THE SUFFOLK LAWYER

THE OFFICIAL PUBLICATION OF THE SUFFOLK COUNTY BAR ASSOCIATION

DEDICATED TO LEGAL EXCELLENCE SINCE 1908 www.scba.org Vol. 30, No. 3– November 2014

INSIDE...
NOVEMBER 2014 FOCUS ON EDUCATION LAW

In Memoriam: Dorothy Paine Ceparano

By John Calcagni

Our Bar Association has fittingly dedicated this issue of *The Suffolk Lawyer* to Dorothy Paine Ceparano, and I am honored to have been asked to contribute my thoughts to this richly deserved tribute. I assume the reason I was asked was that I came to know Dorothy pretty well when I served as the Academy's Dean a few years ago. I would venture to say that she and I even became good friends during that two-year period. I saw her almost every weekday, and during that time we often spoke and worked together on Academy business, a venture that we both had great affection for.

When asked to write about Dorothy, I felt grateful, touched and little intimidated. Grateful, because I felt privileged I would have an opportunity to

honor the memory of someone for whom I and so many others in our Bar Association had great affection and admiration. Touched, because it would give me the chance to publicly express my fond memories about a woman whose remarkable intelligence, talent, work-ethic and dedication were belied by an unfailing spirit of humility. Intimidated, because I didn't feel I could do justice to the memory of someone who inspired great affection and admiration in those of us who came to know her.

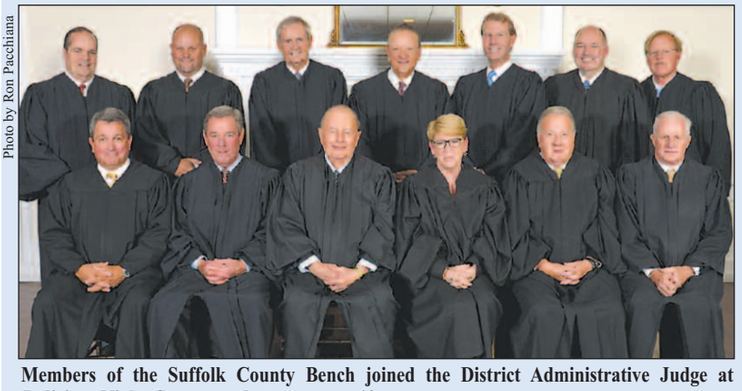
Just a few days before I started to write this, the Academy held its first

(Continued on page 30)

This issue of The Suffolk Lawyer is dedicated to the memory of Dorothy Paine Ceparano

Judiciary Night Brings Together Bench and Bar

Photo by Ron Pacchiana



Members of the Suffolk County Bench joined the District Administrative Judge at Judiciary Night. See more photos on page 13.

PRESIDENT'S MESSAGE

Dorothy was truly special

By Bill Ferris

As a tribute and in celebration of Dorothy Ceparano, we dedicate this issue of the Suffolk Lawyer to Dorothy. She was the "face" of the Academy of Law, and we, who served as deans, officers, volunteers, program presenters, and staff, will forever in our hearts and minds remember Dorothy as the person who knew how to make both the Academy and volunteers look good.

For many years, Dorothy served as both Executive Director of the Academy of Law and as the Editor of *The Suffolk Lawyer*. Each position was a full time responsibility, but she served both positions with dedication and professionalism. Dorothy came to us with a background, which enabled her to elevate the academy to new heights. Her experience was well suited for the Academy and the newspaper.

Bill Ferris

Dorothy was an English teacher in New York City junior high schools in the mid'1960"s. Following her teaching career, she was employed as an Administrative Assistance/Secretary with Ingerman, Smith, Greenberg, Gross, Richmond, Heidelberger and Reich, Esqs. in Northport.

Gabriel K. Wiener was the Executive Director of the Bar Association when Dorothy was hired in March 1989 as Administrator of the Academy of Law.

\(Continued on page 19)

BAR EVENTS

SCBA Annual Holiday Party
Friday, Dec. 5, 4 – 7 p.m.
Great Hall
Celebrate the season with friends and colleagues at SCBA's annual holiday get together.

❑

Judicial Swearing In and Robing Ceremony
Monday, Jan. 12, 9 a.m.
Touro Law Center
All are invited to attend.

FOCUS ON EDUCATION LAW
SPECIAL EDITION

Suffolk County Bar Association

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

Board of Directors 2014-2015

William T. Ferris	President
Donna England	President Elect
John R. Calcagni	First Vice President
Patricia M. Meisenheimer	Second Vice President
Justin M. Block	Treasurer
Lynn Poster-Zimmerman	Secretary
Hon. James P. Flanagan	Director (2015)
Allison C. Shields	Director (2015)
Harry Tilis	Director (2015)
Glenn P. Warmuth	Director (2015)
Leonard Badia	Director (2016)
Cornell V. Bouse	Director (2016)
Jeanette Grabie	Director (2016)
Peter C. Walsh	Director (2016)
Vincent J. Messina, Jr.	Director (2017)
Luis Antonio Pagan	Director (2017)
Richard L. Stern	Director (2017)
Daniel J. Tambasco	Director (2017)
Matthew E. Pachman	Past President Director (2016)
Arthur E. Shulman	Past President Director (2015)
Dennis R. Chase	Past President Director (2017)
Sarah Jane LaCova	Executive Director

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

NOVEMBER 2014
13 Thursday Elder Law & Estate Planning Committee, 12:15 p.m., Great Hall.
Commercial Division, 6:00 p.m., Board Room.
Health & Hospital Law, 6:00 p.m., E.B.T. Room.
Intellectual Property Law, 6:00 p.m., President's Office.
17 Monday Board of Directors, 5:30 p.m., Board Room.
18 Tuesday Education Law, 12:30 p.m., Board Room.

DECEMBER 2014
2 Tuesday Appellate Practice, 5:30 p.m., E.B.T. Room.
3 Wednesday Surrogate's Court, 6:00 p.m., Board Room
5 Friday SCBA's Annual Holiday Party, 4:00 to 7:00 p.m., Great Hall.
8 Monday Executive Committee, 5:30 p.m., Board Room.
11 Thursday Health & Hospital Law, 5:30 p.m., E.B.T. Room

JANUARY 2015
2 Friday Education Law, 12:30 p.m., Board Room.
5 Monday Executive Committee, 5:30 p.m., Board Room.
6 Tuesday Appellate Practice, 5:30 p.m., E.B.T. Room.
8 Thursday Health & Hospital Law, 5:30 p.m., E.B.T. Room.
12 Monday SCBA's Annual Robing & Swearing in Ceremony, Touro Law School. Further details forthcoming.
14 Wednesday Surrogate's Court, 6:00 p.m., Board Room.
15 Thursday Elder Law & Estate Planning Committee, 12:15 p.m., Great Hall.
21 Wednesday Education Law, 12:30 p.m., Board Room.
Traffic & Parking Violations Agency (TPVA), 6:00 p.m., Board Room.
26 Monday Board of Directors, 5:30 p.m., Board Room.

FEBRUARY 2015
3 Tuesday Appellate Practice, 5:30 p.m., E.B.T. Room.
9 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

LAURA LANE
Editor-in-Chief

Leo K. Barnes, Jr.
Alison Arden Besunder
John L. Buonora
Dennis R. Chase
Elaine Colavito
Ilene S. Cooper
Hillary A. Frommer
James G. Fouassier
Justin Giordano
Candace J. Gomez
Robert M. Harper
Andrew Lieb
David A. Mansfield
Patrick McCormick
Lance R. Pomerantz
Craig D. Robins
Allison C. Shields
Barry Smolowitz
Stephen L. Ukeiley
Louis Vlahos
Frequent Contributors

Publisher
Long Islander News
in conjunction with
The Suffolk County Bar Association

Send letters and editorial copy to:
The Suffolk Lawyer
560 Wheeler Road
Hauppauge, NY 11788-4357
Fax: 631-234-5899
Website: www.scba.org

The Suffolk Lawyer

USPS Number: 006-995) *is published monthly except July and August by Long Islander News, LLC, 14 Wall Street, Huntington, NY 11743, under the auspices of the Suffolk County Bar Association. Entered as periodical class paid postage at the Post Office at Huntington, NY and additional mailing offices under the Act of Congress. Postmaster send address changes to the Suffolk County Bar Association, 560 Wheeler Road, Hauppauge, NY 11788-4357.*

COMMERCIAL LITIGATION

Outside Professional Advice No Substitute For Fiduciary Duty Owed

By Leo K. Barnes, Jr.

It is well settled that managing members of a limited liability company owe a fiduciary duty of loyalty to non-managing members and "[that duty] is a sensitive and inflexible rule of fidelity, barring not only blatant self-dealing, but also requiring avoidance of situations in which a fiduciary's personal interest possibly conflicts with the interest of those owed a fiduciary duty." *Pokoik v. Pokoik*, 115 A.D.3d 428, 982 N.Y.S.2d 67, at 70 (1st Dept. 2014) citing *Birmbaum v. Birmbaum*, 73 N.Y.2d 461, 466 (1989).

In that regard, Limited Liability Law § 409, entitled "Duties of Managers" codifies the obligation of an LLC's manager to act in good faith, and likewise provides the manager with the opportunity to rely upon the advice of outside professionals in an effort to discharge that duty owed. Section 409 provides, in pertinent part:

Leo K. Barnes, Jr.

(a) A manager shall perform his or her duties as a manager, including his or her duties as a member of any class of managers, in good faith and with that degree of care that an ordinarily prudent person in a like position would use under similar circumstances.

(b) In performing his or her duties, a manager shall be entitled to rely on information, opinions, reports or statements, including financial statements and other financial data, in each case prepared or presented by: …

(2) counsel, public accountants or other persons as to matters that the manager believes to be within such person's professional or expert competence; …

(c) A person who so performs his or her duties in accordance with this section shall have no liability by reason of being or having been a manager of the limited liability company.

The First Department's recent decision in *Pokoik v. Pokoik*, 115 A.D.3d 428, 982 N.Y.S.2d 67 (1st Dept. 2014), addresses the interplay between these two principles (the fiduciary duty owed by a manager to another member and the manager's effort to discharge that duty by relying upon the advice of an outside professional in accordance with § 409(b)(2)). In *Pokoik*, defendant Gary Pokoik ("Defendant") was the managing member of several Limited Liability Companies managing real estate, and plaintiff Lee Pokoik ("Plaintiff") was a non-managing member of the same LLCs. According to the decision, the dispute centered around the Defendant's shifting of tax burdens that resulted in the reduction of solely Plaintiff's capital account, but not the capital accounts of other members of the LLCs.

The reduction of Plaintiff's capital account stemmed from a prior settlement between the parties in 2006. That settlement included that upon Plaintiff's payment of $2.2 million to defendant and other members of the LLCs, any 'discrepancy' between payments recorded in the LLC's books would be "written off" by the LLCs. According to the decision, Plaintiff timely made all payments pursuant to the settlement, and the parties were aware that the amounts paid by Plaintiff were less than the full amounts originally at issue in that action.

After the 2006 settlement, an outside accounting firm advised Defendant that the LLCs would have to account

(Continued on page 24)

Meet Your SCBA Colleague

Jon-Paul Gabriele, a plaintiff attorney, with experience in defending hospitals, health care professionals and businesses in employment matters, has been hanging around courtrooms for as long as he can remember.

By Laura Lane

Your father, Guido Gabriele, who recently died, was a litigator. Yes and I always went to court with him. I can even remember going for jury selection. I was young and had no idea what was going on but I just loved watching him. I was always so proud of what my father did.

Can you remember when you decided to become a lawyer? I think since I was in elementary school. My father gave me the motivation.

Watching the profession for so many years, did you find when you actually became an attorney three years ago that you had romanticized it? I learned that the reality is that there is a lot more work involved when you are doing it yourself. I always knew how hard my father worked, but never knew how much work was involved in each aspect.

When did you start working at his firm? I began when I graduated high school. I started at the very bottom in the file room, did photo copying, then billing and accounting. In law school I was drafting memos and whatever else I could do to help. My father always said, "I'll open the door for you but you will have to walk through it." He really made me work for it.

In order to work at Gabriele & Marano, LLP you must have gone to school locally. I received a full academic scholarship to attend Adelphi University Honors College and graduated in 2008 Summa Cum Laude. Then I went to New York Law School graduating in 2011, Cum Laude.

It sounds like the hands-on education you received prior to becoming an attorney at the law office was beneficial. It was a well-rounded experience of what it is like to run a law firm. I learned the importance of pro bono work, which my Dad did a lot of, and how important client relationships are. My older brother is an attorney at the firm as well.

Was the firm a family business? No it wasn't. If your last name wasn't Gabriele it didn't mean you wouldn't have a shot at anything. But my dad did say when he hired someone, "Welcome to the family."

Was your father your mentor? Yes, but also my boss and my best friend.

What do you enjoy about being an attorney? There are so many different things. I love to be someone who is standing in someone else's shoes who doesn't know how to protect themselves. Quite simply, being an attorney you see people who need help and you get to go to court and help them. It feels good to stand up and say, "Jon-Paul Gabriele, Esq. on behalf of so and so."

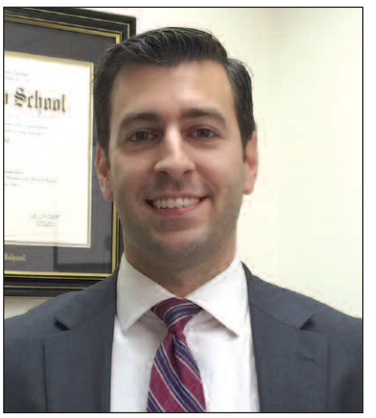
What else do you enjoy? I like that the profession is multifaceted. One thing my Dad told me was to get a law degree because you can do so many different things. Law is an amazing career and I'm definitely seeing what my Dad told me about it.

You are no longer working at your father's firm, right? I resigned and am set to work at Dell & Dean in Garden City. My new firm is a plaintiff firm whereas Gabriele & Marano is a defense firm. At the new firm I'm hoping I'll have an opportunity to try cases faster. I do want to be a trial attorney.

How did you end up getting involved at the SCBA? I saw the great friendships that my father had made there and I wanted to be a part of it on my own personal level. I wanted to share in the camaraderie that I had grown up in.

What did you notice from the get-go? I wanted to grow as an attorney and I learned very quickly that if there is something you don't know there is an attorney at the SCBA that does. I'm always trying to grow and expand as a person and as an attorney and you can do that at the SCBA.

You utilized the Lawyer Referral Service at the SCBA too? Yes I used it to expand my firm's practice. It helped me to branch out because I was able to get leads. There are people in



Jon-Paul Gabriele

Suffolk who need help and they are referred to attorneys that are on this list. I got a variety of cases. The Lawyer Referral Service is a great way to connect attorneys eager to help with the people who need it.

Why would you recommend others join the SCBA? There is such a great group of people there who are technically in competition with each other. The SCBA is dedicated to helping legal professionals grow. They offer CLEs to help attorneys learn more about an area of law from the people who have done it for years. And the social events help you grow your career too.

What do you enjoy most about the SCBA? The camaraderie is what the Bar is all about. It's a special place.

BENCH BRIEFS

By Elaine Colavito

SUFFOLK COUNTY SUPREME COURT

Honorable Paul J. Baisley, Jr.

Leave to amend answer denied; emergency doctrine claim lacking in merit.

In *MD B. Rahman and Husne Ara Rahman v. Peter Kempski, Island Tennis, L.P.,* Index No.: 10452/2012, decided on May 20, 2014, the court denied defendants' motion for an order granting leave to serve an amended answer pursuant to CPLR §3025(b) adding the affirmative defense of the emergency doctrine. In rendering its decision, the court noted that the emergency doctrine posits that those faced with a sudden and unexpected circumstance, not of their own making, that leaves them with little or no time for reflection, or reasonably causes them to be so disturbed that they are compelled to make a quick decision without weighting alternative courses of conduct, may not be negligent if their actions are reasonable and prudent in the context of the emergency. The emergency doctrine has consistently been held not to apply to typical rear-end collisions because following drivers are required to leave a reasonable distance between their vehicles and the preceding vehicles. Here, the court noted that the defendants' own submissions regarding the accident reflected that defendant Kempski was not reacting to an emergency but rather to a common traffic occurrence. Moreover, in rendering its decision, the court noted that the police report did not substantiate Kempski's claim that his vehicle had changed lanes prior to the collisions; the officer's diagram depicted all three vehicles fully within the left lane. Accordingly, the court concluded that the emergency doctrine was lacking in merit and as such, the court denied defendants' application for leave to amend the verified answer.

Elaine Colavito

Petition to change the surname of child denied; cross petition by child's father for dismissal granted; petition vigorously opposed and submissions failed to establish that the interests of the child would be substantially promoted by the change.

After a hearing in *In the Matter of the Application of Marisa Holly Skolnick, the Mother and Natural Guardian of Jack Abraham Goldberg, an infant for leave to change his name to Jack Abraham Skolnick,* Index No.: 632/2014, decided on July 29, 2014, the court denied the petition by Marisa Holly Skolnick to change the surname of her nine-year-old son to her maiden name. The cross petition of the child's father for dismissal was granted.

The court noted that in support of her application, the petitioner alleged that the respondent was not a frequent or constant presence in the child's life, and that respondent made only occasional efforts to see the child, with visits lasting only a few hours. The petitioner further alleged that the child was being raised by herself and her parents, with whom they lived, that the child had regular contact with other members of her immediate family, and that the child identified with being a "Skolnick" and wanted to change his name. The respondent, however, alleged that the petitioner had been unreasonable in responding to his efforts to spend time with the child on a steady basis and that she was preventing the respondent and his extended family from seeing the child. In rendering its decision, the court pointed to Civil Rights Law §63, stated that pursuant to same, the court was authorized to grant a petition to change a child's name where it was satisfied that there was no reasonable objection to the change of name proposed and that the interests of the fact would be substantially promoted by the change. Here, the court stated that the child's father, vigorously opposed the petition whose objections to the name change, the court found reasonable. The court reasoned that the respondent clearly had not abandoned his child, had consistently provided for his support, had made reasonable efforts at visitation and appeared to enjoy a good and loving relationship with his son. Moreover, the court pointed out that the submissions failed to establish that the interests of the child will be substantially promoted by the change.

Honorable Arthur G. Pitts

Cross motion to reargue motion to dismiss granted; upon reargument, cross motion seeking dismissal of complaint against defendant Jay Weiss granted; when a corporate officer acts solely within the course and scope of his or her employment, he or she cannot be held liable in his or her individual capacity.

In *JT Queens Carwash, Inc., and Frank Roman v. JDW & Associates Inc. and Jay Weiss,* Index No.: 18782/2012, decided on March 11, 2014, the court granted the defendants' cross motion for leave to reargue the prior motion for dismissal and upon reargument, the branch of the cross motion seeking dismissal of the complaint against defendant Jay Weiss was granted. In rendering its decision, the court noted that it was well settled that a corporate officer may not be held liable

(Continued on page 25)

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:

Carl Baker
Jonathan Burke
Richard M. Campbell
Tito Vladimir
Nancy Sprawling Cleveland
Anthony Colletti
Ruth E. Cowan
Marie Crosby
Jean DiPaolo
Charles S. Doskow
Pamela Hope Sweeney
Stanley Alexander George III
Charles A. Guadagnino
David M. Homik
Robert Peter Lalor
Joel D. Lerner
Paul Roy Lipton
Jackson Marcelin
Clare Norins
Leslie Peden
Michele Russell
Marion E. Scheck
Timothy Stapleton
Urska Velikonja
Mona R. Washington

Attorney Reinstatements Granted

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

William L. McCormick

Attorney Resignations Granted/Disciplinary Proceeding Pending:

Athina Karamanlis: By affidavit, respondent tendered her resignation as a licensed legal consultant. Respondent acknowledged that she was the subject of an investigation pending into allegations that she allowed her law license in Greece to lapse, and that as a result she is no longer eligible to be a licensed legal consultant. 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. In view of the foregoing, the respondent's resignation was accepted and her name was stricken from the roll of licensed legal consultants.

Ilene S. Cooper

Steven L. Tarshis: By affidavit, respondent tendered his resignation on the grounds that he was the subject of an investigation into his professional misconduct alleging, *inter alia,* that he misappropriated client funds. 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.

Edward I. Yatkowsky: By affidavit, respondent tendered his resignation on the grounds that he was the subject of an investigation into his professional misconduct alleging, *inter alia,* that he neglected a foreclosure action, and knowingly misrepresented the status of the action, converted escrow funds, and failed to timely cooperate with the efforts of the Grievance Committee. He stated that he could not successfully defend himself on the merits against charges predicated upon the foregoing. Further, he stated his resignation was freely and voluntary rendered, that he was fully aware of the implications of submitting his resignation, and that he was subject to an order directing that he make restitution and reimburse the Lawyers' Fund for Client Protection. In view of the foregoing, the respondent's resignation was accepted and he was disbarred from the practice of law in the State of New York.

Attorneys Censured

Michael C. DeLisa: By decision and order of the court, the Grievance Committee was authorized to institute a disciplinary proceeding against the respondent and the matter was referred to a Special Referee. The referee sustained the charges against the respondent relating, *inter alia,* to his failure to comply with the lawful demands of the Grievance Committee and the Grievance Committee moved to confirm. In view of the respondent's admissions and the evidence adduced, the court concluded that the Special Referee properly sustained the charges, and therefore the motion by the Grievance Committee was granted. In determining the appropriate measure of discipline to impose, the court considered the letters and affidavits received attesting to the respondent's good char-

(Continued on page 26)

Educating Unaccompanied Immigrant Children in Public Schools

By Candace J. Gomez

The recent influx of unaccompanied children crossing the United States-Mexico border has continued to fuel an ongoing national debate regarding immigration. This issue has also presented itself on the local level in many New York school districts because, between January 31, 2014 and July 31, 2014, approximately 4,200 unaccompanied children apprehended by immigration authorities have been released to sponsors living in New York State.www.p12.nysed.gov/sss/documents/EducationalServicesforRecentlyArrivedUnaccompaniedChildren.pdf - 30k - 2014-09-17 -

New York school officials should be careful to set aside any personal beliefs that they may have regarding national immigration policies and follow the laws of New York State, which require that undocumented children be given the right to attend school full time as long as they meet the age and residency requirements of New York State law. It is important to remember that students may meet the residency requirements of New York State, even if they are not legal U.S. citizens.

