all who may have even the slightest inclination to understand the workings of the Supreme Court and the importance of the role the Court plays in the daily lives of Americans.

Note: Imtiaz Jafar graduated from Touro Law School. His legal career is marked by employment in a corporate setting, law firm life, and solo practice. He has also completed a Masters of Library Science degree with a focus on legal research and law librarianship from St. John's University. Mr. Jafar has published in The New York Law Journal (twice), The Nassau Lawyer and Law Lines (twice), a law librarian publication. Practicing in Garden City, under The Jafar Law Firm, PLLC, his evolving multi-faceted practice seeks to focus on real estate law and criminal law, with per diem services offered to the Bar. In addition, Imtiaz Jafar seeks to expand his relationships with the Suffolk Bar. He can be reached at jafarlaw@gmail.com.

The Roberts Court: The Struggle for the Constitution
By Marcia Coyle
407 pp. Simon & Schuster
ISBN: 978-1-4516-2751-0

Family Limited Partnerships (Continued from page 17)

property during his life."

The "Retained Interest" cases

The IRS successfully advanced its "retained interest" argument in many cases. For example, the (not Al) Gore family's FLP opened a bank account and deposited substantial amounts of money. Marketable securities were assigned to the FLP but title was never transferred. Dividends were not deposited in the FLP's bank account. The FLP paid many of Mrs. Gore's personal expenses without reimbursement. The accountant filing the FLP's tax returns attempted to fix the errors with "journal entries." Tax Court judges apparently do not like "journal entries." The Gores lost, to the tune of $1 million in estate taxes, plus 10 years of interest. (T.C. Memo. 2007-169).

The Erickson Estate's FLP was thwarted where Mom's assets were transferred to an FLP two days before she died. She was suffering from advanced Alzheimer's. (T.C. Memo. 2007-107). The Rector family similarly lost $1.6 million to federal estate taxes plus five years of interest. The Rector FLP also paid the decedent's personal expenses. The decedent never reimbursed the FLP. Although the Rectors only applied a relatively low 19 percent valuation discount, they still fell victim to the IRS's attack. (T.C. Memo 2007-367). The Jorgenson family treated their FLP like a bank account. The decedent paid $90,000 of personal expenses from the partnership. Her estate also paid $200,000 of her estate taxes from the FLP. The Tax Court's decision was upheld by the Ninth Circuit. (T.C. Memo. 2009-66).[2]

Never fear, it is not all doom and gloom for FLP's. Perhaps next month's column will paint a rosier picture of lesser-fated FLP's. Until then, consider some "stress test" questions to assess whether an FLP will withstand IRS scrutiny:

What motivated the FLP? Have a well-documented, significant legitimate non-tax business purpose for establishing the FLP beyond just getting a valuation discount.

When did you form the FLP? As with most documents, deathbed signings will increase scrutiny. A lapse of time between formation and asset transfer will not help.

How do you maintain the FLP? The FLP must run as a business, with regular meetings and audits. Bad administration will invite IRS scrutiny.

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

FOOTNOTES

1. IRC §2036 can thwart an FLP if (1) the decedent makes a lifetime transfer of property, which (2) was not a bona fide sale for full and adequate consideration; (3) the decedent retains possession or enjoyment of the transferred property or retained the right alone or in conjunction with any other person to designate the persons who would possess or enjoy the property or the income therefrom.

2. *See also* Estate of Bigelow, 503 F.3d 955 (9th Cir. 2007); *Estate of Ida Abraham*, T.C. Memo. 2004-39; *Estate of Lea K. Hillgren*, T.C. Memo. 2004-46; *Estate of Strangi*, T.C. Memo 2003-145; *Estate of Thompson,* T.C. Memo 2002-246; *Estate of Harper,* T.C. Memo. 2002-121; *Estate of Bongrad*, 124 T.C. 95 (2005); *Estate of Lillie Rosen*, T.C. Memo. 2006-115.

Legal Possession of Syringes and Drug Residue (Continued from page 19)

or carrying used ones.

Expanded Syringe Access Program (ESAP)

ESAP is New York State's other syringe access initiative. PHL § 3381 was amended in 2000 to allow for the sale or furnishing of syringes without prescriptions to persons 18 years of age or older in quantities of 10 or fewer per transaction.