The New York State Education Department recently issued a memo to schools reminding districts that pursuant to Education Law Section 3202(1) and Section 3205, school districts have an obligation to provide an educational opportunity, without the payment of tuition, to any resident student over five and under 21 years of age who has not received a high school diploma. *Id.* At the time that the U.S. Department of Health and Human Services ("HHS") places an unaccompanied child with a sponsor who lives in the district, the sponsor typically will not have legal custody or guardianship, but a sponsor does not need to establish custody or control through a formal custodial or guardianship proceeding for the child to be considered a district resident. If the sponsor's home is the child's permanent residence and the sponsor has full authority and responsibility with respect to the child, in most cases, the child should be considered a resident who is entitled to a free education in the district where the sponsor resides.

FOCUS ON EDUCATION LAW
SPECIAL EDITION

It has been difficult for many districts to grapple with the question of whether unaccompanied children who are in HHS shelters are considered homeless and therefore, are eligible for McKinney-Vento services. The U.S. Department of Education recently clarified that "unaccompanied children who are in HHS shelters receive educational services on-site and are not eligible for McKinney-Vento services, but children who are released to live with a sponsor may be eligible on a case-by-case basis under the law's broad definition, which includes youth who are living with family members in 'doubled-up' housing, i.e., sharing the housing of other persons due to economic hardship or a similar reason." *Id.* Students should be immediately enrolled in school while McKinney-Vento eligibility determinations are being made in accordance with Section 100.2(x) of the Commissioner's regulations.


Candace Gomez

How do school officials know how many unaccompanied children are actually enrolled in a particular school or in a particular school district? Many times, they don't know, and that is actually a good thing. The privacy rights of unaccompanied children should be protected to the same extent that we protect the privacy rights of other students pursuant to the Family Educational Rights and Privacy Act ("FERPA"). However, one document that may alert individuals that a child is an unaccompanied immigrant is the child's immunization records. Upon arrival at a U.S. Customs and Border Patrol facility, unaccompanied children are provided with an initial medical screening and, those children without previous vaccinations, are provided with vaccinations by the Office of Refugee Resettlement. In circumstances where children have incomplete documentation of immunizations, Public Health Law 2164(7)(a) provides that such children may be allowed to attend school for up to 30 days if there is evidence of a good faith effort to obtain immunizations or immunization records. Immunization records should be distributed to appropriate school personnel on a "need to know" basis and used only to the extent necessary to ensure proper health compliance - these records should never be used to track a student's immigration status.

NOTE: Candace J. Gomez, an attorney with Lamb & Barnosky, LLP in Melville., practices in the areas of education law and civil litigation. A member of the Suffolk County Bar Association, she also serves as a member of the New York State Bar Association President's Committee on Access to Justice. She is also the Nassau County President of the Long Island Hispanic Bar Association. Follow her at http://nyedulaw.com/ *and* https://twitter.com/@nyedulaw

Excluding the Public from Board of Education Meetings

By Lauren Schnitzer

The Open Meetings Law ("OML") provides the following two mechanisms for boards of education and other public bodies to conduct public business in private: convening into executive session and holding a meeting that is exempt from the requirements of the OML. This article discusses the proper procedures for excluding the public from board of education meetings and addresses those areas commonly misunderstood by boards of education and counsel alike.

Lauren Schnitzer

Executive sessions

A board of education may only enter into an executive session to discuss one or more of the eight subjects listed in Section 105 of the Public Officers Law. The motion to conduct an executive session must refer to the subject(s) to be discussed with specificity.

FOCUS ON EDUCATION LAW SPECIAL EDITION

For example, the motion to adjourn into executive session to discuss "proposed, pending or current litigation" should specify the matter being discussed (*e.g.*, "I move to adjourn into executive session to discuss pending litigation in the matter of Smith v. Anytown School District"), unless the litigation involves a student (*e.g.*, "to discuss pending litigation against the District involving a particular student"). A board cannot meet in executive session for this reason if its adversary or opposing counsel is present because the purpose of this provision is to enable a public body to discuss litigation privately, without baring its strategy to its adversary through mandatory public meetings.

Despite what is often heard in meetings throughout the state, there is no authority to meet in executive session to discuss "personnel matters." Rather, the OML authorizes a board of education to adjourn into executive session to discuss "the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation." The motion to adjourn into executive session for this reason cannot merely repeat this language. It must specify *what* will be discussed, but does not need to specify *who* will be discussed (*e.g.*, "to discuss matters leading to the appointment of a particular person" or "to discuss matters leading to the dismissal of a particular person"). This provision only applies to discussions regarding a single person (for example, a non-aligned employee) or corporation and, therefore, would not apply to a discussion regarding the possible elimination of all employees in the same job title for economic reasons.

Similarly, the motion to adjourn into executive session to discuss "collective negotiations" pursuant to the Taylor Law should identify the specific negotiations that will be discussed (*e.g.*, "to discuss collective negotiations with the Administrators' Unit").

A board may only adjourn into executive session during a public meeting following a majority vote. Thus, if a board wishes to hold an executive session prior to its public meeting, it must first open the public meeting and then approve a motion to enter into executive session to discuss one or more of the eight subjects listed in the OML.

The public notice and/or agenda can refer to an anticipated motion by the board to adjourn into executive session at the beginning of the meeting and can include an approximate time by when the board anticipates reconvening in public session. Including this information will alert the public that they may wish to arrive at the meeting after the executive session. The Committee on Open Government has suggested that it is more appropriate to state that the board "anticipates" making a motion to adjourn into executive session instead of stating that the board "will adjourn into executive session" because it is impossible to know in advance whether the motion will be approved. OML-AO-4889 (2010).

Meetings exempt from the OML

The OML exempts from its coverage matters "made confidential by federal or state law." When this exemption applies, the OML does not and, thus, the requirements for conducting a meeting in public or in an executive session do not apply.

For example, boards of education may meet in private to seek legal advice from their attorneys because those communications are deemed confidential pursuant to the attorney-client privilege set forth in the Civil Practice Law and Rules. Attorneys must be mindful of those present during these meetings because the presence of a person who is not a client can result in a waiver of the privilege and, as a result, the OML exemption will not apply. In addition to exempt meetings, counsel may also be invited to attend properly convened executive sessions and any legal advice given during these sessions to the members of the board of education should remain privileged.

Boards of education may also meet in private to discuss matters concerning individual students because those discussions relate to information deemed confidential pursuant to the Family Education Rights & Privacy Act ("FERPA").

Note: Lauren Schnitzer is an associate with the law firm of Lamb & Barnosky, LLP in Melville. Ms. Schnitzer works in the firm's education, labor, municipal and litigation departments.

NYS Testing Opt-Outs – How Can School Districts Legally Respond to the Opt-Out Movement?

By Richard K. Zuckerman

Common Core testing has developed into one of the hot-button issues in public education. Disputes over "opting-out" of Common Core testing have appeared in countless newspaper and website pages, with those in favor being commonly referred to as the "Opt-Out Movement." In the Spring of 2014, of more than 204,000 Long Island children in grades three through eight who were scheduled to take Common Core assessments, more than 10,000 children opted-out of the Common Core Math Assessment, representing approximately one of every eight students for the school districts that provided survey data.[1] Given the sheer number of testing opt-outs this year alone, the primary question in the minds of school board members and administrators is as much "what can we legally do?" as it is "what *should* we do?"

Richard Zuckerman

To the consternation of those in the Opt-Out Movement, New York State ("NYS") and federal law do not permit parents or school boards to provide public school students with the option of opting out of NYS testing.[2] Instead, pursuant to the No Child Left Behind Act ("NCLB") and the NYS Commissioner of Education's Regulations, New York State English-Language Arts and Math assessments must be administered to all public school students in grades three through eight, and State Science assessments must be administered at least once in grades three through five and at least once in grades six through nine.

FOCUS ON EDUCATION LAW SPECIAL EDITION

Students with individualized education plans are also required to complete the NYS assessments. In fact, the New York State Education Department ("NYSED") has stated that, "Federal and State law and regulations require that all students be assessed, including students with severe disabilities who are assessed on the [NYS Alternate Assessment]."[3]

The NCLB and NYS Education Law and regulations additionally provide accountability standards. These dictate that school districts need to make "Adequate Yearly Progress" ("AYP"). In order for a district to make AYP, at least 95 percent of all of its students must participate in the state assessments. These students are divided into subgroups: race and ethnicity; underprivileged children; English language learners; and special education. If a district fails to meet AYP for three years for the same subgroup of students, then the district is required to develop and implement an improvement plan to address the issue. Failure to meet AYP could also have a negative impact on a district's Title I funding.

School districts, school board members and administrators may face consequences for encouraging students to opt-out. Education Law § 306 grants the Commissioner of Education the authority to withhold State funds from

(Continued on page 27)

The Suffolk Lawyer wishes to thank Education Special Section Editor Candace J. Gomez for contributing her time, effort and expertise to our November issue.

SIDNEY SIBEN'S AMONG US

Announcements, Achievements, & Accolades…


Jacqueline Siben

Lisa Azzato, of Lazer, Aptheker, Rosella & Yedid, P.C., has been chosen as one of the newest members of the, East End Arts board of directors.

Lisa Renee Pomerantz presented a webinar for CLE credit entitled Ethics in ADR: A Practical Guide for Clear Law Institute on November 6, 2014.

Eugene R. Barnosky, of Lamb & Barnosky, LLP was the moderator of a round table discussion of "The Affordable Care Act - Lingering Issues" on Oct. 26, at the 18th Annual Pre-Convention School Law Seminar co-sponsored by the NYS School Boards Association and NYS Association of School Attorneys to be held at the Sheraton New York Times Square.

Douglas E. Libby, of Lamb & Barnosky, LLP presented "Legal Challenges to School Elections and Budget Votes" Oct. 28. at the 95th Annual Convention and Education Expo co-sponsored by the NYS School Boards Association and NYS Association of School Attorneys to be held at the Sheraton New York Times Square.

Richard K. Zuckerman, of Lamb & Barnosky, LLP presented, "Public Sector Update: Labor Law Developments Affecting Municipalities" at the 24th Annual Labor & Employment Law Conference, on Sept. 19, sponsored jointly by the Suffolk County Bar Association's Labor and Employment Law Committee and the Suffolk Academy of Law.

James F. Gesualdi, P.C., whose practice is concentrated on animal welfare and wildlife conservation, recently attended and participated in the joint 2014 Conference of the Association of Zoos and Aquariums (AZA) and International Marine Animal Trainers' Association (IMATA) in Orlando, Florida, from September 13 to the 17. For the AZA portion of the Conference Gesualdi presented at two sessions, T*ransforming Challenges Into Opportunities: Excellence Beyond Compliance, AZA Institutions and the Animal Welfare Act* and the second, *Improving Zoo and Aquarium Safety Programs Through the Constructive Use of the Animal Welfare Act: Excellence Beyond Compliance, AZA Institutions, Safety and the Animal Welfare Act*. For the IMATA portion of the Conference Gesualdi participated as part of a panel entitled *Make My Day: How Behavioral Training Can Positively Affect Animal Care, Enrichment, Public Display, and Guest Experience*, where he emphasized the critical importance of animal welfare.

Alyson Mathews, of Lamb & Barnosky, LLP presented "ACA: What Public Sector Employers Need to Do Now" on October 13 and 14, at the 60th U.S. Annual Employee Benefits Conference in Boston, Massachusetts.

Alyssa L. Zuckerman, of Lamb & Barnosky, LLP will be speaking at a seminar and webcast sponsored by the New York State Bar Association entitled "Social Media and the Workplace: Labor and Employment Legal Issues" on November 14, 2014 in New York City. She will be speaking on the topic, "Social Media and Public Sector Labor and Employment Law.

James F. Gesualdi, P.C., whose practice is concentrated on animal welfare and wildlife conservation, has been appointed to serve as a Vice-Chair of the American Bar Association Tort Trial and Insurance Practice Section Animal Law Committee for the 2014-2015 fiscal year.

Additionally, Mr. Gesualdi's article, *Changing Thinking About Training and Animal Welfare*, appeared in the Second Quarter 2014 edition of the International Marine Animal Trainer's Association Online Magazine, *Soundings*. The article discusses the positive uses of professional animal training to improve and save animal lives in a variety of contexts beyond animal rescue and rehabilitation.

Scott M. Karson, of Lamb & Barnosky, LLP has been re-elected Vice-Chair of the Board of Directors of Nassau Suffolk Law Services Committee, Inc., an organization that provides free legal services to Long Island's indigent and disabled population.

Steven L. Sarisohn, partner at the Commack firm of Sarisohn Law Partners LLP, was recently invited to become a Fellow of the American Academy of Adoption Attorneys. The Academy is a not for profit organization consisting of approximately 340 members throughout the United States and Canada. Steven is the only Fellow with offices in Suffolk County. His practice includes domestic, interstate, LGBT and stepparent adoptions.

Congratulations…

To **Richard D. Winker** of Winker, Kurtz & Winkler LLP, who was name

(Continued on page 28)

PRO BONO

Long Island Attorneys Join in Celebrating National Pro Bono Week.

The Long Island legal community continues to be a leader in serving the growing number of people who have fallen on hard times. Since 1981 Nassau Suffolk Law Services has developed a strong collaboration with the Suffolk County Bar Association to provide pro bono services. This partnership includes bankruptcy and matrimonial clinics and the Foreclosure Settlement Conference Project. Thanks to these joint efforts, hundreds of low income clients receive legal assistance from generous volunteer attorneys supplementing the free legal services to low income and disabled Suffolk residents being provided by Law Services staff attorneys.

This year, in celebration of National Pro Bono Week October 20-24, 2014, Law Services partnered with the Suffolk County Bar Association to sponsor pro bono events.

A Bankruptcy Clinic was held at the offices of Nassau Suffolk Law Services on Monday October 22, 2014, where prospective pro bono clients discussed their bankruptcy cases with Pro Bono Project attorneys joined by students from Touro Law Center. Applicants accepted for pro bono representation were then referred to a pro bono attorney.

In gratitude for the dedication shown by our volunteers, Law Services joined with the Suffolk County Bar Association to salute our pro bono attorneys at a Suffolk Pro Bono Recognition Luncheon held at the Great Hall of the Suffolk County Bar Association on October 23, 2014. We proudly honored Suffolk attorneys who have demonstrated their active commitment to the pro bono effort by completing a case in the past 12 months. (See article on page)

We welcome attorneys who are interested in volunteering their time, especially in the practice areas of bankruptcy, matrimonial, and foreclosure. Please call Ellen Krakow, Esq. at (631) 232-2400 x 3323. Thank you!

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

REAL ESTATE

Real Estate Brokerage Records Go Electronic — Well Sort-Of

By Andrew Lieb

Starting on October 13, 2014, real estate brokerages are authorized to maintain their business records, concerning the sale of residential property, electronically, as a result of revised regulation 19 NYCRR §175.23, which states as follows (bolded indicate new language):

(a) Each licensed broker shall keep and maintain for a period of three years, paper and/or electronic records of each transaction effected through his or her office concerning the sale of real property used or occupied, or intended to be used or occupied, wholly or partly, as the home or residence of one or more persons improved by a one-to-four family dwelling, or a condominium or cooperative apartments but shall not refer to unimproved real property upon which such dwellings are to be constructed. Records to be kept and maintained shall contain:

(1) The names and addresses of the seller and the buyer;
(2) the broker prepared purchase contract or binder, or if the purchase contract is not prepared by the broker, then the purchase price and the amount of deposit (if collected by broker);
(3) the amount of commission paid to broker;
(4) the gross profit realized by the broker if purchased by him or her for resale;
(5) any document required under Article 12-A of the Real Property Law and

Andrew Lieb

(6) the listing agreement or commission agreement or buyer-broker agreement.
(b) In some transactions, the broker may not be provided a copy of the documents required to be maintained by subdivision (a) of this section. In such instances, the broker will not be found to have violated the requirements of this section.

Of note, this amended regulation does not apply to vacant land, lease transactions and commercial deals. Nonetheless, it is advisable that brokerages maintain the following documents in such stated transactions:

(1) RPL §443 Agency Disclosure Form/Affirmation of refusal or, instead, proof of compliance with 19 NYCRR 175.7 Disclosure should RPL §443 be inapplicable;
(2) Listing Agreement/Fee Arrangement;
(3) Name and contact information of seller/lessor and buyer/lessee;
(4) Date of transaction with term of rental, amount of any deposits, and sale/rental amount;
(5) Proof of commission paid, and amount;
(6) Any contracts prepared by the brokerage or its salesperson(s); and
(7) Identity of salesperson/associate broker who handled the transaction.

Additionally, such documents should be maintained in paper form and not electronically (both paper and electronic, jointly, is acceptable). The reason for the inconsistent record-keeping obligations on real estate brokerages, dependent on type of transaction, is that another, albeit unamended regulation, also requires record retention, to wit: 19 NYCRR §175.21(b), which states as follows:

Supervision of Salesperson by Broker. The broker and salesperson shall keep written records of all real estate listings obtained by the salesperson, and of all sales and other transactions effected by, and with the aid and assistance of, the salesperson, during the period of his association, which records shall be sufficient to clearly identify the transactions and shall indicate the dates thereof. Such records must be submitted by the salesperson to the Department of State with his application for a broker's license.

In such, the unamended regulation, 19 NYCRR §175.21(b), expressly requires "written records" and the brokerage regulations, as a whole and set forth at 19 NYCRR §175, indicate, in light of the rules of statutory construction, that had the Department of State intended to provide for electronic record keeping under the obligations set forth at 19 NYCRR §175.21(b) it would have done so. Consequently, brokerages are advised to maintain physical "written records" for everything except for the express carve-out provided by the amended 19 NYCRR §175.23. Your author calls upon the Department of State to make their regulations consistent and to amend 19 NYCRR §175.21(b) to coincide with 19 NYCRR §175.23.

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

FREEZE FRAME

Suffolk County Bar Association Treasurer Justice M. Block and his wife Sheila Goloboy would like to announce the birth of their new baby, Cooper Jonathan Block.

Good Old Summer Time - LRE Applies to Summer Services

By Robert H. Cohen

One of the hallmarks of the Special Education Statutes is the concept that disabled students should be placed in an appropriate educational program that is the least restrictive environment possible (LRE). The requirement of LRE and providing disabled students with an opportunity to interact with their non-disabled peers (mainstreaming) was meant to remedy the historic separation of disabled students from the general population that existed prior to the Individuals With Disabilities Education Act (IDEA).

The legal requirement of Extended School Year Services (ESY) was incorporated into the IDEA to provide summer services to those classified students whose disabilities were severe enough to cause substantial regression from educational gains made during the school year. It is important to note that unlike LRE which applies to all classified students, ESY applies only to those students who demonstrate a clear need for it.

FOCUS ON EDUCATION LAW
SPECIAL EDITION

For many years, the conventional wisdom embodied in New York State Education Department Guidance Memos did not view LRE as being applicable to summer services. The two concepts were meant to do very different things: LRE was meant to further the student's educational, social and emotional progress during the regular school year while ESY was meant to prevent substantial regression and maintain the status quo over the summer months. This conventional wisdom, and the way School Districts viewed summer placements, was abruptly turned on its head however, by the Second Circuit's April 2014 decision in *T.M. vs. Cornwall Central School District,* 752 F.3d 145 (2d Cir. 2014). In *Cornwall,* the Second Circuit decided for the first time that the IDEA's LRE requirement applies in the same way to summer placements as it does to regular school year placements and that a summer placement of only disabled students was too restrictive for an autistic student who attended a regular mainstreamed classroom during the school year.


Robert Cohen

The student in *Cornwall* was diagnosed at an early age with "autism spectrum disorder." When the student reached school age, Cornwall's CSE recommended that he be placed in a mainstream Kindergarten classroom with a 1:1 Teaching Assistant and the related services of Occupational Therapy, Physical Therapy and Speech and Language Therapy. The following year's Individualized Education Program (IEP) added extended year services "in order to prevent substantial regression over the summer months." The recommended summer program was Cornwall's own summer special education program offering three hours of instruction per day in a 12:1 special class open only to students with disabilities. As in the case of most districts, Cornwall did not operate a mainstream summer program, but felt that its special class summer program was appropriate to prevent the student from losing the gains he had made during the school year. To the CSE's surprise, the parents, while agreeing that extended year services were appropriate, nevertheless rejected the summer placement offered on the grounds that it was too restrictive and violated LRE.

The parents' argument was a simple one: If their son was able to gain a meaningful educational benefit in a mainstream setting during the school year, then a more restrictive summer program was per se inappropriate because it failed to provide LRE. The district's argument was somewhat more complex: It argued that it did not operate a mainstream summer program and that the cost to do so would be prohibitive; and that it was not legally bound to do so because LRE does not apply to summer programs designed to prevent substantial regression.

After an Impartial Hearing Officer determined that Cornwall had violated its LRE obligations, the district appealed to the State Review Officer,

(Continued on page 28)

BOOK REVIEW

Book Focuses on Preventing Prosecutorial Misconduct

By Joseph W. Ryan, Jr.

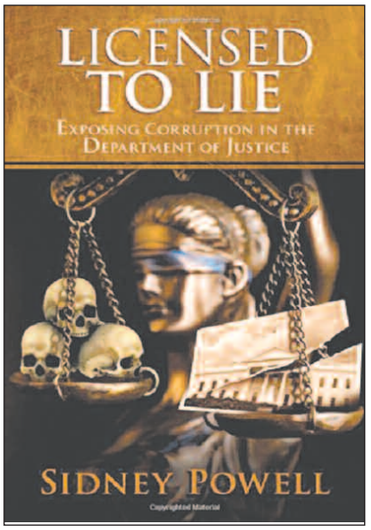
"Licensed to Lie," by Texas attorney Sidney Powell (Brown Brooks Publishing Group 2014), packs a loaded gun aimed at federal prosecutors who treasure winning high profile cases over their ethical and legal obligation to turn over evidence favorable to defendants, evidence that might jeopardize their victories that catapulted their careers into the highest levels of the White House and Department of Justice. This book should be a required on-the-job reading for prosecutors, as well as judges, lawyers and those concerned with the integrity of the criminal justice system.

Billed as "Exposing Corruption in the Department of Justice," Powell, a highly regarded and seasoned appellate practitioner in the Fifth Circuit, rests her case on the prosecution of U.S. Senator Ted Stevens, a World War II hero and legend in Alaska, whose jury verdict of "guilty" was vacated "with prejudice" because of the prosecution's failure to turn over to Stevens' defense team evidence of his innocence. Building on the Stevens case, Powell exposes the misdeeds of the Enron Task Force prosecutors for their "annihilation" of the prestigious accounting firm Arthur Andersen LLP and the wrongful prosecution of officers of the investment firm Merrill Lynch. Andersen was the accounting firm for Enron, and Merrill Lynch, a $7 million investor in one of Enron's "energy trading" ventures.

The Enron Task Force was born out of Enron's declaration of bankruptcy in December 2001, which caused havoc throughout the stock market., and inflicted tremendous financial pain upon investors and the economy. Enron, the seventh largest company in the United States with a $400 billion dollar annual revenue based in Huston, Texas, was suspected of "cooking its books" in order to mislead the investing public as to its precarious health. President George Bush vowed "to ferret out and prosecute 'those white collar crooks.'" To fulfill the President's directive, the Department of Justice, according to Powell, assembled a team of the most aggressive prosecutors it could find. One member of the team later rose to counsel in the President Obama White House, and another, to Deputy Director and Counsel to the FBI.

Powell opens the book with a chilling account of how a federal prosecutor in the Sen. Stevens case committed suicide at 37. He went to the basement of his home, slashed his left wrist with a razor blade, and watched the blood run down his hands and, when he realized it would take more — he hung himself with a heavy-duty power cord. This occurred while he was a target of an investigation ordered by United States District Judge Emmet G. Sullivan (District of Columbia) to determine whether he and others of the prosecution team should be charged with contempt for violating the judge's prior orders to produce *Brady* material that was favorable to Senator Stevens' defense. Throughout the book Powell extols Judge Sullivan for his courage and proactive steps to prevent, as well as sanction, prosecutorial misconduct.

"Corruption," Powell claims, is the willful non-disclosure of evidence and information favorable to the defendants by ambitious federal prosecutors who bear the highest academic credentials and seizing on their "victories," ascended to the highest positions in our government. Described as a "legal thriller," Powell offers a rare insight to the pain impacted on the personal lives of the defendants and their families. It included one defendant who was forced to serve jail time in a maximum security prison after the prosecution persuaded the Court of Appeals to deny a stay of surrender before the Fifth Circuit. The defendant was later acquitted for insufficient evidence.



Powell's theme seems to be fully supported by court decisions. The Supreme Court threw out the Arthur Andersen conviction because, according to Powell, the same federal prosecutor at the Enron Task Force had induced the Andersen trial judge to offer a jury instruction that eliminated the essential element of "criminal intent." Powell shows the adverse impact of the prosecutors' misdeeds: Arthur Anderson "was destroyed the minute it was indicted" and inflicted an "unnecessary toll" upon 85,000 Anderson families. The Ninth Circuit ordered new trials in the prosecution of two Alaska state legislators because the same prosecution team in the Senator Stevens' case suppressed favorable evidence concerning the credibility of its key prosecution witness in both trials.

The Fifth Circuit threw out all but two counts based upon Powell's appellate advocacy for a Merrill Lynch defendant where she argued there was blatant suppression of favorable evidence of innocence. Four years after the trial, the successor prosecutors produced a disk containing the former prosecutors' notes of interview of witnesses favorable to the defense that Powell describes as "plainly suppressed." The suppressed notes are reproduced in the book, including the prosecutor's yellow highlighted witness statements, which supported the defense claim at trial that Merrill made a good faith investment in the Enron energy venture and did not assist Enron in "cooking its books."

Powell was eventually successful in ending her client's nightmare by a sentence of "time served"— jail time her client served before the Fifth Circuit's decision ordered a new trial on the counts not dismissed.

Few escape Powell's fury, including numerous federal judges (other than Judge Sullivan), the DOJ Office of Professional Responsibility and the various bar associations who "have abdicated all responsibility regarding violations by these high-profile lawyers and prosecutors in general." Powell describes U.S. District Judge Erwin Werlein, Jr. (Southern District of Texas), who presided at the Merrill Lynch trial, in the most unflattering terms imaginable.

One has to wonder, as Powell admits, "whether I can continue practicing law…" given her avowed lost trust and faith in the federal system. But there is a higher calling, as Ninth Circuit Chief Judge Alex Kozinski notes in the Forward: "One way or another, however, this book should serve as the beginning of a serious conversation about whether our criminal justice system continues to live up to its vaunted reputation. As citizens of a free society, we all have an important stake in making sure that it does."

Note: Joe Ryan, a former federal prosecutor and defense attorney, served as Chair of the Federal Courts Committee for the Suffolk County Bar Association and the Bar of Association of Nassau County where he also served as President. (JoeRyanLaw.com)

REAL ESTATE

Interstate Land Sales Full Disclosure Act to be Inapplicable to Condominiums

By Andrew Lieb

On September 26, 2014, H.R. 2600, Public Law No: 113-167 (hereinafter "The Act"), was enacted, which amends the Interstate Land Sales Full Disclosure Act (hereinafter "ILSFDA" a/k/a "ILSA") to exempt from certain registration and disclosure requirements the sale or lease of a condominium unit.

The Act takes effect on March 25, 2015 and thereafter, its amendments, addressing 15 USC §1702(a), the exemption section of ILSFDA, will both: (i) add the category of "the sale or lease of a condominium unit that is not exempt under subsection (a)" to subsection (b), which is the subsection of ILSFDA that expressly renders "registration and disclosure", pursuant to ILSFDA, inapplicable to named categories of lots of property; and (ii) define the term "condominium unit" under the Act. Specifically, The Act defines "condominium unit," under ILSFDA, as follows:

[A] unit of residential or commercial property to be designated for separate ownership pursuant to a condominium plan or declaration provided that upon conveyance— (1) the owner of such unit will have sole ownership of the unit and an undivided interest in the common elements appurtenant to the unit; and (2) the unit will be an improved lot.

Andrew Lieb

Following the Great Recession, many condominium unit purchasers brought action against real estate developers, pursuant to ISFDLA, in order to rescind their purchase agreement and to recover their down payment by arguing that the developer failed to make certain requisite disclosures to them that were mandated pursuant to ISFDLA. In fact, ISFDLA had become a tool by wary purchasers who had signed contracts to purchase condominiums pre-construction, but then, could not afford to go forward as a result of the financial crisis. This law resulted in instability for developers and stemmed their investments.

Within this litigation matrix, the issue of ISFDLA's applicability to condominium units has been before the courts wherein ISFDLA has been expressly held to be applicable thereto. See *Cruz v. Leviev Fulton Club, LLC,* 711 F.Supp.2d 329 (S.D.N.Y., 2010); See *Tencza v. Tag Court Square, LLC,* 803 F. Supp.2d 279 (S.D.N.Y., 2011).

Consequently, a condominium developer was required to comply with ISFDLA's registration and disclosure provisions prior to any sale or risk the arbitrary recession of the agreement by their purchaser should prices fall.

ISFDLA's registration and disclosure provisions are codified at 15 USC §1703(a)(1)(A)-(B) as follows:

It shall be unlawful for any developer or agent, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce, or of the mails— (1) with respect to the sale or lease of any lot … (A) to sell or lease any lot unless a statement of record with respect to such lot is in effect... (B) to sell or lease any lot unless a printed property report ... has been furnished to the purchaser or lessee in advance of the signing of any contract or agreement by such purchaser or lessee.

A Property Report is a disclosure document, required to be distributed to prospective buyers, that includes, among other things, a description of the property and information about the title to the land. The Statement of Record is a registration of a real estate developer's offering of lots with the United States Department of Housing and Urban Development, which includes, amongst other things, details about the planning and physical characteristics of the property along with information about the developer, such as their background and financials. The Statement of Record must be substantiated with exhibits, including plats, maps, title documents and lot sales / financing contracts.

Pursuant to ISFDLA, if the developer fails to deliver the required Property Report before the purchaser signs the purchase agreement, the sale "may be revoked at the option of the purchaser ... within two years from the date of such signing," and the purchaser is entitled to a refund of all monies paid by the purchaser under the contract. *See* 15 USC §§1703(c), (e).

So, Public Law No: 113-167 expressly overrides the court decisions that applied ISFDLA to condominium units. On and after March 25, 2015, The Act provides condominium developers with a much needed reprieve from buyer's remorse into the future. Now, with respect to New York condominium development, the Martin Act will be the central statute offering consumer protection. Is it enough?

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

TRUSTS AND ESTATES UPDATE

By Ilene Sherwyn Cooper

Turnover directed

In *In re Estate of Cain,* the Surrogate's Court, New York County (Mella, S.) was confronted with a petition, pursuant to SCPA §2103, seeking the turnover of $105,945.02 from the decedent's granddaughter. Although served with citation, the granddaughter failed to answer the petition. Accordingly, the court proceeded to an inquest in order to determine whether the record supported the relief requested.

The facts established that between 2006 and 2007, the decedent had co-signed four promissory notes to Sallie Mae, in the total sum of $78,000, in order to enable her granddaughter to attend college. The loan documents established that the principal debtor, the decedent's granddaughter, and co-signor, the decedent, were jointly and severally liable for repayment. Specifically, the documents indicated that the decedent was not a surety on the loan, but instead, was a guarantor, against whom the creditor could proceed directly without the need to first seek collection from the principal debtor. The documents further indicated that upon the death of either one of the parties to the notes, repayment could be accelerated.

As a consequence, following the decedent's death and the appointment of the petitioner as fiduciary of the decedent's estate, Sallie Mae made demand for repayment of the outstanding balance of the unpaid loan. Repayment was made by the fiduciary in the sum of $105,945.02, who then sought indemnification from the decedent's granddaughter. When she failed to respond to the fiduciary's request, the proceeding for discovery was commenced.

Ilene S. Cooper

In granting the relief requested by the petitioner, the court opined that a guarantor has a right to indemnification upon repaying the creditor for a loan from which the principal debtor benefitted. The right of recovery by the guarantor from the principal debtor does not need to be supported by a separate contract with the principal debtor. Rather, the liability of the principal debtor is lodged in equity, which seeks to prevent unjust enrichment. As a result, the guarantor, who has repaid the creditor, stands in the shoes of the creditor as to the principal debtor for purposes of recovering any monies paid on the principal debtor's behalf.

Within this context, and based on the undisputed record, the court held that the fiduciary had made a prima facie case for indemnification against the principal debtor, the decedent's granddaughter, and she was directed to turn over to the estate the full amount requested by the petition.

***In re Estate of Cain,* NYLJ, June 20, 2014, at p. 22 (Sur. Ct., New York County).**

Motion to dismiss discovery proceeding denied

In *In re Estate of Friedricks,* the Surrogate's Court, Nassau County, was confronted with a motion to dismiss a discovery proceeding commenced by the estate executor pursuant to SCPA 2103. The subject matter of the proceeding were certain monetary transfers made by the decedent to the respondents, who were his son, and co-fiduciary of his estate, his son's wife, and his two children, which the petitioner claimed were the result of fraud and undue influence. More specifically, the petitioner maintained that the transfers, which amounted to approximately $426,000, were out of character for the decedent, who had no history of making large gifts to his children or grandchildren, that they were effected by forged checks and documents, and that the respondents perpetrated actual or constructive fraud on the decedent. In addition, the petitioner alleged, based on the decedent's medical records and conversations with the decedent's doctors and others, that the decedent was suffering from manic depression and dementia, cognitive impairment, psychosis and confusion, and lacked the mental capacity to make the transfers, some of which she also claimed were made pursuant to forged instruments. Finally, the petitioner maintained that the respondent had agreed to equalization of the transfers, which amounted to approximately $426,000, but that the attorneys for the parties were unable to resolve the issue.

The petitioner claimed that each transfer constituted a conversion of the decedent's property, and requested a return of the assets to the estate pursuant to the equitable principles of replevin and unjust enrichment.

In response to the petition, the respondents alleged that the petitioner's claims were time-barred by the statute of limitations and the doctrine of laches, having been asserted nearly six years after the final transfer of assets by the decedent, and more than three years after the issuance of preliminary letters testamentary. Further, respondents argued that petitioner could not satisfy her burden of proving undue influence, since decedent and respondents lived 3000 miles apart, and that her claims were supported by nothing more hearsay statements and conclusory allegations unsupported by facts.

Based on the foregoing claims, the respondents moved to dismiss the petition. The petitioner opposed the motion

(Continued on page 29)

PRACTICE MANAGEMENT

Managing Email in Outlook 2013 with Rules and Quick Steps

By Allison C. Shields

Although email is supposed to make communication quicker and easier, it can often complicate things instead. Most lawyers have email clutter. Many have inboxes with thousands of messages in them. Email has become a major clutter and productivity obstacle. Two ways to help manage that avalanche of email if you use Outlook are using Rules and Quick Steps.

Using Outlook Rules

Outlook uses "rules" to automate common tasks. They're easy to create and can be used to streamline common e-mail-related tasks. Here's how to create a rule from a template or from scratch:

- In the Navigation pane (the column on the left side of the Outlook window that includes buttons for the Mail, Calendar, and Tasks views and folders), click **Mail**.
- On the **Tools** menu, click **Rules and Alerts**.
- If you have more than one e-mail account, in the "Apply changes to this folder" list, click the inbox you want.
- Click **New Rule** or **Create Rule**.
- Do one of the following:
- Use a template with prespecified actions and conditions and select the template you want
- Create the rule by specifying your own conditions, actions, and exceptions

To have this rule apply to all your e-mail accounts and inboxes, select the "Create this rule on all accounts" check box on the last page of the Rules wizard.

Allison Shields

Create a Rule Based on a Message

You can also create a Rule directly from a particular message. This is helpful when you're reading a message and you realize that you would like to create a rule that applies specifically to all messages with a particular subject line, or to all messages from a particular sender. For example, you may want to create a folder for all messages that come from your bar association list-serve or from a particular client, and to have all of those messages automatically sort into those folders when they arrive in your inbox. To do so, simply right-click the message you want to base the rule upon, and click ***Create Rule***.

In the dialog box, select the conditions and actions you want to apply. To add more conditions, actions, or exceptions to the rule, click the **Advanced Options** button, and then follow the rest of the instructions in the Rules wizard.

Creating and Using Outlook Quick Steps

Some email management tasks are performed repetitively in Outlook, but are not appropriate for Rules, because they cannot be automated; they require you to make a decision about what to do with the email. Quick Steps can be used to perform repetitive tasks easily in Outlook when those tasks are not ones that can be made into Rules. For example, when doing an initial sort of my email inbox, I use a Quick Step to sort emails that require some action or follow-up on my part into a folder I've created called "Action." In one click, I can move the message to the Action folder so I don't have to go searching through my Inbox later for all of the messages that require my attention.

Quick Steps are located under the Home tab in Outlook, toward the middle of the toolbar. Click the arrow in the lower right corner of the Quick Steps box to bring up the Manage Quick Steps dialog box.

To change an existing Quick Step, click on it and then click ***Edit***.

Under **Actions**, change or add the actions you want this Quick Step to perform. These might include moving or copying a message to a particular folder, permanently deleting a message, assigning a category and more. You can also assign a keyboard shortcut to the Quick Step using the Shortcut key box, which is found at the bottom of the Quick Step Edit dialog box.

To change the icon for a Quick Step, click an icon next to the Name box at the top of the Quick Step Edit dialog box, click an icon to select it, and then click OK.

To create a new Quick Step, under the Outlook **Home** tab, in the Quick Steps group, click ***Create New***. In the Name box, type the name for your new Quick Step. Click an action type from the list. If you would like to add additional actions (perhaps you want to move messages to a specific

(Continued on page 29)

SCBA PHOTO ALBUM

Judiciary Night Draws a Crowd

The Suffolk County Bar Association held its annual Judiciary Night reception and dinner on Thursday, October 2, at Capt. Bill's Restaurant in Bay Shore. More than 250 members and guests of the Association attended a memorable evening to honor those who have dedicated themselves to public service on the Bench.

This year, the speeches were brief — only a welcoming remarks by SCBA President William T. Ferris, comments by Presiding Justice Randal T. Eng of the Appellate Division, Second Department who traveled over two and half hours to get to Capt. Bill's and another "Randall," our own Suffolk District Administrative Judge C. Randall Hinrichs, who thanked the members of the Bar Association who put together this special occasion, which he said contributes to the friendliness of Suffolk County's practice. President Ferris read a letter written by the Hon. A. Gail Prudenti, Chief Administrative Judge, who had a previous commitment and could not be with us on this special evening. She said that Judiciary Night provides the perfect opportunity to strengthen the important relationship between the bench and the bar – a characteristic cited regularly by bar leaders.

President Ferris and Justice Hinrichs presented the second annual *Hon. Alan D. Oshrin Award of Excellence* to Larry Voigtsberger, Case Management Coordinator, in Supreme Court, Riverhead. He said that Larry is a special court employee who exhibits an outstanding performance in the workplace. He demonstrates the core values of professionalism, Mr. Ferris said, has an extraordinary amount of energy and possesses a demeanor and attitude that makes the courts accessible to members of the bar, coworkers and litigants alike.

President Ferris concluded the evening's speeches by thanking the members of the Judiciary for taking the time to enjoy the informal aspects of the evening, an evening where justices and judges shed their judicial robes (although they all brought their robes for the special photographs taken by photographer Ron Pacchiana) and the lawyers discard their courtroom protocol to simply meet, mingle and enjoy the delicious array of hot and cold dishes and have a good time.

– Sarah Jane LaCova














Photos by Ron Pacchiana and Barry Smolowitz

IN MEMORIAM

Remembering Dorothy Paine Ceparano

Dorothy had a smile for every idea that she heard, turned fragments and scraps into beautiful tapestries and set the example of perseverance in the face of tragedy for all of us to follow. We are diminished by her loss and cherish our memories of her.

- Harry Tilis

I didn't know Dorothy well at all, but I'm one of those people that chooses personal contact and opts for it every time, rather than using the computer, text, etc. That's where Dorothy came in.

I would actually attend CLE courses rather than take them on the computer or listen to a CD in the car. I would even make a phone call to schedule my course (as opposed to email), and there was Dorothy, always, on the other end of the phone with her sweet charming voice saying, "Great, certainly Miss Dunbar, you can pay by check at the door, you're all set!" And then I would see her when I signed in, again, always with a warm smile and a kind greeting, the kind that makes you feel happy to be there, that there's someone familiar, like someone you've known your whole life. Suddenly, I realize, I'm exactly where I'm supposed to be; and I haven't taken a CLE course that wasn't at the Suffolk Bar Association since the last 10 years, at least. I will miss Dorothy's voice, her smile, her warmth and her kindness, immensely.

– *Kelly Dunbar*

Dorothy was truly one of a kind. I joined the Suffolk County Bar Association while a law student at Touro. Dorothy encouraged me to join committees and to actively participate in the Bar association. Dorothy Ceparano created a collegial and hospitable environment at the SCBA. She always made me, and I am sure so many others, feel "at home" at the SCBA. Although several months may have passed when I did not see her, upon meeting, she always remembered my name and asked how I was doing.

While Dorothy may no longer be physically present with us, she will always be the rock and foundation of the Suffolk County Bar Association. Thank you, Dorothy, for your commitment and dedication to the legal profession. You will be deeply missed.

– Barbara Cannova

I miss you so much and I think of you everyday. You meant so much to me and to all of us. You were our sanity, our buffer, our person. It was so easy to love you my Dorothy. We all knew your pains, your sorrows and your happy times, and you knew ours too. I'll miss going in your office and sitting in that chair in front of your desk and talking about work or just what was going on in our lives. Sometimes it was one by one; sometimes it was your three girls all at once. The pain is deep; the missing you hurts more than I can ever say.

It was always so cold in that office of yours but you made it so warm with that warm heart of yours. No one will ever come close to filling your shoes, not in ANY way. You were the light, and you made it so nice to come to work everyday. I know you're with Steve now and that makes it easier to bare, say yia sou to my friend. I love you, I love you, I love you forever and ever Dorothy mou.

– Nicolette Ghiglieri

In helping to create, facilitate and otherwise orchestrate meaningful CLE for all of us, Dorothy instilled confidence in so many of us as leaders with her "sure we can do that" attitude, and she was equally encouraging and graceful in getting us back on track when our ideas may have been unrealistic. She did the same for so many of us as her friends in ways well beyond CLE. Her enthusiasm, compassion and spirit will be missed in ways that cannot be expressed with words. I am still in disbelief that she is gone.

– Sheryl Randazzo

Fifty words are simply not enough to describe my friend Dorothy. However, I would begin with - exceptional, genuine, kind, and blessed with sincere warmth. I sorely miss her and her absence leaves me with a deep and melancholy void. My sincere condolences to her family.

– Chris Jay

Although she's gone
Her memory lives on
As we try and go through our days
We think of her kind and gentle ways
The good times we spent together
we will surely remember

You meant so much to us all
And for us, we knew you cared
We loved your lilting laugh
It was that, we all shared.