The law limits this sale or furnishing to three classes: licensed pharmacies, health care practitioners otherwise authorized by law to prescribe syringes, and health care facilities. These pharmacies, practitioners and facilities are required under the law to register with the New York State Health Department in order to provide syringes in this manner. PHL § 3381 authorizes a "person eighteen years of age or older...[to] obtain and possess a hypodermic syringe or hypodermic needle" as part of this program. Through the implementing regulation, 10 NYCRR 80.137, this program became known as the Expanded Syringe Access Program or ESAP.

There are approximately 3,200 ESAP-registered providers throughout New York State, with 97 percent of them being pharmacies. All counties in the state except one, Hamilton County, have at least one ESAP-registered pharmacy. This gives ESAP a much broader geographic reach than the SEPs. Individuals acquiring syringes through ESAP do so anonymously and without any registration or the issuance of identification cards. There is no requirement that ESAP customers retain either a sales receipt or the "Safety Insert" which accompanies ESAP transactions. Although each ESAP transaction may entail the sale or furnishing of no more than 10 syringes, ESAP customers may make serial transactions and have in their possession a larger quantity.

Opioid overdose prevention programs

Under PHL § 3309 and its implementing regulation, 10 NYCRR 80.138, the NY State Health Commissioner may authorize Opioid Overdose Prevention Programs in which individuals are taught how to recognize and respond to an opioid overdose. This response includes summoning emergency medical services, providing rescue breathing, and administering a drug to reverse the overdose. This drug, Naloxone (sometimes known as Narcan), is prescribed and furnished to the Trained Responder, as are the syringes used for intramuscular injection. Naloxone is not a controlled substance. There are currently over 60 Opioid Overdose Prevention Programs throughout New York State. Possession of overdose prevention syringes is legal under PHL § 3381, because they are furnished pursuant to a prescription.

Though Trained Responders are issued a certificate upon completion of training, there is no requirement that they carry this when they are in possession of the opioid overdose kit. Similarly, though the Naloxone is furnished pursuant to a prescription, it is not mandatory that the prescription be carried with the opioid overdose kit. Trained Responders, however, are encouraged to have both of these documents with them when in possession of the kit.

Note: Maxine Phillips, M.S., is the Director, Harm Reduction Unit, NYS Department of Health/AIDS Institute and Mary Ellen Cala, M.A., is the Coordinator of Community Relations, Education & Training, NYS Department of Health/AIDS Institute.

Use Evernote As A Legal Marketing Tool (Continued from page 18)

a business card, send the photo to Evernote, scan the card for data, pull their profile from LinkedIn and add it to your phone's contact list. Although the business card scan feature is not yet available for Android, you can still get the Hello app and enter their information manually or connect to a group of people using the Hello Connect feature.

Collaborate and Share

Often, marketing and business development tasks or projects aren't handled by a single individual. A team of lawyers may be working with a particular client or prospect, and staff members may need access to information or perform specific tasks in a marketing initiative. For example, the attorney may be responsible for drafting a blog post, while a staff member is responsible for publishing the post or for adding social media links. In that case, Evernote's sharing features are the way to go.

Evernote lets you create shared notebooks so that each member of the team can see what is being done. Checklists can ensure that no steps are skipped. Shared notebooks can include pages from the prospect's website, notes from meetings with prospects, prospect contact information, checklists and timelines so that everyone can see what stage the project is in, who is doing what and when.

Reminders

Another Evernote feature that can aid your follow up efforts is Reminders. Reminders allow you to add alerts inside your Evernote account and via email, or to pin specific notes to the top of your notes list for easy reference.

Clicking on the alarm clock icon will pin the selected note into the Reminder list at the top of the Note List, create a to-do item for that note and add alarms to make sure your task-related notes are completed on time. If you've shared a notebook with a colleague, they can subscribe to that notebook's Reminders to get alerts about upcoming deadlines.

Not only will the reminders feature allow you to keep track of follow ups, but it is also a great way to remember those marketing and posting deadlines.

Think of Evernote as a giant file cabinet. You can make it as structured or as unstructured as you want, but it is much more functional than a paper file cabinet, thanks to the robust search (including search of text in photos) and tagging features available in Evernote. You can create a separate notebook for each client, prospect or project, or keep all of your marketing and business development related notes in a single notebook.

Note: Allison C. Shields, Esq. is the President of Legal Ease Consulting, Inc., which provides marketing, social media, practice management and productivity coaching and consulting services for lawyers and law firms nationwide. More information can be obtained through her website, www.LawyerMeltdown.com or blog at www.LegalEaseConsulting.com.