For me, I miss you more than words can say
I've thought of you each and every day
I know you are in a happy place
Where you can watch over us, and say
Be good to each other
For life is precious in every way!

– Laura Latman

I have known Dorothy for most of my years as an attorney. She has always treated me, and my daughter when she interned at the SCBA during the summer after tenth grade, with respect and a joyful spirit. She had an amazing, generous nature, and terrific sense of humor. Dorothy was so bright. She wrote beautifully, spoke beautifully and was always a pleasure to be around.

When the Women's Bar was celebrating one of our milestones, my husband, a videographer and photographer in an earlier life, put together a CD of all our photos over the past 25 years. Our steering committee spent half an hour laughing and talking and "walking down memory lane" in Dorothy's office. She was so gracious. It was most likely after hours, and I am quite sure she was there as she had other things to do. She never rushed you or made you feel that what you needed/wanted was too much or any imposition whatsoever.

Maya Angelou once said:
"People will forget what you said,
They will forget what you did,
But they never forget how you made them feel."

Dorothy always made us feel special.

– Val Manzo

Nassau Suffolk Law Services will always remember Dorothy's kind support, especially of the Suffolk Pro Bono Project. Through the Academy, she helped to promote the pro bono mission by facilitating recruitment presentations as part of CLE programs and generously approving free tuition for CLE participants who agreed to accept a pro bono case. We will miss her.

– Maria Dosso

I've only known Dorothy since August, and unfortunately all communication with her was by phone or email. I was deeply saddened when I heard of her passing. Whenever I spoke with Dorothy, she was always so genuinely warm and friendly, and always helpful. I'm sure she will be missed by all, and I regret that I never had the opportunity to meet her. My sincerest condolences to all.

– Deborah Amato, RN, CLNC

Dorothy gave me such a warm welcome at my first SCBA function as a student member.

– Phil Siegel

There are few words that do justice to describe Dorothy. To all who knew her, Dorothy was far more than just the Executive Director of the Suffolk Academy of Law. In the purest sense of the word, Dorothy was a friend.

This past year was difficult for Dorothy as she had lost her beloved husband, Steve, a loss from which, I believe, she never recovered. With that being said, anyone who saw Dorothy in the last weeks of her life would tell you the old Dorothy was back; the Dorothy with a smile and an encouraging word for all; The Dorothy who would be a burden to no one and again a supportive friend to everyone.

When people told me they were shocked about Dorothy's passing, all I could think was how much she missed Steve and that maybe, just maybe, her recent rebound was her way of saying she now was ready to take her place next to Steve. With Steve is the place Dorothy belonged the most. Dorothy has now returned to Steve with a smile on her face, the only way Dorothy would have wanted it. May Dorothy rest in peace and to Dorothy, you are truly missed, my friend.

– Cheryl Mintz

Dorothy made sure that our Academy programs were cutting edge. Back in 1990, I became involved in the Academy. Talking to Dorothy about the emergency services and the legal challenges of disaster management, Dorothy had the foresight to push us to organize a conference on the "Legal and Practical Aspects of Disaster Management." Our keynote speaker was the San Francisco mayor discussing the legal issues of his recent earthquake. Subsequently after Hurricane Katrina, Dorothy stepped forward again to recommend that we organize another Disaster Conference. The keynote speakers were the National Security Advisor to the President and the attorney in charge of recreating a legal system in New Orleans. Dorothy worked tirelessly on these programs and made these conferences happen.

Suffolk Academy of Law led the way nationally in presenting legal issues of emergency management because of Dorothy. The best thing about Dorothy besides her great work ethic, was that she always had a smile on her face and she always had time to say hello and ask how you were doing. Dorothy, thanks for a job "WELL DONE!"

– David H. Fischler

Dorothy was part academician, part wordsmith, and part cheerleader. We'd meet monthly at the absurd hour of 7:30 am, and I'd compliment her polished appearance. She always responded, "I don't know how I do it." I know why — because she was the face of the Academy. And its heart, too.

– Lita Smith-Mines

I hired Dorothy to run the Suffolk Academy of Law back in the years I served as the Bar Association's professional Executive Director (1984-1996). The minute I met her I was impressed with her intelligence and warmth. She replaced Barbara Mehrman and was an instant success.

We had a lot in common. She had graduated from the same college I attended, Queens College, and brought a thesis with her to demonstrate her writing talents. We worked together in harmony and kept in touch throughout the ensuing decades. I would often suggest to her that she needed to take time off for some R and R, but that was not in her makeup.

She loved working for the Academy and was a fabulous mentor to so many attorneys. She died doing what sparked her life! Her light will continue to shine in our hearts and memories.

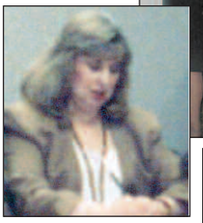
– Gabriele K. (Wiener) Libbey

IN MEMORIAM








I was shocked and saddened to learn of the loss of Dorothy Paine Ceparano. To me, Dorothy was the face of the SCBA. If I had a question, I called Dorothy. If I needed something, I called Dorothy.

I joined the SCBA shortly after graduating from law school, when the office of the SCBA was at its prior location on Veterans Memorial Highway. At the time, the Academy of Law was offering its Bridge-the-Gap series of CLE classes for new lawyers. I signed up for the class, after discussion with Dorothy, and got to see Dorothy at each session that summer. She would greet me – "Do you need a yellow pad? Do you need a pen?" She made me feel so comfortable.

I knew Dorothy before I ever got a job in the legal field. Dorothy was my personal bridge the gap into the legal profession – and a nicer one I couldn't have had. Dorothy and I became close friends through the years. She supported me and cheered me. I wish we could have had a little more time with Dorothy, so that we could have supported her in her hour of need before she left us so quickly. My condolences to her family at home, as well as to her family at the SCBA.

– Amy J. Koreen

If tears were words, I could write volumes! I miss you, Dorothy, so much on so many levels. Thanks for being a GREAT person to work for, a valued mentor and a close friend. We shared so many special and heartfelt personal moments over the years. We were a great duo early on. As the Academy grew, you entrusted to me more responsibilities and I thank you for the acts of confidence. When you passed, I hope you were surrounded by Steve and Stephen and your other family members, and that you are now in the arms of the angels. Gone too soon...."

– Joy Ferrari

As a former Academy officer and frequent CLE presenter, I thoroughly appreciated Dorothy Ceparano's professionalism, dedication, intellectual curiosity, creativity, diplomacy and joie de vivre. I considered her a friend as well as a colleague. She will be greatly missed.

– Lisa Renee Pomerantz

Dorothy always had a smile and warm greeting for me. She provided me with the backup needed for the Academy lectures that I gave. She was especially encouraging, enthusiastic, and most helpful, about having me present the initial lecture about the then new Limited Liability Company law on Halloween, October 31, 1994.

I guess that I had one of the last communications with Dorothy. Late in the afternoon on September 23, I emailed Dorothy to say, "This was a wonderfully written article." I was referring to her article in the September issue of The Suffolk Lawyer, "Changing Times at the Suffolk Academy of Law", and she replied a half hour later, at just after 4 p.m., "Alan, Thank you so much! Miss you...Dorothy." I miss you too Dorothy.

– Alan E. Weiner

Whenever I think of Dorothy, I smile – in appreciation, in admiration, and with heartfelt thanks. I appreciate her tireless efforts and talents that she gave so willingly, conducting from behind the scenes and enabling the Academy of Law to always be at its best. I admire her intellect, her ladylike disposition, and her welcoming nature. I am grateful to have had the opportunity to learn from her eloquence and calming temperament, even when surrounded by lawyers. I am better for having known her. Thank you, Dorothy; you are truly one of a kind.

– Rosemarie Tully

I cannot say enough good things about Dorothy. So many accolades come to mind. Dorothy was a quick study, exceptionally intelligent, but yet, so humble. She had such a warm and engaging manner. She made all of us feel welcome to participate. Dorothy epitomized commitment and dedication to her work. Her tireless devotion to the Academy of Law was inspirational. She brought the Academy to new levels, ultimately advancing it to an educational institution of prominence. I consider myself very fortunate that Dorothy was my friend, and I thank her for being the undeniable true leader of the Academy of Law.

– Ed Gutleber

Dorothy was one of a kind. I greatly respected her and appreciated all her support, patience and little kindnesses to me over the years. Dorothy was understanding to a fault and always had a kind word to say to spur me on. She never knew how much I needed and appreciated all those kindnesses and encouragement. I thought she was one of the truest, kind and genuine people I have ever met, and I will miss her greatly.

– Amy L. Chaitoff

Dorothy was one of those rare people who knew her job from the ground up and yet approached it on a person-to-person basis. She was sweet, very knowledgeable and always obliging. Deans came and went, but it was Dorothy who held everything together from year to year and who nurtured the growth and expansion of our Academy of Law.

– Sarah Jane LaCova

I want to express that Dorothy was an absolute pleasure to be around. Always greeted you with a smile and a kind word. No matter how busy she was, she always found the time to be there for you if you needed to talk or something was bothering you. The Bar will NOT be the same without her, however, her kindness and memory will live on here forever." I MISS YOU!!

– Edith Dixon

What can I say except that Dorothy was always there with a ready smile and ready to assist.

– Regina Brandow

Her knowledge of the opera and English grammar was exceptional, and as each person we know becomes a part of the fiber of our being, I am very grateful to have had the privilege of knowing Dorothy. Over the past 27 years Dorothy has given me many angel ornaments for my Christmas tree. Now to know she's with all the angels is comforting.

– Marion Baumer

Dorothy, have you been listening to us telling you how much we miss you, wish this was all a bad dream and that you would be here tomorrow? However, we would not wish that upon you because now there is no more suffering, no more stress, no more worry and no more loneliness. We will continue to miss you and your wonderful being. Until we see you again, rest in peace sweet Dorothy.

– Mary Shannon

It is with great respect that CBS Coverage Group, A Division of Assured SKCG, Inc. remembers Dorothy Paine Ceparano. Dorothy was tireless in her efforts to provide continuing legal education to Suffolk County Bar members, and the results of her efforts are a cadre of skillful, knowledgeable attorneys. She will be deeply missed by many.

– Regina Vetere

Regardless of ideology, she encouraged my contribution as a cartoonist to bring the benefit of a live, love, laugh approach to life in general and the law profession in particular.

– John R. Minto

Words cannot express the deep loss we at the SCBA feel for you as we miss you everyday. You were such a kind, warm, loving person and your smile would light up the office. No one could ever fill your shoes in the Academy. There is not a person on earth that would ever utter anything but kind words about you. I consider the time we worked together (26 years) an honor. I remember the first day you started working at the SCBA; I said "WOW" what a wonderful, talented person to work with. How lucky we were!!! Rest in peace my friend. You will always be remembered in our hearts.

– Tina O'Connor

It was always my pleasure to be known as the "Nassau Dorothy." She was smart, clever, easy to work with, a colleague to bounce and share ideas, a wonderful travel companion and friend. Dorothy made NAL/SAL programs a success. I'll miss her.

– Barbara Kraut

LAND TITLE LAW

‘Legal Access’ and ‘Physical Access’

By Lance R. Pomerantz

Many landowners believe their title insurance policy will protect them if they are physically unable to access their property. Such lack of access may be attributable to natural features such as dense vegetation, rock formations or swamps. Or, it may be attributable to human interference such as a neighbor’s parked vehicles or accumulated debris. A recent case contains the clearest explanation yet that New York courts will not extend title insurance protection to cover merely physical barriers to access.

The latest word

In *43 Park Owners Group, LLC, et al. v. Commonwealth Land Title Insurance Company, et al.,* 2014 NY Slip Op 07120 (Second Dept., Oct. 22, 2014) the insured parcel adjoined a public street. For many years, the City of New York had maintained a 1½-foot-thick stone retaining wall along the length of the street boundary. Due to the steep slope of the parcel, the wall was eight feet above grade at its shortest point and 34 feet above grade at its tallest. Vehicular access was impossible and pedestrian access would require a ladder.

Despite obtaining construction permits that allowed partial demolition of the wall, the insured owner commenced litigation against the title insurer. The insured alleged a policy breach for failing to disclose that the wall blocked access from the public street.

Lance Pomerantz

The Appellate Division upheld a grant of summary judgment in favor of the insurer. The panel expressly held the policy provision insuring against a ‘lack of a right of access to and from the land’[i] only protects against the absence of a legal *right* of access and “does not cover claims concerning lack of an existing means of physical access.”

This is the first New York appellate case to clearly enunciate the law. The existing New York law, *Mafetone v. Forest Manor Homes, Inc.,* 34 A.D.2d 566 (Second Dept., 1970) involved a change to the abutting street grade. The court found “the provisions of the standard title insurance policy here in question are concerned with matters affecting *title* to property and do not concern themselves with physical conditions of the abutting property” [emphasis in original], did not recite the policy provisions at issue.

Welcome to the Club

This holding puts New York in line with the majority rule on this issue. As summarized by the New Mexico federal court construing the identical provision, **“**courts in other jurisdictions have found that coverage for a ‘lack of right of access’ to the insured property is not triggered where access is merely impractical or difficult as long as the right to access exists.” *Riordan v. Lawyers Title Insurance Corporation,* 393 F.Supp.2d 1100, 1104 (U.S.D.C., D. New Mexico, 2005).[1] Courts in Florida, California and Missouri have considered the issue and agree with the Second Department’s holding.

The only outlier is a case out of North Carolina, *Marriott Financial Services, Inc. v. Capitol Funds, Inc.*, 288 N.C. 122**,** 217 SE 2d 551 (1975), which, in *dicta,* construed the provision to insure against a lack of physical access. *Marriott* was cited in the brief for appellants in *43 Park Owners Group,* but was not even mentioned in the Second Department appeal.

Homeowners can obtain protection

The form of owner’s title insurance policy presently authorized in New York State insures against damage caused “by reason of … [n]o right of access to and from the land.” A purchaser of a one-to-four family residence may purchase a “TIRSA Owner’s Extended Protection Policy,” which protects against a lack of “both actual vehicular and pedestrian access to and from the Land,” as long as the access is based upon a legal right.

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

[1] From this language, as well as the date the policy was purchased (2005) it appears the policy being construed is the 1992 ALTA Owner’s Policy. This policy cannot be issued in New York after May 1, 2007. The current owner’s policy contains a slightly different coverage provision.

State of New York
UNIFIED COURT SYSTEM
SUFFOLK COUNTY
DISTRICT ADMINISTRATIVE JUDGE’S OFFICE
JOHN P. COHALAN, JR. COURT COMPLEX
400 Carleton Avenue
P.O. Box 9080
Central Islip, NY 11722-9080
(631) 853-5368 Fax (631) 853-7741

A. GAIL PRUDENTI
Chief Administrative Judge

C. RANDALL HINRICHS
District Administrative Judge
Suffolk County

MICHAEL V. COCCOMA
Deputy Chief Administrative Judge
Courts Outside New York City

WARREN G. CLARK, Esq
District Executive

October 21, 2014

William T. Ferris, III, Esq.
President, Suffolk County Bar Association
560 Wheeler Road
Hauppauge, NY 11788-4357

Re: Judiciary Night

Dear Mr. Ferris:

On behalf of my colleagues on the Suffolk County bench, please accept our gratitude for the wonderful Judiciary Night hosted on October 2nd by the Suffolk County Bar Association. This special event is one which is very much anticipated as it provides an opportunity for members of our legal community to interact with one another in a social setting. The strong professional relationship between judges and lawyers, fostered in large measure by the ongoing efforts of the Suffolk County Bar Association, has greatly enhanced all aspects of our judicial system. In that regard, your efforts and those of the staff, officers, directors, committee chairs, and members of the Bar are very much appreciated.

Thank you also for organizing photographs of the judges during the evening. It is extremely important to document the history of our Bar and opportunities such as group pictures serve to remind future members of our profession in Suffolk of the work done by those who came before.

On a personal note, I would like to express my appreciation for everything the Bar has done to assist me in my role as Administrative Judge. Thank you.

Sincerely,

C. Randall Hinrichs
District Administrative Judge

Association of Legal Administrators – A Valuable Resource

The Long Island Chapter of the Association of Legal Administrators (the Association) is the local chapter of an international organization known as the Association of Legal Administrators (ALA), which is comprised of over 10,000 members representing 30 countries. The Long Island Chapter of the ALA is made up of legal administrators from 45 Long Island firms in both Nassau and Suffolk counties.

The main purpose of the Association is to provide support and education to legal administrators and attorneys in all areas related to the day-to-day operations of small, mid, and large sized firms. From human resources, finance, marketing, insurance and all of the various concerns that come up on a daily basis, the ALA is there as a group to educate and support its members.

The Long Island Chapter meets monthly from September through June. Events include educational seminars on some of the hot issues concerning law firms this year, roundtable discussion meetings on topics of common interest, as well as social events. Many members attend the nationally sponsored annual conferences, which are held at various locations throughout the country. These conferences provide a great educational and networking opportunity. We have also developed strong business relationships with various legal industry consultants, suppliers and vendors that our members frequently work with and who provide vital services to the legal community. One of the benefits that appeal to our members is the immediate access that they have to every member through email. Our members are always willing to share their knowledge to help out another member who is struggling with a difficult issue in their firm.

If you are a legal administrator or attorney looking for a great resource, please visit our website at www.alalongisland.org or email Cathy Harnett at charnett@hocd.com.

ADR

Whose Dispute is It Anyway? Understanding the Role of the Client in Resolving Disputes

By Lisa Renee Pomerantz

People find conflict distressing and distracting. Understandably, when a conflict arises with an employee, customer or vendor, businesses frequently hire an attorney to help them resolve it. Often though, the client does not remain engaged in the dispute resolution process, often resulting in unanticipated consequences, missed opportunities for resolution and excessive fees.

The relationship between the attorney and client should be a collaborative one. The attorney brings to the table his or her knowledge of the law and possible approaches to resolution. The client, though, knows the facts, the players and its own priorities. They should be the one making both substantive and procedural decisions, taking into account the advice of counsel. To ensure a collaborative relationship, the client should:

Lisa Pomerantz

- Fully and accurately disclose all relevant information to counsel;
- Discuss, review and approve any correspondence, settlement offers or pleadings for accuracy and acceptability before they are sent out;
- Review, discuss and provide direction and relevant information to counsel in responding to any correspondence, settlement offers or pleadings from the other party; and
- Actively participate in strategic decisions after discussing options and their potential costs and consequences with counsel.

The idea of a collaborative relationship is embedded in paragraph 6 of the Statement of Client's Rights promulgated by OCA, which states: "You are entitled to sufficient information to allow you to participate meaningfully in the development of your matter." This collaborative approach is also reflected in Paragraph 7 of the Statement of Client Responsibilities issued by the New York State Bar Association stating in relevant part as follows: "The client should . . . respond promptly to a request by the lawyer for information and cooperation."

Since many clients are unfamiliar with the allocation of responsibilities in an attorney client relationship, it is a good idea not only to provide these statements to the client but also to include a summary of both parties' responsibilities in the engagement letter.

Note: Lisa Renee Pomerantz is an attorney in Suffolk County, New York. She is a mediator and arbitrator on the AAA Commercial Panel and serves on NYSDRA's Board of Directors and the ACR Commercial Section Advisory Council.

LITIGATION

The Role of the Forensic Accountant in Litigation

By Andrew P. Ross and James Stewart

The Association of Certified Fraud Examiners, a leading organization in the area of fraud prevention and detection, describes on its website the characteristics of a forensic accountant — "Forensic accountants combine their accounting knowledge with investigative skills, using this unique combination in litigation support and investigative accounting settings." The work of a forensic accountant will be marginalized if his[1] findings cannot be effectively communicated to the attorney who retains him to perform these services, and ultimately to the trier of fact. Attorneys look to the forensic accountant to untangle complex financial issues, and provide explanations needed for the tactical planning and negotiations for the matter, which they have been retained.

Forensic accounting is a field that has adapted well to the rapid advancements in technology. More than ever, the forensic accountant is able to utilize technology to assist in investigating both the people and the money involved in a case. These technologies have allowed the forensic accountant to work in a more efficient manner, and provide the retaining attorney with a visually appealing product to bring to negotiations or trial.

Aside from the expertise that an attorney can receive from a forensic accountant, the attorney can also expect independent, unbiased work. The attorney's client may request that his current CPA be retained to perform the required forensic accounting services. This strategy is often times shortsighted despite the client's CPA having extensive knowledge of the finances of the company in litigation. Not only is the client's CPA probably not trained to deal with forensic accounting and litigation matters, their inherent bias may become a weakness at deposition or trial.

Andrew P. Ross

James Stewart

Forensic accountants generally serve as either a consulting expert or as a testifying expert. The main difference between the two assignments is that a consulting expert does not provide an expert opinion, and the work product generally is privileged and protected from the discovery process. The primary purpose of the consulting expert is to serve as an extension of the retaining attorney, often times not even disclosed to the opposition. The consulting expert is often asked to assist in formulating case strategies and evaluate the merits or weaknesses of the matter at hand.

The testifying expert usually is required to give an opinion, and the expert's work product generally is not protected from discovery. There are certain instances where the forensic accountant is initially retained as a consulting expert, only to be subsequently retained as a testifying expert. The positives and negatives associated with this arrangement should be carefully evaluated by the retaining attorney.

Forensic accountants have been retained in a wide range of matters including, but not limited to, commercial litigation, shareholder/partnership disputes, damage calculations, fraud investigations, business valuations, bankruptcy, and marital dissolutions.

Although each case is different, there are certain areas where a forensic accountant can effectively provide services to retaining counsel. Early retention of a forensic accountant will allow the retaining attorney to benefit from a greater amount of the procedures that the forensic accountant is qualified to assist in. Here are some of the services that a forensic accountant can provide:

Evaluation of the matter

Not all prospective cases should be litigated. An effective forensic accountant can assist plaintiff's counsel in the evaluation of the merits of a case and assist in determining the feasibility of proceeding with the litigation. Perhaps the preliminary financial evidence obtained indicates that the case should not be pursued, or the client should accept some form of a settlement offer.

Similarly, the defendant's retaining attorney can also benefit from the use of a forensic accountant in the evaluation of a matter. These benefits may include the forensic accountant assisting in structuring an initial settlement offer that will bring closure to a potentially damaging litigation before it begins.

Discovery assistance

The early retention of a forensic accountant can be of great benefit to the retaining attorney. The forensic accountant can assist retaining counsel by preparing a financial document request that is specific to the matter. While the attorney may know exactly how he plans to handle the case, from a legal perspective, he may not be familiar with the specific financial documents that may be necessary to prove the case arguments. The use of the forensic accountant's skill can be especially integral in especially difficult cases involving electronic discovery that contain a large volume of documents, and identifying pertinent documents is challenging.

Analysis of Documents

At the core of a forensic accountant's assignment is an analysis of the relevant documents obtained. Who better to analyze the contents of tax returns, general ledgers, financial statements and other financial documents than the forensic accountant? The forensic accountant understands the subtle accounting and financial issues related to a matter.

Depositions

The forensic accountant can assist the retaining attorney in preparing to depose the opposition's expert, and even certain fact witnesses. This assistance can take the form of preparing questions for, and attending, the depositions of these witnesses. At the deposition, the forensic accountant may be asked to prepare questions, in real time, for the attorney. This can be especially useful in a matter that entails a complicated financial fact pattern where the answers of the deponent might necessitate pinpointed follow-up questions. After the deposition is completed, the forensic accountant may be asked to read the deposition transcripts of various witnesses to interpret

(Continued on page 29)

TAX LAW

Transferring the Family Business — Part IV: Not Just Gifting

By Louis Vlahos

This is part four of a five part series.

Our last post covered certain gifting techniques. Today, we will look at some non-gift approaches to transferring a parent's interest in the family business to his or her children.

Sale

The most common means for transferring a business interest to someone is through a sale of the interest. Thus, it's not unusual for a parent to sell a business interest to a child. Indeed, a sale may comport with a parent's philosophy that a child should "earn" the interest. In addition, for a parent who needs a flow of funds in respect of the business interest, a sale presents an attractive option.

A sale is also an attractive option where the parent wants to shift the future appreciation in the value of the business interest out of his or her estate, but the parent's remaining gift tax exclusion amount is insufficient to cover the transfer. If a parent sells a business interest to his or her child, for consideration in an amount equal to the value of such interest at the time of the sale, no gift occurs. Moreover, the sale allows the parent to effectively "freeze" the value represented by the interest at its sale price – by exchanging the interest for non-appreciating cash and/or a promissory note – and to shift any future appreciation in the interest (above the sale price) to the child.

The sale could be for the full value of the business interest, or for a bargain price, i.e., an amount that is below the fair market value ("FMV") of the interest at the time of its sale. In the case of a bargain sale, or, in an instance in which the IRS successfully challenges the "full sale price" as too low, the excess of the FMV over the amount paid would likely be treated as a gift. In both instances, however, the increased gift tax exclusion amount (for tax years beginning after 2010) may provide a greater cushion for sales that are partially characterized as gifts.

The cost of a sale

Although a sale can be an effective tool for transferring a business interest to one's children, it will likely come with a cost: income tax. Where the interest sold was a capital asset (as is typically the case), the sale of which generates long-term capital gain, the lower 20 percent federal capital gains rate would apply to the amount recognized; the 3.8 percent surtax on net investment income may also apply.

In addition, once an interest is sold to a child, the child would then own the business interest outright, though his or her exercise of many "incidents of ownership" may be contractually restricted somewhat through the use of shareholder and operating agreements. Alternatively, the interest may be sold to an irrevocable trust of which the child is the only beneficiary – more on this later.

Installment sales

A sale may also be structured as an installment sale; i.e., in exchange for the child's promissory note. An installment sale may be appropriate where the parent wants to defer the gain recognition on the sale, or where the child is unable to make a lump sum payment for the business interest.

Louis Vlahos

In order to avoid gift characterization of any portion of the sale transfer, the child's installment obligation should bear a statutorily prescribed minimum rate of interest, the installment obligation should be memorialized in writing (with a note and sale agreement), preferably secured (at least by the transferred property), the term of the note should not exceed the seller's life expectancy, and payments (both the amount and timing thereof) should be made as required by the terms of the sale and note agreements. Additionally, as always, the value of the business interest should be established with an appraisal. Principal may be payable currently or in a balloon at maturity; preferably, interest would be payable currently. Ideally, each of the parent and child should have separate counsel.

Of course, the sale is taxable to the taxpayer for income tax purposes, though gain in respect of the installment obligation is only recognized as principal payments are made; interest (actual or imputed) is taxable as ordinary income. If the parent should die before the note is satisfied, the value of the note as of the date of death will be included in his or her estate for estate tax purposes. Thus, the FMV of the note at that time (usually the unpaid principal if adequate interest was provided), plus the accrued but unpaid interest, may be subject to estate tax. Moreover, because it represents an item of "income in respect of a decedent," the note will not receive a basis step-up (unlike most items of property that are included in a decedent's gross estate), thus preserving the tax gain inherent in the note.

SCIN

How does one address the inclusion of the note in the parent-seller's estate if the parent dies before the note has been satisfied?

In some cases, the parent will receive a "self-cancelling installment note" (SCIN) in exchange for the business interest being sold. In the case of a SCIN, the remaining note principal is cancelled if the parent dies before the end of the note term. Of course, this benefits the child-buyer, and it also avoids inclusion of the note in the parent's estate. This technique works best where the parent is not expected to survive for his or her life expectancy, but is not terminally ill.

Sale to Grantor Trust

While an installment sale may "freeze" the value of the parent-seller's business interest for estate tax purposes, there are some disadvantages to consider: the interest and principal that must be paid are taxable; if the seller disposes of the note (or if the child disposes of the purchased property within two years after its purchase), the gain on the sale is accelerated; a special interest charge may apply if the principal of the note exceeds $5 million, which defeats the deferral benefit of installment reporting (though an inter-spousal gift of a portion of the interest to be sold may alleviate this problem); and the sale of an LLC or partnership interest may result in immediate gain recognition (if the entity has any indebtedness).

There is another option that should be considered: a sale of the business interest to a grantor trust. In order to use this technique, an irrevocable trust must be created and funded. The trust is structured as a grantor trust so that the parent is treated as the owner of the trust for income tax purposes. In general, the funding requires a seed gift equal to at least 10 percent of the FMV of the business interest to be sold to the trust. Again, the increased gift tax exclusion amount allows a greater seed gift to be made on a tax-free basis, which allows more property to be purchased by the trust. The parent then sells business interests to the trust in exchange for a note with a face amount equal to the value of such assets, bearing a minimum rate of interest and secured by the property acquired. The interest may be payable annually, with a balloon payment at the end of the note term. The sale to the grantor trust is not subject to capital gains tax (since the parent-taxpayer is dealing with him- or herself), and the issuance of the note prevents any gift tax (since there is adequate consideration). (If the IRS does challenge the adequacy of the consideration, the shortfall will be treated as a gift, which the increased exclusion may protect.) The value of the business interest sold to the trust is frozen in the parent's hands in the form of the note, the cash flow from the interest and/or the appreciation in the value of the interest should cover the loan, and the remaining, excess value of the interest passes to the beneficiaries of the trust.

Price Adjustments

In the case of a sale, whether to a child or to a trust (grantor trust or otherwise), of closely held business interests, the IRS may challenge the transfer as a bargain sale; i.e., the sales price is below the FMV of the property being sold.

In order to address this possibility, taxpayers have sometimes included a valuation adjustment clause in the sale agreement. In general, the IRS has refused to recognize such clauses, claiming that they violate public policy.

More recently, taxpayers have employed "formula clauses" that express the amount of the property being sold as a formula; e.g., "that number of shares having a value of $X as determined for gift tax purposes." To the extent that the value of the shares sold, as finally determined, exceeds the stated purchase price, the "excess" shares have usually been directed to a spousal trust or to a charity (but not back to the seller). However, one court has approved a defined value clause where the excess business interest was "returned" to the donor-taxpayer; the court held that what the taxpayer had transferred were units in a business having a specific dollar value, and not a specific number of units. Thus, the taxpayer was able to avoid a taxable gift in excess of the gift tax exclusion amount.

In the case of a parent who has completely exhausted his or her gift tax exclusion amount, but who still wants to transfer business interests to a child by way of a sale, the parent may want to consider a defined value clause to try to ensure that the amount sold to the child does not exceed the consideration received for the sale.

Family Limited Partnerships

The final transfer vehicle to consider is the family limited partnership, or FLP. A number of advisers tout FLPs as a great way to generate valuation discounts and, in fact, a properly structured FLP may generate significant transfer tax savings.

Notwithstanding the valuation benefit, the parent's adviser should not focus the parent-client primarily on the discounts. There must be legitimate and significant non-tax reasons for forming and funding the FLP. The discounts that are applied to value transfers of FLP interests should be ancillary benefits to achieving the non-tax goals. Even when there is a legitimate business reason for using an FLP, the IRS will audit the arrangement for gift and estate tax purposes, and there will be significant costs associated with this.

In many cases, it may not be readily apparent how a FLP would serve a strong non-tax purpose where the asset at issue is an equity interest in an operating business, such as a closely held corporation or an LLC, especially where the entity has a shareholder or operating agreement in place. In any case, where the entity is an S corporation the FLP cannot hold its stock at all without voiding the S election. However, in other cases, as where different family groups own different blocks of equity in a "C" corporation, it may be that there are valid business reasons to hold one group's shares through a FLP rather than to leave them in the hands of individual members.

Possible reasons for holding the stock of a C Corporation in a FLP might be to maintain block voting, to keep shares within the family, creditor protection, and to handle management succession. Bear in mind, however, that it still may be difficult to make the argument for a legitimate business purpose. Indeed, the IRS may find that there was no management of the shares contributed, no attempt to diversify or invest, just a mere "recycling" of value to generate discounts.

(Continued on page 19)

Transferring the Family Business (Continued from page 18)

\(Continued from page 1)
In 1996/1997, Dorothy became editor of *The Suffolk Lawyer*. Her title was then changed to Executive Director of the Academy of Law. In 2006 Laura Lane was hired as the Editor of *The Suffolk Lawyer* to help relieve Dorothy of her heavy work load and to allow her to focus on the Academy issues.

With her background, intellect, curiosity, and quick perception, she actively participated in the planning sessions for the numerous presentations sponsored by the Academy. She offered suggestions to the attorneys on wide ranging topics as part of the presentations. At first I was amazed, but then I relied upon her wonderful ability to capture, in a few words, the essence of a presentation on any discipline of our legal practice, and use it in a caption to market the presentation. It was part of the wonderful gift she gave to the Academy and the Bar Association.

I am pleased to have several former Deans join me in this tribute:

Hon. Fred Block: "Dorothy began her wonderful career at the SCBA in 1989. She was a very special person and was essential to the success of the Academy of Law, which she nurtured through its infancy. It would not have evolved to what it is today if had not been for her."

Arthur Shulman: As a Past Dean of the Academy, I learned firsthand how much Dorothy meant to its every day operation. Her unique ability with the English language (a former English teacher) to describe the Academy's upcoming programs made even the most boring legal program sound so exciting to those considering attending the program. I know I could not have done my job during my two-year term as Dean without the assistance given to me by Dorothy. May she rest in peace with her beloved husband, Steve."

Rick Stern: I just left your funeral and cannot accept the fact that I willnever see my dear friend again. Through the years we worked together and we also developed a friendship. You exemplified everything good in a person. You were sweet, caring respectful, competent, personable, and you were a wonderful wife, mother and grandmother. On Tuesday evening we were chatting and participating at the Board meeting of the SCBA and the next day you were gone from all of our lives. Your being has made me a better person and the only solace from your untimely passing is that you are at peace with your husband, Steve, who you have missed so terribly since his pasing. I thank you for enriching my life and those of so many who you touched. I am blessed to have shared a portion of my life with you. May you rest in peace.

Patricia Meisenheimer: The passion of the Academy was epitomized in Executive Director, Dorothy Paine Ceparano, who unwaveringly shared her wisdom, friendship and inspiration to all who she met. Dorothy was truly the foundation upon which the Academy stands and from which it gained sustenance. I will always remember Dorothy for her enthusiasm, which is the genesis of every great and magnificent moment. I was privileged to serve as Dean of the Academy from 2007 to 2009, a time when the Academy met challenges and enjoyed many memorable moments. Dorothy's smile, enthusiasm and love for the Academy was always her focus; her willing assistance to anyone in need was always evident. CLE programs require creativity, effort and teamwork to become reality. Dorothy had the extraordinary ability to take an idea and expand it from conception to the presentation of a coherent, well-reasoned program, never wavering from her commitment to provide the highest quality legal education. Dorothy has left footprints in the sands of the passion of the Academy and was truly phenomenal! Dorothy, I am thankful for your friendship, you will forever remain in our hearts.

Edward J. Gutleber: Working with Dorothy was always a pleasure. She was smart, gracious and considerate. She had an uncanny ability to work with our volunteers to transform the simplest proposals into elaborate CLE programs. She made the Dean's job easy. The success of the Academy over the years is directly attributable to Dorothy's tireless work and dedication. Her devotion to the Academy was unparalleled and despite her passing, she continues to inspire us all.

George L. Roach: I have been lecturing for the Academy of Law since 1982, some 32 years. In that time there have only been two Academy Administrators... Barbara Mehrman and Dorothy Ceparano. Dorothy hit the ground running and was a perfect fit for the job, both professionally and personally. She spanned the era into mandatory CLE and is primarily responsible for making the Academy what it is today. She got the most from her speakers and made them look good. People did things just because Dorothy asked. Whoever replaces her will have BIG shoes to fill. She is remembered in my prayers and I will always have a fond place for her in my heart. It's how you are remembered by others that defines your legacy.

John Calcagni: One of the most rewarding aspects of serving as Dean was getting to know this kind, intelligent and talented woman, who, for 25 years, worked quietly and indefatigably to elevate and maintain our Academy of Law as one of the elite legal educational programs of its kind. She was a respected and admired friend who will be sorely missed.

Alan Costell: Beyond the obvious love and dedication that Dot brought to her work at the Academy, I will always remember the affection and support that she gave to me, and all the Deans before and after.

John Kelly: Dorothy was among a very small group of people in this world that nobody ever had a bad word to say about. Dorothy, no matter what was going on, always had a smile on her face and would try to help you in any way she could. She will be forever missed.

Hon. James Flanagan, Present Dean: As present Dean of the Academy, I feel her loss most acutely as we try to keep moving forward and the enormous burden and workload she maintained becomes readily apparent. I miss her as a friend, problem-solver, the voice of wisdom and reason, the ever-present foundation of the Academy and as a brilliant wordsmith. So many times she would take the barest outline for a program, produce a flyer that was pure gold and draw people to the seminar. God rest you Dorothy. Tell Steve he can make the reservations now.

Dorothy, Thank you for sharing so much of your life with us. We miss you. Love and Peace, Bill Ferris

Transferring the Family Business (Continued from page 18)

That being said, if a parent is in a position to utilize a FLP in connection with the transfer of business interests, consider these guidelines:

- Document the business reasons;
- Observe "corporate" formalities (documents, meetings, minutes, etc.);
- Do not contribute personal assets or co-mingle funds;
- Pool assets of various members (have the children contribute capital);
- Credit capital accounts properly;
- Share economics (e.g., distributions) pro rata;
- Use contemporaneous appraisals;
- Have separate counsel;
- Do not make gifts of FLP interests right away;
- Manage, invest, etc. (do something);
- No deathbed planning.

Redemption

Another means by which a parent may "shift" value to children-shareholders (without actually transferring anything to them), or position his or her estate for a better estate tax valuation result, is by way of a stock redemption. A redemption can reduce the parent's percentage interest in the redeeming business entity and increase that of the children-shareholders.

If the redemption is affected for FMV, there is no gift to the other shareholders, even though their relative interests increase. The removal of some of the parent's interests in the business freezes the value thereof by replacing it with cash that may be spent; the reduction in his or her percentage interest of the total equity may also put the parent in a less-than-controlling position, allowing for a minority discount at the time of his or her death.

In the case of a corporation, the redemption is generally an income-taxable event to the parent, though the specific consequences depend upon a number of factors, the primary ones being the status of the corporation as a C corporation, the presence of E&P from C corporation tax years, the taxpayer's stock basis, and the degree of reduction experienced by the parent (taking into account certain attribution rules). If the reduction is significant enough, the redemption may be treated as a sale of the stock redeemed, allowing recovery of stock basis before any capital gain is recognized and taxed. If not, then the amount distributed in the redemption is treated and taxed as a dividend distribution to the extent of E&P. Under the Code, both dividends and capital gains are taxed at the same 20 percent rate, the primary difference being the recovery of basis. Thus, where stock basis is low, as is often the case with closely held corporations, the tax consequences may be almost the same. In addition, the 3.8 percent surtax on net investment income must be considered. In any case, the income tax hit must be weighed against the potential transfer tax savings.

In the case of an LLC or partnership, the distribution of cash in partial or complete liquidation of the parent's interest will be taxable if the amount distributed exceeds the parent's adjusted basis in the interest. Any gain realized will generally be capital, though the presence of "hot assets" in the entity may change that result to some extent.

Conclusion

The last few posts have assumed that it was in the best interest of the family business that the parent transfer interests in the business to his or her children. In many cases, at least one of the children is capable of managing the business. In some cases, none of them is. In the latter situation (and sometimes even in the former), it may be imperative to the success and continued well being of the business – and to the financial security of the family – that one or more key employees (including family members) remain with the business after the parent's retirement or passing. This will be the subject of our next post.

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@farrellfritz-com.

APPELLATE PRACTICE/LAND USE

Vested Rights: Vexing Issues

By Robert J. Flynn, Jr.

Every land use lawyer knows the feeling, well actually that frustration that emerges at the point in the land use process where everything about a project that once seemed so promising now seems destined to fail. At this stage, the landowner is usually deeply invested (in terms of both time and money) in the project, and then a legal change occurs that can jeopardize it. The change could be a rezoning of the property, a new zoning ordinance or amendment to the law, a new health department regulation, a revocation of a building permit, etc. The list is endless.

It's not surprising that it has been said that one of the most troublesome areas in the field of land use is the issue of common law vested rights.[1]

"Generally speaking, nonconforming uses or structures in existence when a zoning ordinance is enacted are constitutionally protected and will be permitted to continue" (notwithstanding the contrary provisions of a new zoning ordinance or change in the law).[2] The more difficult situation to gauge is where the subject property is in a transitional stage (land under construction pursuant to permit, subdivision, site plan, etc.) at the time the change occurs. Whether a landowner in a transitional stage of the land use process retains a right to continue based upon a theory of common law vested rights requires a thorough grasp of the law as applied to the specific facts of the case.


Robert J. Flynn Jr.

Two cases set forth below clearly outline the nuances and conditions that can effect a claim for vested rights.

The seminal case in New York that outlines the criteria to establish vested rights is *Town of Orangetown v. Magees*.[3] In that case, the defendant, Bradley Industrial Park Inc. owned 34 acres of land located in the Town of Orangetown, New York. The defendant acquired the property in order to erect an 184,000 square foot building at a cost of three million dollars. Following the issuance of a building permit, the defendant commenced the process of clearing and grading the land. Thereafter, community opposition to the building and development of the site mounted, and the town supervisor directed the building inspector to revoke the permit. The Town commenced an action to have the temporary building erected at the site during construction completely removed. The defendant answered and counterclaimed for reinstatement of the building permit: the defendant alleged that it had acquired vested rights in the permit, the planned construction pursuant to the permit as well as damages pursuant to USC §1983.

In their decision, the Court of Appeals noted that in the lower courts the evidentiary factual proof demonstrated that the defendant had sufficiently committed the land to the use authorized by the permit prior to revocation. Although the building permit specifically enabled the defendant to commence clearing, grading, and foundation, the building permit also entitled the defendant to construct the entire building (as long as the subsequent detail plans comported with the already approved plans for the building). At the time the building permit was revoked, the defendant had already spent in excess of four million dollars on the project.

The Court of Appeals stated, "In New York a vested right can be acquired when pursuant to a legally issued permit, the landowner demonstrates a commitment to the purpose for which the permit was granted by effecting substantial changes and incurring substantial expenses to further the development. Neither the issuance of a permit nor the landowner's substantial improvements and expenditures standing alone will establish the right. The landowner's actions relying on the permit must be so substantial that municipal action results in serious loss rendering the improvements essentially valueless". [4] Finding that the defendant's commitment to the project relying on a legally issued building permit was serious and substantial, and the revocation of the permit indeed unlawful, the Court of Appeals affirmed the Appellate Division decision declaring that the defendant had established its claim for vested rights and was entitled to reinstatement of the building permit, as well as substantial damages.

Recently, a different result ensued in a case where at first blush one would have thought a vested rights determination was a sure thing — the case of *Matter of Exeter Building Corp. v. Town of Newburgh*.[5] Therein, a tortured set of facts demonstrates the hurdles that must be overcome in the land use process, and also shows that when things go wrong, they can go very wrong.

In December of 2000, the Petitioners Exeter Building Corp. and 17K Newburgh LLC (hereinafter Petitioners)

(Continued on page 24)

TRUSTS & ESTATES

Applying the Ancient Document Rule in Probate Proceedings

By Robert M. Harper

Whether the validity of a testamentary instrument is contested or not, the instrument's proponent must prove that the instrument was duly executed in accordance with the statutory formalities of Estates, Powers and Trusts Law ("EPTL") § 3-2.1. The proponent of a testamentary instrument generally will seek to carry that burden with the testimony of the attesting witnesses in a contested proceeding, and with the witness' self-proving affidavit in an uncontested proceeding. However, where the attesting witnesses cannot be located, with reasonable diligence, to testify in favor of a testamentary instrument and did not sign a self-proving affidavit, the proponent may, nevertheless, be able to prove the instrument's validity based upon the ancient document rule. This article discusses the rule's application in probate proceedings.