Admissibility of Online Land Records (Continued from page 16)

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

1 Jurisdiction was lacking because the vacant lot was "devoid of a building or structure being used … as a home or residence as required by RPAPL §1305" [internal quotations omitted]. Summary proceedings can only concern "residential premises."

2 The defense is not germane to this article and will not be discussed further.

3 ACRIS is the acronym for "Automated City Register Information System," the official online land records recording system used in Bronx, Brooklyn, New York and Queens counties.

4 CPLR §2105 provides: "Where a certified copy of a paper is required by law, an attorney admitted to practice in the courts of the state may certify that it has been compared by him with the original and found to be a true and complete copy. Such a certificate, when subscribed by such attorney, has the same effect as if made by a clerk."

5 The Court refers to a disclaimer found on the NYC DOF ACRIS website that "neither ACRISap nor ACRIS.com is a New York City Department of Finance approved service or website" as support for the idea that the image found on the ACRIS website is not the "original image." The point of the disclaimer is that "ACRISap" and "ACRIS.com" are *unofficial* websites whose accuracy cannot be presumed. In *Velez,* the attorney maintained that he viewed the deed on the official DOF ACRIS site.

6 *See* State Technology Law §302(5) for the definition of "governmental entity."

7 State Technology Law §302(2) defines an "electronic record" to mean "information, evidencing any act, transaction, occurrence, event, or other activity, produced or stored by electronic means and capable of being accurately reproduced in forms perceptible by human sensory capabilities."

8 *Ibid.,* §305(2)

9 *Ibid.* §306.

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

Helmsley Building on Park Avenue. While we continued to reiterate our concerns regarding this new rule and the relative need for adequate representation, the meeting was limited to the four of us. While we would've preferred to have the Presidents of the five bar associations (Suffolk, Nassau, Brooklyn, Queens, and Richmond Counties) as well as a representative of the NYSBA, we were nonetheless quite pleased to have this opportunity to personally state our concerns regarding this extremely important issue.

Both Judge Lippman and Judge Prudenti were extremely generous with their time and addressed the concerns we maintained, however, the end result of our meeting was that this new controversial rule remains in effect. Judge Lippman explained the sole basis for the rule was for the collection of data regarding voluntary pro bono services and financial contributions to organizations providing civil legal services AND there would be no pursuit of any potential punitive action on behalf of the Office of Court Administration ("OCA") for failure to accurately report the requested information; all attorneys practicing in the private sector are still required to affirm this data on their biennial registration forms filed with the OCA.

Judge Prudenti suggested we reach out to fellow colleagues across the state to elicit suggestions on how the OCA could collect the data they need without requiring attorneys to not only affirm the data they provide, but permanently associate the data to the particular attorney for possible future release to the public. While I could rage on regarding why most practicing attorneys find this new controversial rule to be so offensive, there could be some good news that comes from this meeting. While clearly the OCA is often guided by the opinions of the NYSBA, said opinions are not always clearly dispositive. The members of the Executive Committee of the Suffolk County Bar Association began asking ourselves whether the NYSBA is (or even *should be*) the only voice of practicing attorneys. There undoubtedly exists power in sheer numbers. Currently, there are over 76,000 members of the NYSBA, thus making it one of the largest (and most powerful) voluntary bar associations in the country. Consider, however, aside from the NYSBA, there are 185 county and other specialty bar associations with membership exceeding 125,000 practicing attorneys. What if there was a way to reach out to the leaders of these other associations to solicit opinions regarding changes (or proposed changes) effecting how each of us practices across the state?

How many attorneys have even heard of the Conference of Bar Leaders? Each year, the NYSBA through the Conference, compiles a list of the leaders of each of these 185 bar associations from across the state, along with their respective contact information. Said information is easily compiled to create a master list of email addresses of said leaders. Once compiled, the list of email addresses can easily (and effectively) be utilized to create a listserve at little or no cost. For those unfamiliar with the concept, the term listserve has been used to refer to an electronic mailing list, allowing a sender to send one email to the list, and then transparently sending it on to the addresses of the subscribers to the list and additionally allowing subscribers to respond to email posts.

We believe this is, potentially, a *far better way* to communicate the opinions of all of the attorneys practicing across the state, whether or not they are members of the NYSBA. While I currently sit as a very proud member of the House of Delegates of the NYSBA, I have come to believe the position of the NYSBA may coincide with the opinions of non-members; we have learned most recently, that even the NYSBA cannot dictate the actions taken by OCA that affect they ways in which we all practice.