Under the ancient document rule, "when a writing is old, is shown to be in the possession of the natural custodian, and is unsuspicious in appearance in that it appears itself to be free from indications of fraud or invalidity, it may be introduced into evidence or admitted to probate without the necessity of a hearing."[i] The ancient document rule typically applies when the propounded instrument is more than 30 years old,[ii] although some Surrogate's Courts have relied upon the rule in probating testamentary instruments that are between 20 and 30 years of age.[iii] That the propounded instrument contains an attestation clause is entitled to weight in determining whether the statutory formalities of due execution have been met.[iv]


Robert M. Harper

Former Bronx County Surrogate Lee L. Holzman's decision in *Matter of Sims* is highly instructive. There, the decedent and his wife executed a joint will, which left the estate of the first spouse to die to the spouse who survived and, on the death of the surviving spouse, provided for the estate to pass to the wife's son and his two children.[v] Thirty years later, after the deaths of the decedent and his wife, the wife's son was unable to locate the attorney-draftsperson or attesting witnesses to testify or sign attesting witness affidavits in support of the joint instrument, as the law firm where the will was executed had gone out of business. Nevertheless, the wife's son located the original joint will in a metal box marked "important papers" in a dresser drawer in the decedent's bedroom. Noting that the will bore an attestation clause, was unsuspicious in nature, and dated back more than 30 years prior to the decedent's death, Surrogate Holzman admitted it to probate under the ancient document rule.

The lesson to take away from this article is that, while the proponent of a testamentary instrument generally will need to prove that the testator duly executed the instrument through either the testimony or self-proving affidavit of the attesting witnesses, it may be possible to have the instrument admitted to probate where the attesting witnesses cannot be located with reasonable diligence and did not sign a self-proving affidavit. Indeed, to the extent that the instrument is at least 20 years old; is in the possession of its natural custodian; and is free from any indicia of fraud or invalidity, the proponent may be able to have the instrument admitted to probated based upon the ancient document rule.

Note: Robert M. Harper is an associate in the trusts and estates department at Farrell Fritz, P.C. He serves as a Co-Chair of the Bar Association's Surrogate's Court Committee; an Officer of the Suffolk Academy of Law; and is a Special Professor of Law at Hofstra University.

1. 3 *Warren's Heaton on Sur. Ct. Prac.* § 41.10; *Matter of Haugh*, N.Y.L.J., June 21, 2012, at 27 (Sur. Ct., Queens County); *Matter of Cunningham*, N.Y.L.J., Apr. 14, 1999, at 30 (Sur. Ct., Nassau County).
2. *Matter of Koehl*, N.Y.L.J., Mar. 28, 2002, at 22 (Sur. Ct., Suffolk County).
3. *Matter of Kempen*, N.Y.L.J., Apr. 7, 1998, at 26 (Sur. Ct., Nassau County).
4. *Matter of Homburger*, N.Y.L.J., Apr. 2, 2013, at 22 (Sur. Ct., New York County).
5. *Matter of Sims*, N.Y.L.J., Feb. 8, 2006, at 25 (Sur. Ct., Bronx County).

APPELLATE/CRIMINAL CASE APPEALS

Expanding the Scope of Review in Criminal Cases Before the Court of Appeals

This is part two of a two part series.

By Michael J. Miller

Preservation of Sufficiency of the Evidence after *People v Finch*

Last month, the perverse effect of CPL §470.15 on the scope of appellate review was discussed. Here, in Part II, the relaxing of the preservation doctrine is reviewed.

There is nothing more basic to the appellate advocate handling a criminal case appeal than an examination of the record to ascertain if a factual or legal issue has been preserved for appellate review via a contemporaneous objection. Certainly there are some mode of proceeding errors involving fundamental constitutional rights that do not require preservation, but they are few in number.[1] But, as a general matter, "[f]or purposes of appeal, a question of law with respect to a ruling or instruction of a criminal court during a trial or proceeding is presented when a protest thereto was registered, by the party claiming errors, at the time of such ruling or instruction or at any subsequent time where the court had an opportunity of effectively charging the same."[2]

The preservation doctrine functions to prevent review of legal issues that have not been specifically presented to the trial court.[3] The theory underpinning the rule is that if each party protects the record through timely objections or motions, a full and fair resolution of the trial will result. Any errors will be avoided because the parties to the litigation will have the opportunity to fix any problem brought to their attention. To preserve a question regarding the sufficiency of the trial evidence, the Court of Appeals has required a motion by the defendant at the close of the evidence directed at specific evidentiary deficiency that is later raised on appeal. A general objection to the proof at trial or an objection to the evidence on the ground other than the one raised on appeal is insufficient to preserve the issue for appellate review.[4] The recent case of *People v Finch*, has, however, altered this time-honored construct.[5]

Michael Miller

In *Finch*, the defendant was charged with three counts of criminal trespass and one count of resisting arrest. The charges arose from three separate incidents and the charges were filed separately after each alleged trespass. When the defendant was arraigned on each of the first two trespasses, his attorney maintained – in the light most favorable to the defendant – that the defendant was an invited guest on the property and the charges were, therefore, untenable. After the third arrest, which was for both trespass and resisting arrest, the defendant did not make the same sufficiency argument.

The charges were joined for trial and the jury acquitted the defendant on the first two trespasses and convicted him on the third trespass with the attendant resisting arrest. The intermediate appellate court reversed the trespass conviction and the defendant was granted leave to appeal to the Court of Appeals with regards to the sole remaining resisting arrest charge. The People's cross-appeal regarding the trespass reversal was disallowed because the motion for leave to appeal was untimely

At the close of the People's case, defense counsel in *Finch* moved for a trial order of dismissal because the alleged trespass took place in an area that was not enclosed to exclude visitors and that his client was not given written notice that he was not permitted on the property. The motion was denied and the defendant testified and called another witness. At the close of the defense case, counsel renewed his prior dismissal motion and it was likewise denied.[6] Neither motion preserved the issue that was raised in the Court of Appeals. "Whether, on the assumption that defendant was in fact innocent of criminal trespass, there was nevertheless sufficient evidence for a jury to find, beyond a reasonable doubt, that [the police] had probable cause…to believe [the defendant] guilty of a crime."[7]

Despite the lack of any type of traditional preservation, the Court held that, "where a defendant has unsuccessfully argued before trial that the facts alleged by the People do not constitute the crime charged, and the court has rejected the argument, defendant need not specifically repeat the argument in a trial order to dismiss in order to preserve the point for appeal." The Court maintained that it was not changing the preservation rule and was merely reiterating that once an argument was made and rejected by the trial court, the proponent of that position has no obligation to repeat the same argument in order to preserve the same issue when it is presented later in the same case.[8]

There were, however, two dissenting opinions in *Finch* that garnered three votes in the Court. Indeed, a dissenting judge found that majority's rationale was "downright bizarre." Although the

(Continued on page 25)

TOURO

Lane v. Franks: Supreme Court Clarifies Public Employees' Free Speech Rights

By Thomas Schweitzer

On June 19, the United States Supreme Court decided an important First Amendment case concerning government employees' free speech rights. *Lane v. Franks*, 143 S.Ct. 2369 (2014). While public employees speaking as citizens on matters of public concern have the same free speech rights as other citizens, *Pickering v. Board of Ed. of Township High School Dist.* 205, 391 U.S. 563 (1968), the Court has held that when they make statements pursuant to their official duties, their free speech rights are more limited. *Connick v. Myers*, 461 U.S. 138 (1983).

Lane v. Franks rejected the extreme position of the Eleventh Circuit, which had held that a public official had no remedy when he was fired in retaliation for turning in a "no show" office holder who was tried, convicted and imprisoned. 523 Fed.Appx. 709 (11th Cir. 2013). Lane's actions, which presumably provoked his termination, manifestly promoted the public interest in combatting government corruption. Thus, the lower courts' position that Lane had suffered no remediable wrong evidently convinced all the justices that prompt action was required to set the Eleventh Circuit straight.

Thomas Schweitzer

***Lane v. Franks* in the lower courts**

Edward Lane was the Director of "CITY" (Community Intensive Training for Youth) at an Alabama community college. Upon discovering that Alabama State Representative Suzanne Schmitz was on CITY's payroll in what amounted to a "no show" job, Lane confronted Schmitz and ordered her to report for work, but she refused. Lane subsequently fired the recalcitrant Schmitz, despite having been warned by college president Steve Franks that this could have negative repercussions for him and the college. Schmitz told a fellow employee that she intended to "get [Lane] back" for firing her. 134 S.Ct. at 2375.

After the FBI investigated, Lane testified before a federal grand jury about his reasons for firing Schmitz. Schmitz was indicted and convicted on seven felony counts in a federal trial at which Lane, pursuant to a subpoena, testified against her. She was sentenced to 30 months in prison and ordered to make restitution of over $177,000. Franks then fired Lane, who sued him under 42 U.S.C. sec. 1983, claiming that his firing was in retaliation for testifying against Schmitz and violated his First Amendment rights.

The federal district court granted summary judgment against Lane, ruling that defendant Franks was protected by qualified immunity and that claims against him in his official capacity, were barred by the Eleventh Amendment. Since Lane had learned about Schmitz's criminal conduct while working as a government official, the court concluded that his testimony in bringing Schmitz to justice could be considered "as part of his official job duties and not made as a citizen on a matter of public concern…" *Lane v. Central Alabama Community College*, 2012 WL 5289412 (U.S. District Court, N.D. Ala., Middle Div.), 10.

The Eleventh Circuit affirmed, concluding that Lane's statements were not constitutionally protected. The Supreme Court granted certiorari "…to resolve discord among the Courts of Appeals as to whether public employees may be fired – or suffer other

(Continued on page 27)

Be a Mentor! Help Other Attorneys in Need of Your Experience

The SCBA is preparing the "Assistance For Lawyers" section of the upcoming 2015 SCBA Directory and are in need of names of attorneys willing to accept phone calls from newly admitted attorney members who seek expert advise on a particular area of law.

Please e-mail Marion at marion@scba.org or call (631) 234-5511 ext. 230 and let her know the area/areas of law you would like to have listed in your capacity as a mentor.

COMMERCIAL

The Secret World of Bad Paper – Debt Collection

By Mona Conway

Virtually every American adult has some form of debt. The economic crash of 2008 exposed the grand mistakes made by millions of people in getting way over their heads by borrowing too much money. In the years since that time and before, the business of collecting money owed, mostly to banks, has gotten incredibly shady.

The basics of debt collection seem simple enough. However, the money trail gets complicated with every twist and turn of the debt. When a consumer stops paying their debt or loan, a bank "charges off" the account after 180 days of non-payment and records it as a loss. This applies to all kinds of debt, such as credit cards, medical and auto loans and even gym fees and utility bills. The bank or lender then sells the debt in bulk to debt collectors. Sometimes lawyers handle this work, but other, often unscrupulous debt collectors purchase billions of dollars' worth of debt. "Top" debt buyers bought nearly 90 million accounts at a face value of more than $140 billion from 2006 to 2009.

The voluminous accounts of debtors are traded from one debt collector to another until paid or abandoned. A single debt can be traded over a dozen times; meaning from the original creditor, the debt was sold to many other entities, diminishing in value with every new turn of the "paper." "Fresh paper" is what comes directly from the banks. At some point, the debt is considered "bad paper" because it's potential for collection has become slim-to-none. That's when the experts – not the attorneys – come in to scoop up the leftovers, which can yield billions in collecting on "bad paper."

This is a "lawless marketplace"[i] where actual criminals finesse each deal to get paid pennies on the dollar. One such expert is Brandon Wilson, a debt collector whose personal story is outlined in the new book, "Bad Paper; Chasing Debt From Wall Street to the Underworld" by Jake Halpern. Bad Paper has pulled back the dark curtain of secrecy behind the "underworld" of debt collection.

Mona Conway

Brandon says that he buys "crap," which is the kind of debt that is so old or otherwise considered uncollectable by other debt collectors that no one else wants it to hustle. He calls himself the "King of Crap," usually purchasing nothing more than spreadsheets, which indicates the debtor's name, contact information and balance of the debt. That's it; that's all he needs. The FTC conducted a study of large debt buyers, finding that only about 6 percent of the time, the debtor's account comes with an account statement. He and others like him, find the debtors through skip-tracing. Once located, the debtor is classified based on the chances of them paying. Most people actually want to pay their debts. If efforts by the debt collectors are resisted, they typically resort to aggressive and illegal means of collection, such as threatening lawsuits, which they cannot do.

While a house or a car cannot be bought two or three times simultaneously, a single debt can be held by more than one collector. This is because debts, in the form of basic information on a spreadsheet, can be stolen. One example is outlined in Mr. Halpern's book — that of a Marine named Theresa, who made payments to a debt collector, who never legitimately owned the debt. So, when the actual owner of her debt called her for payment, a confrontation ensued between the two debt collectors.

This raises the question of why and how a consumer debt, which has been bundled and traded multiple times, should pay what the collectors say is owed. First, the debtor cannot be sure whether or not the debt claimed is legitimate. It should also be noted that there is no legal reason to pay a debt over the statute of limitations period. However, debts stay on a consumer's credit report for seven years. Some debtors simply feel a moral obligation to pay whatever debt they are accused of owing. Other times, debt collectors bully debtors and/or they just want the incessant calls to stop.

The system of consumer debt is chaotic: there is no central registry or regulatory agency, no attorney general and no better business bureau; there are simply no agencies that can control this market.

With respect to the law, a debt collector cannot threaten legal action if he or she is not an attorney. If the debt is beyond the statute of limitations (3-6 years, depending on state), it cannot be collected in court. The Fair Debt Collection Practices Act (15 U.S.C. § 1692) may be helpful to consumer debtors, but there are not enough agencies to ensure a safe marketplace for the buying, selling and collecting of debt.

The Consumer Financial Protection Bureau (CFPB), led by Elizabeth Warren, may create new rules to protect consumers from wrongdoing in this area. But, the GOP is targeting this agency for failure. Currently, predatory lenders do not adequately protect consumers. Ringing in the nearly 10,000 collection agencies in the United States will not likely be possible and, therefore, offer assistance to the vast majority of consumers, who are prey to illegal collections practices. About 42 percent of collection companies have a small number of employees and can easily do business under the radar of any agency scrutiny.

In its first lawsuit, the CFPB accused a Georgia-based law firm of violating federal consumer protection laws. The suit claims that hundreds — perhaps thousands — of consumer defendants owe no money or less than what is claimed. It is also claimed that lawyers of the firm usually spend less than one minute reviewing each complaint. Perhaps that is how the firm filed over 350,000 lawsuits on behalf of credit card collection companies. Since most of these defendants do not show up in court, the firm collects on piles of default judgments. Interestingly, the CFPB says that it can sue law firms simply for operating as debt-collection businesses and not legal advisers.

In short, the debt collection business is the Wild West of a legal or quasi-legal forum. It is simply out of control and operating in what one expert, armed-robber-turned-successful entrepreneur, Brandon Wilson calls an "underworld."

Note: Mona Conway is a member of Conway Business Law Group, P.C., practicing business law and commercial litigation in Huntington, New York. She is also a former chair of the SCBA's Commercial Law Committee. She can be reached at mconway@conwaybusinesslaw.com.

Sources: wnyc.org, "Fresh Air" 10/9/14; New York Times Magazine, "Paper Boys" 8/14; MotherJones.com, 9/26/14; The Wall Street Journal Online Law Blog 8/4/14.

[i] New York Times

Ignite Your Inner Leader – Is Leadership in Your Future?

The Nominating Committee of the Suffolk County Bar Association is soliciting recommendations and expressions of interest from members interested in holding the following positions: president elect, first vice president, second vice president, secretary, treasurer, three directors (terms expiring 2018) and three members of the Nominating Committee (terms expiring 2018). The Nominating Committee is accepting resumes from those interested in serving in a leadership position. Resumes may be sent to the Executive Director at the SCBA Headquarters marked for the Nominating Committee.

Members of the Nominating Committee: John L. Buonora; Harvey B. Besunder; Matthew E. Pachman; Louis E. Mazzola; Michael J. Miller; Arthur E. Shulman; Scott M. Karson; Diane K. Farrell; Dennis R. Chase.

–LaCova

CONSUMER BANKRUPTCY

Chapter 13 Debtor Slammed for Outrageous Conduct

Judge Trust, in recent decision, sanctions debtor $10,000

By Craig D. Robins

Let's skip the introduction and go right to the sharp, severe and stinging opening paragraph of a recent judicial decision involving a most bizarre and incredible situation.

"The Debtor in this chapter 13 case. . . operates in disbelief of and disregard for the sanctity and propriety of court proceedings. He has exhibited disrespectful conduct before this Court, acted as if he himself is a court and/or judge of his own court, failed to comply with his obligations as a chapter 13 debtor, and unnecessarily multiplied the proceedings before this and other courts."

The judge continued, "This Court has determined that Debtor should be sanctioned for raising claims without color of law and acting in bad faith,. . . vexatiously, wantonly, or for oppressive reasons, by (1) making intentionally false representations to the Court, (2) attempting to mislead this Court by representing a fabricated "judgment"... and (3) blatantly disrespecting the Court and the judicial process."

Judge Alan S. Trust, sitting in the Central Islip Bankruptcy Court, did not mince words about his ire and indignation towards this Chapter 13 consumer debtor who went grossly out of bounds in trying to stop foreclosure by resorting to incredible bad faith shenanigans in a bankruptcy filing. *(In re Jerry Campora, Jr.*, No. 14-70330-ast, (Bankr E.D.N.Y. October 6, 2014).

Craig D. Robins

The debtor, who appeared *pro se*, apparently filed his Chapter 13 petition on the eve of a foreclosure sale in an effort to delay the foreclosure. Incidentally, in the foreclosure proceeding, the state court judge lambasted him as well. Judge Trust called the debtor's conduct in Bankruptcy Court to be a continuation of his litigious and inappropriate conduct in the state court.

The debtor filed his Chapter 13 case in January 2014. He filed a proposed plan, in which he said that there were no secured liens. Yet, in the plan, he stated that the mortgagee is a disputed mortgage holder, and holder of a "void" judgment. Further, he stated that he intended to avoid the mortgage lien.

The trustee quickly filed a motion to dismiss the case based upon defects in the plan. The debtor then filed an order to show cause claiming that he was entitled to an emergency hearing in which he sought to compel the mortgagees to surrender the original notes evidencing their liens. Judge Trust treated the debtor's application as an objection to their claim.

When the debtor filed an amended plan, he also filed numerous additional pleadings, which stated Judge Trust "appear to be based on various disjointed and irrelevant theories cobbled together from various statutes and court decisions."

At the hearing to dismiss held in May 2014, the debtor made several outbursts despite being repeatedly warned.

Judge Trust questioned the debtor about the state court judgment of foreclosure, which had been issued in October 2013, and which the debtor had described in his Chapter 13 plan as being void. In response, the debtor represented to the Court that the foreclosure judgment had been vacated.

The debtor testified that he absolutely had an original order to that effect, but that he did not have it with him in court. In response, Judge Trust gave the debtor 10 days to produce the order, and stated that the case would be immediately dismissed if he could not provide it.

The following week the debtor filed a document entitled, "Notice of Timely Satisfaction of Request." Judge Trust observed that the notice contained a number of scandalous allegations, in apparent violation of the Bankruptcy Rules. For example, the debtor alleged that one of the state court judges acted in concert with the attorneys for the mortgagee and threatened to sell the debtor's house by theft and forgery. The debtor also alleged that two of the judges admitted by "tacit procuration, to perjuring their oaths of office."

Most amazingly, the debtor stated that a certified copy of a judgment vacating the foreclosure judgment was attached to the notice he filed, and he included two such documents. However, Judge Trust noted that the debtor fabricated these documents to appear as if they were lawful orders or judgments of the state court as they contained rubber stamps and seals. However, Judge Trust observed that the debtor in his own name with the title,

(Continued on page 31)

VEHICLE & TRAFFIC

Traffic and Parking Violations Agency Trial Practice

Note: This article is dedicated to the memory of Dorothy Paine Ceparano, Executive Director of the Suffolk Academy of Law, for her tireless efforts in support of continuing legal education. On a personal note, I will miss her encouragement and assistance in planning the annual Vehicle and Traffic Law updates.

By David A. Mansfield

Defense counsel must have their clients appear in person for a scheduled trial at the Suffolk County Traffic and Parking Violations Agency. This has been one of the most contentious aspects of defense counsel representation at the agency. Defense lawyers at the former Suffolk County Traffic Violations Bureau routinely represented clients in their absence pursuant to written authorization on file. A simple representation on the record backed by written authorization on file would suffice.

My experience over many years as a defense lawyer who represented motorists in their absence at Suffolk Country Traffic Violations Bureau was that the system worked well in cases that reflected your client's wishes not to be present. The Suffolk County Traffic Violations Bureau was governed by 15 NYCRR Part §124 regarding the conduct of hearings. There was no stated requirement that the motorist appear in person for trial when represented by counsel.

David A. Mansfield

Now the agency, an arm of the Suffolk County District Court, takes the position that the defendant must appear for trial even when represented by counsel.

The Criminal Procedure Law (CPL) governs the Suffolk County Traffic and Parking Violations Agency (The Agency). One of the main complaints of defense counsel regarding the predecessor administrative agency was that the CPL did not apply. The Agency relies upon CPL §340.50, which requires the defendant to appear personally unless defense counsel secures the advance approval of the People and the Court to waive their appearance. Defense counsel can make a motion to the Court, which will be granted in the absence of an objection by the prosecution. This course of action will require a filing of a written and subscribed statement by the defendant with a waiver of the right to be present at the trail and authorizing their counsel to conduct a full trial. But the Court or the People could object and deny the motion.

Defense counsel has the option to file a motion, but must be aware that The Agency requires all motions to be submitted in person with 20 days as a return date.

Should your client not wish to be present, provisions must be made in advance with the consent of the People and a Judicial Hearing Officer. You can conference your case well in advance of the trial date with a supervisor to seek to obtain the People's consent to waive your client's appearance. You must then appear before the Judicial Hearing Officer and seek their approval.

The defendant may not be able to or desire to appear for any number of reasons. Defense counsel should have a written signed waiver by the defendant that they waive their right to be personally present at trial and authorizing their attorney to conduct their defense. The document should state the full range of fines, civil penalties, points, Driver Responsibility Assessment fees, driver license suspensions or revocations or even in rare cases, incarceration. The waiver should state they are aware that by not appearing they are giving up their right to testify.

It should also be noted that these arrangements must be made well in advance as The Agency, once the case is marked for trial and the trial date arrives, unlike its predecessor, will not demonstrate any flexibility in adjourning the case for the purpose of getting a waiver or adjourning the case for your client's personal appearance.

The authority for the judicial hearing officer to conduct a trial is contained in CPL §350.20 and Vehicle and Traffic Law §1690. The enabling legislation for

(Continued on page 26)

Vested Rights: Vexing Issues (Continued from page 20)

purchased 29 acres in the R-3 zoning district of the Town of Newburgh. In 2002, the petitioners applied to the Planning Board for approval of a site plan known as the Madison Green Plan for 34 residential buildings with 136 units. Over the next seven years, obstacle after obstacle befell the petitioners. Initially, a sewer moratorium was in place (which petitioners acknowledged in writing they were aware of but nevertheless wanted to proceed). Then, in 2005 a change of zone of the parcel to an R-1 more restrictive residential zoning district occurred.

In response, the petitioners challenged the zone change and asserted a claim for vested rights. The lower court invalidated the zone change but also declared that petitioners had achieved no vested rights. Both the petitioners and the building inspector appealed that decision to the Appellate Division.

In 2007, before the appeal was decided, petitioners received conditional site plan approval. The approval was conditioned on petitioners completing 18 items required by the Planning Board, without which the chairman had no authority to sign the site plan. By this point, the petitioners had spent in excess of $358,000.00 in engineering and review costs.

In March of 2008, the Appellate Division decided the appeal. The Court determined that the zone change from R-3 to R-1 was legally enacted but, also, determined that petitioners had vested no rights under the common law to proceed with the project. Because during the application process the Planning Board had suggested a boundary adjustment to petitioners' property, which petitioners complied with, the Court found this in effect constituted a subdivision, thereby allowing the petitioners a three year exemption from the zone change under Town Law 265-A. By this time, the exemption period, which began in January of 2006 (when the zoning change went into effect), had only 10 months left. Over the next several months, petitioners received a demolition permit (to remove a water tank and foundation on the property), a clearing and grading permit, and a sign permit to advertise the soon to be built project.

However, there was no dispute that in January of 2009 the 18 conditions required to authorize the chairman to sign the plan had not been completed. It was also clear the petitioners had now spent an additional $181,780.97 in engineering review and construction costs.

In April of 2009, the petitioners sought to amend the site plan. The Planning Board denied the amendment due to the zone change in January of 2006. The petitioners filed an appeal of the Planning Board denial with the Zoning Board of Appeals. In their decision, the Zoning Board of Appeals determined that petitioners had no vested rights to continue the project. The board found the permits that were issued to be nothing more than ancillary to the project, and, in the absence of a building permit authorizing construction under an approved unconditional site plan, petitioners had established no right to common law vesting.

Petitioners commenced an Article 78 proceeding to review the zoning board denial and sought a declaratory judgment stating that it had accrued common law vested rights. The lower court found for the petitioners…but the Appellate Division reversed.

Finding that the question of common law vesting was properly before the Zoning Board for review, the Appellate Division refused to disturb the board's finding because they said that it was not arbitrary, capricious, or made in error of law. While the Court did not rule upon whether a final unconditional site plan could serve as a tool for reliance, and thereby establish vested rights to continue a project,[6] the Court did opine that, because the 18 requirements of the conditionally approved site plan were not met, the chairman had no authority to sign the map. Therefore, petitioners had not established vesting based upon reliance. The Court also agreed the ancillary permits that had been issued (the demolition permit, the clearing and grading permit and the sign permit) did not constitute an approval of the Madison Green project under R-3 zoning, but could now be used by petitioners in developing the property under the R-1 zone.

The Exeter case is an example of how a project so far along could fail with no common law vested rights having accrued. The case demonstrates clearly that good faith, monies expended, and years of effort lost alone will not be the determining factor in the search for vested rights.

Reliance and action are the key words.[7] In a transitional stage of the land use process, common law vested rights can be achieved through a demonstration to the Court of reliance and action by the landowner upon a legally issued unconditional permit, as well as a substantial and serious commitment to the process, which if lost, will render the landowners' improvements essentially valueless. When it comes to common law vested rights, nothing less will do.

Note: Robert J. Flynn, Jr. is a practicing lawyer in Huntington, specializing in municipal and real estate law and land use appeals. He is the co-author of the book "Zoning Board of Appeals Practice in New York" published by the New York State Bar Association.

1. 4 Ziegler, Rathkopfs' Law of Zoning and Planning, §70:1 at 70-3 [4th Ed. 2011].
2. Glacial Aggregates LLC v. Town of Yorkshire, 14 NY3d 127 at 135.
3. Town of Orangetown v. Magee, 88 NY2d 41.
4. Id. at pg. 47-48.
5. Matter of Exeter Building Corp. et al v. Town of Newburgh, 114 AD3d 774 [Second Dept. 2014].
6. The Court in Exeter noted that the question of whether an unconditional final site plan could qualify under the first prong of the vested rights test (i.e., reliance on a permit) without a permit was unsettled law in New York and was not before the Court for decision. The Court limited its review to the Town of Newburgh Zoning Board decision.
7. Town of Orangetown v. Magee, 88 NY2d 41; Glacial Aggregates LLC v. Town of Yorkshire, 14 NY3d 127.

Outside Professional Advice No Substitute For Fiduciary Duty Owed (Continued from page 3)

for the $750,000 "written off." Plaintiff thereafter "followed the accountant's instructions to place the entire burden on plaintiff, reasoning that the 'discrepancy' had likely been due to plaintiff's previous actions." Only Plaintiff's capital account was reduced (the other members' accounts were unaffected), and the same was effectuated without any notice to Plaintiff. The manager's decision to place the burden of the write off solely upon the Plaintiff was not authorized by the subject operating agreements or the 2006 settlement agreement.

Plaintiff filed suit, alleging that Defendant, as a managing member of the LLCs, breached his fiduciary duty owed to Plaintiff. Both parties engaged in motion practice: Plaintiff requested summary judgment on his breach of fiduciary duty claim and for dismissal of defendant's affirmative defenses; Defendant moved to dismiss Plaintiff's claims.

Plaintiff argued that by diverting the LLCs' financial burdens solely to the Plaintiff without informing or consulting with him, Defendant was merely trying to benefit himself and was not acting with Plaintiff's best interest in mind. Defendant argued that because he relied on an outside professional advice from the accountant to reach the decision to allocate the funds, he is protected under Limited Liability Company Law §409 or alternatively the Business Judgment Rule. The trial court denied both parties' motions, and subsequently the parties appealed.

On appeal, the First Department rejected Defendant's argument that he was shielded from liability and granted summary judgment in favor of Plaintiff, stating that in order to establish protection under LLCL §409, the reliance on an outside professional's advice must be made in good faith. The First Department concluded that by failing to give notice to Plaintiff and reducing only Plaintiff's capital account (and not the other LLC members, which benefitted Defendant himself), the Defendant failed to act in good faith and with undivided loyalty.

The Court further defined the limits of the Business Judgment Rule's protection by stating that "[the rule] doesn't protect corporate fiduciaries when they make decisions affected by inherent conflict of interest." *Pokoik*, at 71. When addressed with the issue of whether or not the Court even had the authority to challenge Defendant's business judgment, the Court noted that "The business judgment rule… permits review of improper decisions, as when the challenger demonstrates that the board's action… deliberately singles out individuals for harmful treatment." *Pokoik,* at 71, citing *Barbour v. Knecht*, 296 A.D.2d 218, at 224, 743 N.Y.S.2d 483 (1st Dep't 2002).

The Court concluded by providing an excellent summation of the applicable law:

> While it may be that [Defendant] relied on his accountant's opinion when he drained [P]laintiff's capital account, his and the accountant's failure to inform [P]laintiff of this decision or of the subsequent elimination of distributions, clearly establishes [P]laintiff's claim that [Defendant] was not acting in his best interest and that [Defendant] breached his fiduciary duty of care.

The *Pokoik* case is a perfect example that a managing LLC member's reliance upon the advice of an outside professional is not an absolute bar to a breach of fiduciary duty claim. Instead, undivided and undiluted loyalty remains the primary focus in responding to claims of malfeasance.

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

Bench Briefs (Continued from page 4)

for the negligence of the corporation merely because of his or her official relationship to it. Further, the court noted that when a corporate officer acts solely within the course and scope of his or her employment, he or she cannot be held liable in his or her individual capacity. The court continued by stating that where the principal of a corporation expressly signs a contract in his or her capacity as an officer of the corporation, unless he purports to personally bind him or herself, he or she will not be held personally liable under the contract. Here, the court found that presuming the allegations pled in the amended complaint were true and construing such allegations in a light most favorable to plaintiffs, the court held that plaintiffs failed to state a cause of action against defendant Weiss in his individual capacity. Accordingly, upon reargument, the branch of defendants' motion to dismiss the complaint as to Weiss in his individual capacity was granted.

Motion for leave to serve an Amended Notice of Claim denied; plaintiffs waited almost two and one half years to move to amend their Notice of Claim; defendants were not given the opportunity to conduct prompt and accurate investigation.

In *Juana Torres and Dionisio Gonzales v. Town of Babylon and Town of Babylon Industrial Development Agency,* Index No.: 4438/2012, decided on February 14, 2014, the court denied plaintiffs' application for an order for leave to file and serve an amended Notice of Claim. In rendering its decision, the court noted that Plaintiffs filed a Notice of Claim on or about April 27, 2011 to recover damages for personal injuries sustained from an incident, which occurred on January 27, 2011, when plaintiff Torres slipped and fell in the parking lot of her employer due to the alleged accumulation of snow and ice. Said Notice of Claim stated that the fall occurred at 595 Smith Street, East Farmingdale, New York. On September 30, 2013, plaintiff's served an Amended Notice of Claim, which was rejected by the defendants. The Amended Notice of Claim provided that the accident "occurred on 540 Smith Street, East Farmingdale, New York when claimant was walking along said roadway/parking lot and was caused to slip and fall…"

In denying plaintiffs' motion for leave to serve an Amended Notice of Claim , the court noted that plaintiffs waited almost two and one half years to move to amend their Notice of Claim and continually provided the same error in reporting the location of the incident by way of their complaint, bill of particulars and supplemental bill of particulars. As such, the defendants were not given the opportunity to conduct prompt and accurate investigation in a timely manner and accordingly, the plaintiffs' motion was denied.

Honorable William B. Rebolini

Motion to dismiss denied; plaintiffs set forth a reasonable basis to believe that with additional discovery they would be able to develop facts sufficient to establish the elements of their claims of fraud.

In *Estate of Florence Jurzenia, Jean Jurzenia Burden, as c-Executor of the Estate of Florence Jurzenia, Edward Jurzenia, as co-Executor of the Estate of Florence Jurzenia, Silver Sands Motel, Inc., Jean Jurzenia Burden as Shareholder in Silver Sands Motel, Inc., Edward Jurzenia as Shareholder in Silver Sands Motel, Inc., Terry Keefe, as Shareholder in Silver Sands Motel, Inc., and Walter H. Burden, III, Edward Jurzenia, individually, and Jean Jurzenia Burden, Individually v. Jerry M. Mims, Eric Friedlander, Long Island Capital Management Corp., Somer Estrin, Esq., PM Advisory Group, Sol Lopiccolo, Anthony Galeotafiore, AJG capital Group Associated, Inc., Patricia Chessman, Deborah Loftain, Peter Shembri, Gail Shembri, Patricia A. Judd, Richard Olivo, Michael Harrison, Philip Solomon, Rosemary Solomon, Angela Sivillo, Annemarie Prokopiak, Annemarie Panagos, Susan Bonitch, Patricia Warner, Jennifer H. Hain, Elizabeth R. Reis, The Gross family Holdings, LLC, The Wheatley Harbor, LLC, Stanley Weisz and Stanley Gross, Brightwaters Abstract, Ltd., Titleland Abstract a/k/a Titleland Guarantee, Inc., Affirmative Land Services, Inc., Hamlet Title Agency,* Index No.: 13490/2013, decided on January 14, 2014, the court denied defendants' motion dismissing the complaint against them. The court noted that plaintiffs commenced this action by the filing of a summons and complaint on May 20, 2013 to recover damages and for other relief arising out of numerous allegedly fraudulent mortgage transactions. Central to their allegations were claims that the defendants fraudulently profited from receipt of mortgage proceeds paid in connection with mortgages burdening plaintiffs' real properties. In deciding the motion, the court noted that while plaintiffs set forth facts regarding the underlying mortgage transactions in sufficient detail to give notice to the defendants of the nature of the claims against them, plaintiffs also asserted that facts essential to justify opposition may exist but could not presently be stated. In particular, plaintiffs claimed that they had been unable to obtain documentation to identify how the proceeds from the various mortgages on their properties were distributed. The court concluded that in light of the particular circumstances of the case, dismissal of the claims against the movants at this stage was inappropriate, as plaintiffs had set forth a reasonable basis to believe that with additional discovery they would be able to develop facts sufficient to establish the elements of their claims of fraud against the defendants.

Motion to dismiss granted; a party seeking to pierce the corporate veil must establish that the owner exercised complete dominion of the corporation in respect to the transaction attacked; and that such domination was used to commit a fraud or wrong against the plaintiff which resulted in the plaintiff's injury.

In *Warren Fastenings Corporation v. Vishnu Dayal and Datacomm Cables, Inc.,* Index No.: 23581/2013, decided on June 24, 2014, the court granted the cross motion by defendants for an order dismissing the complaint against Vishnu Dayal. In rendering its decision, the court noted that the complaint did not allege that Dayal was a party to the lease, nor did it allege that the plaintiff was in contractual private with Dayal. Datacomm was identified as the tenant on the lease and the lease was signed by Dayal in his representative capacity as president of Datacomm. In granting the motion to dismiss, the court stated that generally a party seeking to pierce the corporate veil must establish that the owner exercised complete dominion of the corporation in respect to he transaction attacked; and that such domination was used to commit a fraud or wrong against the plaintiff which resulted in the plaintiff's injury. The mere claim that the corporation was completely dominated by the owners or conclusory assertions that the corporation acted as their "alter ego," without more, will not suffice to support the equitable relief of piercing the corporate veil. Accordingly, the motion to dismiss the complaint as to defendant Dayal was granted.

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

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

Expanding Scope of Review (Continued from page 21)

combined dissents found many flaws in the majority opinion, the crux of the issue is that "a challenge to the facial sufficiency of the accusatory instrument…cannot be equated with a claim that the trial evidence is insufficient to support a conviction." According to the dissent, the *prima facie* facial validity of an accusatory instrument is not the legal equivalent of a claim that the trial evidence is insufficient. Furthermore, the dissent found it incredible that an objection at the first arraignments could preserve an issue regarding the third set of charges when the arraignments pre-dated the last charges.[9]

There are some major flaws in the *Finch* holding, but there is also no doubt that the decision eases the preservation burden. It is an open question whether the holding will have much effect on appeals to the intermediate appellate courts because those courts have both interest of justice jurisdiction and they can reweigh the trial evidence. The intermediate appellate courts have, therefore, always had the power to correct egregious trial errors even if they were not preserved for review. The Court of Appeals has, on the other hand, potentially expanded its scope of reviewable issues. Whether this will have a profound or limited effect remains to be seen but it would be unfortunate if a court of law has reimagined itself as a court of equity.

Note: Michael J. Miller graduated from Vanderbilt University School of Law in 1981. He is currently the Chief of the Appeals Bureau of the Suffolk County District Attorney's Office. The views expressed are those of the author and they do not represent the views or policy of the District Attorney's Office.

1. See, for example, *People v Rivera*, __NY3d__, 2014 WL 2573347 (2014), reiterating the holding of *People v O'Rama*, 78 NY2d 270 (1991), requiring the defendant's presence at all material stages of the trial.
2. CPL §470.05(2).
3. *People v Hawkins*, 11 NY3d 484, 491 (2008).
4. See, *People v Hines*, 97 NY2d 56, 61-62 (2001); *People v Gray*, 86 NY2d 10, 18-20 (1995); *People v Cona*, 49 NY2d 26, 33 n.2 (1979).
5. *People v Finch*, __NY3d__, 2014 WL 1883961 (2014).
6. A post-trial CPL §330.30 motion that addressed the legal sufficiency of the evidence was denied. A motion to set aside the verdict does not preserve an issue for appellate review (see, *People v Hines*, 97 NY2d at 61).
7. *People v Finch*, __NY3d__ at ___, 2014 WL 1883961.
8. *Id.*
9. *Id.* (Read and Abdus-Salaam, dissenting).

Court Notes (Continued from page 4)

acter, as well as his prior disciplinary history, consisting a letter of admonition. Accordingly, under the totality of circumstances, the respondent was publicly censured for his professional misconduct.

Attorneys Suspended:

Ira S. Kaplan, admitted as Ira Stephen Kaplan: By decision and order of the court, the Grievance Committee was authorized to institute a disciplinary proceeding against the respondent and the matter was referred to a Special Referee. The Grievance Committee served a petition upon the respondent containing four charges of professional misconduct, alleging, *inter alia,* that respondent engaged in fraud, deceit or misrepresentation, that he knowingly made a false statement of law or fact, and assisted a client in conduct that he knew to be illegal or fraudulent. After a hearing the Special Referee sustained the charges, and the Grievance Committee moved to confirm. The respondent stipulated to the charges. In view of the respondent's admissions and the evidence adduced, the court concluded that the Special Referee properly sustained the charges, and therefore the motion by the Grievance Committee was granted. In determining an appropriate measure of discipline, the court noted that the respondent engaged in serious professional misconduct. Nevertheless, the court found that the conduct occurred almost 7 years prior to the proceeding, and that respondent had no prior disciplinary history. Furthermore, the respondent demonstrated remorse, and cooperated with the Grievance Committee and law enforcement in the related criminal proceedings. Accordingly, under the totality of circumstances, the respondent was suspended from the practice of law for a period of one year.

Garrett R. Lacara: By decision and order of the court, the Grievance Committee was authorized to institute a disciplinary proceeding against the respondent and the matter was referred to a Special Referee. The Grievance Committee served a petition upon the respondent containing 12 charges of professional misconduct, alleging, *inter alia,* his failure to comply with the lawful demands of the Grievance Committee in its investigation of six separate grievance complaints that had been filed against him. After a hearing the Special Referee sustained the charges, and the Grievance Committee moved to confirm. In determining an appropriate measure of discipline, the court noted that the respondent engaged in a pattern and practice of failing to cooperate with the Grievance Committee. Moreover, the court found no reason to disturb the Special Referee's findings that respondent's claims in mitigation were incredible. Further, the court found that the respondent had received a letter of caution and reprimand. Accordingly, under the circumstances, the respondent was suspended from the practice of law for a period of three years.

Thomas Anthony Sirianni: By decision and order of the court, the Grievance Committee was authorized to institute a disciplinary proceeding against the respondent and the matter was referred to a Special Referee. The Grievance Committee served a petition upon the respondent containing 11 charges of professional misconduct, alleging, *inter alia,* that respondent failed to cooperate with the Grievance Committee, that he failed to account for fund held in his IOLA account, that he entered into a retainer agreement in which the client was required to pay 20 percent interest on funds advanced to him by the respondent, that he entered into a business transaction with the client that was not fair or reasonable to the client, and that he deposited non-qualified funds into his escrow account. In view of the respondent's admissions and the evidence adduced, the court concluded that the Special Referee properly sustained charges 1-6, 10, 11, improperly declined to sustain charge 7, and properly declined to sustain charges 8 and 9. In determining an appropriate measure of discipline to impose, the court considered the respondent's lack of prior disciplinary history, and the marital problems he was experiencing. Nevertheless, the court concluded that the respondent engaged in serious professional misconduct, compounded by his persistent failure to cooperate with the legitimate demands of the Grievance Committee. Accordingly, under the totality of circumstances, the respondent was suspended from the practice of law for a period of two years.

Thomas Peter Tedeschi: By decision and order of the court, the Grievance Committee was authorized to institute a disciplinary proceeding against the respondent and the matter was referred to a Special Referee. The Grievance Committee served a petition upon the respondent containing one charge of professional misconduct, alleging that respondent misappropriated funds belonging to other persons or entities. The referee sustained the charge and the Grievance Committee moved to confirm. The respondent moved to disaffirm the report, in part. In view of the respondent's admissions and the evidence adduced, the court concluded that the Special Referee properly sustained the charge. In determining an appropriate measure of discipline to impose, the court considered the mitigating evidence propounded, including the respondent's sincere remorse, his unblemished record, his cooperation with the Grievance Committee, and his absence of pecuniary loss. Nevertheless, the court concluded that the respondent's conduct constituted a breach of fiduciary duty, from which the respondent and members of his family benefitted. Accordingly, under the totality of circumstances, the respondent was suspended from the practice of law for a period of one year.

Rony Princivil: By decision and order of the court, the respondent was suspended from the practice of law, and the Grievance Committee was authorized to institute a disciplinary proceeding against him. The matter was referred to a Special Referee to hear and report. The referee sustained both charges against the respondent, and the Grievance Committee moved to confirm. The respondent did not oppose the application, or request additional time to do so. The charges alleged, *inter alia,* that the respondent breached his fiduciary duty by failing to preserve client funds. In view of the respondent's admissions and the evidence adduced, the court concluded that the Special Referee properly sustained the charges, and therefore the motion by the Grievance Committee was granted. In determining an appropriate measure of discipline to impose, the court considered the mitigating evidence propounded, including the respondent's sincere remorse, his unblemished record, his extensive pro bono record, his cooperation with the Grievance Committee, and his absence of pecuniary loss. The court also considered the respondent's request to limit the sanction by, *inter alia,* providing credit for the time elapsed under the order of interim suspension. Accordingly, under the totality of circumstances, the respondent was suspended from the practice of law for a period of six months, with credit for the time elapsed under the order of interim suspension.

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.

Traffic and Parking Violations Agency Practice (Continued from page 23)

the Agency is §1690 of the Vehicle & Traffic Law.

There has been much legal debate about the nature and extent of the authority of the judicial hearing officer.

The adjudication of class B misdemeanors pursuant to statute and signed consent forms by judicial hearing officers was upheld. *People v. Davis*, 13 N.Y.3d17, 884 N.Y.S.2d 665 (2009)

The Court of Appeals upheld the authority of the Nassau County Traffic and Parking Violations Agency as an adjunct of the District Court to have judicial hearing officers preside over selected traffic infractions. *Matter of Dolce v. Nassau County Traffic and Parking Violations Agency, 7* N.Y. 3d 492, 859 N.Y.S 2d 663 (2006)

Defense counsel must be prepared for trial and have their client present unless an approval of waiver of appearance has been secured in advance of the trial date. Defense counsel and their client, if required, should arrive at the appointed time for trial and be prepared to budget several hours in order to avoid the possibility of having a default conviction entered against the client.

Approximately 99 percent of the cases represented by defense counsel proceed to disposition without any requirement that the defendant appear. Nonetheless, the 1 percent of cases presents many challenges, which defense counsel with enough advance preparation can anticipate most contingencies regarding the appearance of their client.

The short answer is that it is always better if your client can be present at the trial in order to see the process at work. Your client's appearance and testimony may be integral to your defense. Defense counsel may find that it is easier to have the defendant appear in the ordinary case.

When defense counsel has a compelling reason to request the defendant's appearance to be waived, there is a process to be followed well in advance of the trial date.

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

NYS Testing Opt-Outs (Continued from page 6)

school districts and to remove school officers in cases of "…any willful violation or neglect of duty…or willfully disobeying any decision, order, rule or regulations of the regents or of the commissioner of education…" A willful failure to administer the NYS assessments to all public school students who fall within the specified grade criteria could, in the most extreme instance, result in the Commissioner of Education removing school board members or school administrators or withholding a school district's state aid.

To date, though, there have not been any publicly reported instances in which this drastic remedy has been applied in cases of opt-outs or failing to administer field testing.

What options, then, are available to school districts with students who attend school on NYS testing days but whose parents have opted them out of the NYS assessments? The following is a summary of the limited guidance provided by NYSED about how to address this situation:

1. Districts must record the names of those students who did not participate in the assessments and report them to the state using NYSED's scoring rules addressing students who opt-out of testing.[4]

2. School districts do not have any obligation to provide an alternative location or activities for individual students while the tests are being administered.

3. Once a test is removed from a student's desk, school districts have the *discretion* to allow the student to quietly read a book at his/her desk for the remainder of the testing period.[5]

In summary, although the "Opt-Out Movement" has gained a lot of publicity over the past several years, school districts' obligations regarding testing opt-outs remain, for better or for worse, unchanged unless and until state or federal laws are modified, or more explicit guidance is provided by NYSED setting forth additional options for handling students who opt-out. In the meantime, school boards should consider reviewing their policies and procedures regarding NYS test administration to ensure that they are in compliance with law and the school board's desired direction.

Note: Richard K. Zuckerman is a Partner at the law firm of Lamb & Barnosky, LLP in Melville. He practices in the areas of education law, labor and employment law, and municipal law. Mr. Zuckerman is a former Chair of the New York State Association of School Attorneys (NYSASA) and is a member of the Suffolk County Bar Association.

** I would like to express my sincere appreciation to Alyssa L. Zuckerman, Esq., an attorney in our firm, for her assistance in preparing this article.*

1. *See Schools Expect State Test 'Opt-Outs' to Increase*, Newsday, Mar. 24, 2014, http://www.newsday.com/long-island/schools-expect-state-test-opt-outs-to-increase-1.7481327; *see also Newsday Survey: Thousands of LI Students 'Opt Out' of State Math Exams*, Newsday, http://www.newsday.com/long-island/news-day-survey-thousands-of-li-students-opt-out-of-state-math-exams-1.7904604.

2. *See Barber v. New York*, 2013 U.S. Dist. LEXIS 59335 (W.D.N.Y. 2013) (holding that parents failed to show that students have a First Amendment right to abstain from taking State tests or that the student at-issue was denied Equal Protection because other students may have been treated differently in other school districts); *see also* New York State School Boards Association, *What Board Policies are Relevant to Testing?*, On Board, Dec. 16, 2013 (stating that "…there is no mechanism or authorization in law or regulation that would permit a board to allow parent(s) to 'opt out' a child from a state-required test"), http://www.nyssba.org/news/2013/12/12/on-board-online-december-16-2013/what-board-policies-are-relevant-to-testing/; Guidance Memorandum from Steven E. Katz, Director, Office of State Assessments, NYSED, to Superintendents and Principals re: *Information on Student Participation in State Assessments* (Jan. 2013), http://www.p12.nysed.gov/assessment/ei/2013/student-participation.pdf.

3. NYSED, *Questions and Answers Regarding the Administration of the 2013-14 New York State Alternate Assessment (NYSAA)*, http://www.p12.nysed.gov/assessment/nysaa/2013-14/nysaa-qal.pdf.

4. According to NYSED's *2014 Grades 3-8 Common Core English Language Arts and Mathematics Tests School Administrator's Manual*, if a student was absent for the entire test or refused to take the entire test, the student should receive a final score of "999" indicating that the student has no valid test score. This score will be counted as "not tested" in calculating the school district's participation rate toward meeting the 95% participation rate requirement for AYP purposes.

5. Because there is no definitive guidance about whether the school district must still place a test in front of a student who has opted-out in order to fulfill the school district's obligation to administer the test to each student, many school districts have done so in order to minimize the possibility of legal sanctions being imposed by the State.

Supreme Court Clarifies Public Employees' Free Speech Rights (Continued from page 21)

adverse employment consequences – for providing truthful subpoenaed testimony outside the course of their ordinary job responsibilities…" 134 S.Ct. at 2377.

Prior Supreme Court precedents

The Supreme Court has long held that special rules apply to government employees' free speech rights. Public employees do not forfeit their free speech rights when they take government jobs, but efficient government operation requires that it maintain a significant degree of control over its employees' words and actions in the exercise of their official duties.

In Pickering, *supra,* the Board of Education fired a public high school teacher after his letter criticizing the Board's handling of proposed bond issues and tax increases was published in a local newspaper. He sued, and the Illinois lower courts and Supreme Court rejected his First Amendment arguments. The United States Supreme Court reversed, emphasizing that school finance issues were matters of public concern, and even criticism by public employees of their superiors deserves First Amendment protection in such cases.

The Supreme Court subsequently limited public employees' free speech protection in *Connick v. Myers*, *supra,* and *Garcetti v. Ceballos*, 547 U.S. 410 (2006). The Court in *Connick* held that the speech of a government employee, which led to her firing, was not constitutionally protected because it involved personnel matters, which were not issues of public concern.

Assistant District Attorney Myers, who objected to being transferred to a different department, distributed to her colleagues a questionnaire about office morale and the need for a grievance committee. District Attorney Connick (father of the musical entertainer), fired her for insubordination, and the Court upheld this 5-4. Reversing the lower courts, the Court observed that the district attorney could reasonably believe that the questionnaire would undermine his authority and disrupt close working relationships in the office. It emphasized that federal court was not the appropriate forum in which to review the wisdom of a personnel action.

Garcetti v. Ceballos, *supra*, involved a similar claim by Deputy District Attorney Ceballos, who alleged that he had suffered retaliation for his performance of his duties. As "calendar deputy", Ceballos had to review search warrants when defense attorneys requested this. In a criminal case, he found that a deputy sheriff's affidavit in support of a search warrant contained allegations, which he found not credible. He wrote a memorandum to his superiors questioning the affidavit. However, neither the affiant nor Ceballos's supervisors agreed with him, and the prosecution proceeded. Ceballos testified about the affidavit at a court hearing, following which he was subjected to what he regarded as retaliatory actions: he was reassigned, transferred to another courthouse and denied a promotion.

Since Ceballos's memorandum was written in the course of his employment duties, the district court granted summary judgment in favor of his adversaries. The Ninth Circuit reversed on the grounds that Ceballos's memorandum, which recited what he regarded as government misconduct, was inherently a matter of public concern.

The Supreme Court reversed 5-4 in an opinion by Justice Kennedy. Since Ceballos's memorandum was part of his regular duties as a prosecutor, the Court held that he was not protected against the alleged disciplinary actions: "We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." 547 U.S. at 421. To hold otherwise, as the Ninth Circuit had done, would displace the managerial discretion, which supervisors need to do their job and replace it with intrusive judicial supervision.

Acknowledging that resolving retaliatory termination claims was not straightforward, the Court stated that courts must first determine whether the employee spoke on a subject of public concern. If yes, the courts must decide whether the government entity was justified in treating the employee differently than a member of the general public. Whether the employee's speech dealt with a matter of public concern would depend on whether it occurred in the workplace and whether it was made pursuant to the public employee's job duties.

Note: Professor Thomas Schweitzer is on the Touro Law Center faculty. He graduated from Holy Cross College and received a Ph.D. in Modern European History from the University of Wisconsin and a J.D. from Yale Law School.

Among Us (Continued from page 7)

2014 Super Lawyer. Mr. Winker's area of practice is personal injury general: plaintiff.

Sharon N. Berlin, of Lamb & Barnosky, LLP was selected for inclusion on the New York Super Lawyers list for 2014 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 2014 in the practice area of appellate law.

Jeffrey A. Zankel, of Lamb & Barnosky, LLP was selected for inclusion on the New York Super Lawyers list for 2014 in the practice area of estate planning and probate.

Richard K. Zuckerman, of Lamb & Barnosky**,** LLP was selected for inclusion on the New York Super Lawyers list for 2014 in the practice area of employment and labor law.

The Honorable **Edward G. McCabe**, Special Counsel and **John Christopher**, an Associate with Sahn Ward Coschignano & Baker, PLLC, have been selected by Long Island Business News to receive the "Leadership in Law" Award. Justice McCabe will receive the Lifetime Achievement Award and Mr. Christopher will be recognized in the category of Associate.

Eugene R. Barnosky, was selected as one of the 50 Around 50 Award recipients for 2014 by the *Long Island Business News*, in their annual salute to Long Island business leaders.

We congratulation **Robin S. Abramowitz, Christine Malafi**, **Karen J. Tenenbaum**, and SCBA supporter **Ellen P. Birch** of Realtime Reporting, Inc. who were recognized by Long Island's Business News as 2014 Top 50 Influential Business Women. Congratulations also to SCBA member honoree **Emily Franchina**, Touro Law Center's **Linda Howard Weissman** and SCBA supporter **Colleen West** of Enright Court Reporting, Inc. who were inducted into the Hall of Fame.

James M. Wicks, a partner at Farrell Fritz, has been recognized as a Top 100 *New York – Metro Super Lawyer* for 2014. This is the second consecutive year Mr. Wicks was selected for inclusion. He has been included on the *Super Lawyers* list annually since 2008 in the Business Litigation practice area.

Jennifer B. Cona, managing partner of Genser Dubow Genser & Cona (GDGC), Melville, was named a Super Lawyer in the 2014 New York Metro Super Lawyers publication. The Super Lawyers annual list was included as a special section in The New York Times on October 5. The list represents no more than 5% of lawyers in each state who have attained high peer recognition, professional achievement and meet ethical standards.

Richard K. Zuckerman, of Lamb & Barnosky, LLP has once again been selected by his peers for inclusion in the 2015 edition of "The Best Lawyers in America®" in the practice areas of Education Law, Employment Law - Management, Labor Law - Management and Litigation - Labor and Employment and Best Lawyers' 2014-15 New York City Labor Law - Management "Lawyer of the Year." Only a single lawyer in each practice area, in each community is honored as a "Lawyer of the Year."

Troy Rosasco, a partner at Turley, Redmond, Rosasco & Rosasco, LLP, has been selected to the New York Metro Super Lawyers list as one of the top New York Metro area lawyers for 2014 in the area of Workers Compensation. Each year, no more than five percent of the lawyers in the New York metro area are selected by the research team at Super Lawyers to receive this honor.

Robert M. Harper, of Farrell Fritz, who is also a frequent contributor to *The Suffolk Lawyer*, has been selected to receive *Long Island Business News*' "Leadership in Law" Awards. He will be honored at a gala dinner to be held on Thursday, November 13, 2014 at Crest Hollow Country Club.

Condolences...

To the family of former Professor and New York practice giant **David D. Siegel**. Professor Siegel (Distinguished Professor Emeritus at Albany Law School) taught New York civil practice and procedure at the Academy of Law for many years. He was the authority of many works of legal commentary on New York law, including the treatise *New York Practice* (now in its fifth edition).

We extend our deepest sympathy to **Past President Dennis R. Chase** on the death of his father, Dennis C. Chase, who died on Nov. 5, 2014, after a lengthy and courageous battle with cancer.

New Members...

The Suffolk County Bar Association extends a warm welcome to its newest members: **Leigh-Anne Amore, James B. Bouklas, Nicole J. Brodsky, Joseph M. Champion, III, Nathan D. DeCorpo, Jonathan D. Greenidge, Susan E. Hartmann, Wendy L. Hodor, Sunny Kakwani, Stephen A. Katz, Amy N. Latuga, Peter H. Mayer, IV, Gail J. McNally, Tiffany N. Moseley, Rachel Rattner, Ryan A. Riezenman, Melissa B. Schlactus, Tara N. Senft, Timothy D. Sini, Daniel R. Wasp, Alan G. Weinberg and Christopher Worth.**

The SCBA also welcomes its newest student members and wishes them success in their progress towards a career in the law: **Kathryn Carroll, Beverly Edelman, Vincent J. Esposito, Katharine A. Israel, Joni-Kay Johnson, George Pammer, Peter Reitano, Jessica Rooney, Ross Ruggiero, Annmarie Sitar, James E. Stephens and Richard Wolf**.

LRE Applies to Summer Services (Continued from page 9)

who reversed because Cornwall "does not have an obligation to provide ESY services to non-disabled students and did not have any summer programs for non-disabled students in which the student could be placed." The SRO also denied the parents' claim for tuition reimbursement based on its finding that the summer services offered had been appropriate. The parents sought judicial review, but like the SRO, the U.S. District Court found that Cornwall had appropriately offered the student a summer placement in his LRE because no mainstream program was available or feasible to operate just for this one student. The parents then appealed to the Second Circuit.

The Second Circuit reversed, holding that the mainstream classroom setting was the least restrictive placement appropriate for the student's educational needs and that, on its face, the LRE requirement applies in the same way to extended year placements as it does to regular school year placements. The court thus concluded that the summer program offered by Cornwall was inadequate under IDEA and New York State Law. The court, however, did not go so far as to require Cornwall to create a new mainstream summer program just to serve the needs of one disabled child. Instead, it held that the district should place the student in a private mainstream summer program or a mainstream summer program operated by another school district if these programs are available. If such summer programs are truly unavailable, then the court has the equitable power to deny or greatly reduce a parent's claim to tuition reimbursement. The matter was remanded to the District Court to determine whether tuition reimbursement was appropriate pursuant to the analysis set forth in the court's decision.

As a result of the *Cornwall* decision, we now have clear precedent in this Circuit that the requirement of LRE applies to summer services. What we don't know is how school districts and parents of classified students will react to *Cornwall.* Will school districts develop summer programs for general education and special education students where mainstreaming is possible? Will those districts that have existing general education summer programs alter them to provide mainstreaming opportunities? Will BOCES or private schools develop programs to fill the gap? Only time will tell.

But there is another unanswered question and possible unintended consequence of the court's holding in *Cornwall*: Will school districts give greater scrutiny to the threshold determination of whether or not a classified student qualifies for ESY? After all, a CSE doesn't have to scramble to find a mainstream summer program that is equivalent to the one the student attends during the school year if the student doesn't qualify for summer services. Indeed, in *Cornwall* itself, it appears from the record that the student, although classified as autistic, is making educational gains in a mainstream setting with a one-to-one aide and related services. It is at least arguable that the student would not have qualified for summer services upon a stringent application of the "substantial regression" standard.

Ultimately, will the lesson drawn from *Cornwall* be to take a hard look at initial ESY eligibility rather than placing students in existing special education summer programs that may be found too restrictive? Here again, only time will tell.

Note: Robert H. Cohen is a partner at the law firm of Lamb & Barnosky, LLP in Melville. He practices in the areas of education law, municipal law, appellate practice and commercial litigation. Mr. Cohen is currently the President-Elect of the New York State Association of School Attorneys.

Trusts and Estates Update (Continued from page 12)

maintaining that any delay in the filing of the proceeding was based on her good faith reliance upon lengthy settlement negotiations between the petitioner and the respondents. To this extent, petitioner claimed that the respondents were equitably estopped from asserting the statute of limitations as a defense since they acted wrongfully in reneging on an agreement to equalize the transfers, and that in any event, the statute of limitations was not a bar to all of the causes of action asserted. Finally, the petitioner argued that she should be allowed to pursue discovery in order to bolster the allegations in her petition, and thus, dismissal of the proceeding was premature.

The court opined that pursuant to CPLR 214(3), the statute of limitations for replevin and conversion actions is three years. A conversion takes place when a party, without authorization, exercises ownership rights over the rightful owner's property, to the exclusion of the owner's rights. A cause of action for conversion, or for replevin based on a conversion, accrues on the date the conversion took place, and not when it was or should have been discovered.

Within this context, the court noted that while the alleged conversions began in 2005 and ended something prior to the decedent's death on October 4, 2009, the petitioner did not commence her action until 2013, more than three years after each of the causes of action accrued. The court rejected the petitioner's request that the statute of limitations be tolled, finding that she received preliminary letters testamentary in January, 2010, well before the statute of limitations had expired, but did not commence her cause of action for conversion for another three years. Further, the court rejected the petitioner's claim of equitable tolling of the limitations period, concluding that the petitioner had offered no meaningful support for her allegations that the respondents conducted settlement negotiations with her with the intention of delaying the matter to a time when her claims would be time-barred. Accordingly, the court held that all of petitioner's claims based on conversion and replevin were barred by the statute of limitations.

Further, the court held that petitioner's claims of undue influence, duress, coercion, forgery, money had and received and unjust enrichment, were also time barred, concluding, despite these underlying allegations, that the relief requested in the petition, i.e. return of the property or replevin, was dispositive of the statutory time period for commencing the action.

However, the court held that petitioner's claims based on fraud were not time barred. The statute of limitations for a claim of fraud is the later of six years from the commission of the wrong, or two years from the date the alleged fraud was discovered or could reasonably have been discovered. The court found that there was nothing in the record to indicate that the petitioner knew of the transfers prior to the summer of 2009, when she was first informed of them, and thus, her proceeding commenced in May, 2013, was timely. Further, although the respondents maintained that petitioner's claims of fraud were not sufficiently pled with specific detail to sustain a cause of action, based on a liberal construction of the pleading, and according the petitioner every possible favorable inference to determine whether the facts as alleged fir within any cognizable legal theory, the court disagreed.

***In re Estate of Friedricks,* NYLJ, July 25, 2014, at p. 34 (Sur. Ct. Nassau County).**

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

Role of the Forensic Accountant in Litigation (Continued from page 17)

and integrate new information into existing theories or to assist the attorney with trial preparation.

An effective forensic accountant must be ready to defend the expert report, expert findings, conclusions and opinions. The forensic accountant should understand the difference between a deposition and trial and prepare accordingly.

Settlement Negotiations

The vast majority of matters do not make it to trial. An effective forensic accountant will continuously update the attorneys on the strengths and weaknesses of the case as it progresses. This can be invaluable to an attorney during the negotiation phase, and help structure any appropriate counter offers. The forensic accountant may be asked to evaluate any tax ramifications of a potential settlement offer.

Expert report

The testifying expert may be required to present an expert report containing the expert's opinions. If the case is being litigated in Federal Court, a written report will be required pursuant to the Federal Rules of Civil Procedure 26(a)(2)(B). This expert report must be clear and concise, based on applying reliable theories and methodologies to the facts that are learned during the assignment. The expert report should serve as an effective tool in supporting the opinions that the expert has reached. The forensic accountant's report may serve as the roadmap for the expert's testimony in court or even facilitate a favorable out-of-court settlement.

Trial

The forensic accountant must be able to articulate his findings to the trier of fact at trial. This is best achieved by effective verbal communication supported by the use of visual aids. For the forensic accountant, verbal communication is the ability to convey, in a clear and concise manner, complex accounting and financial issues. The forensic accountant's audience can be a judge, jury or arbitrator. Therefore, the forensic accountant must understand who his audience is to be effective.

Visual aids are a very useful tool for the forensic accountant. There is truth in the saying that "a picture is worth a thousand words." A picture tells a story just as well, if not better, than a large amount of descriptive text. Studies have shown that approximately 65 percent of us are visual learners who are best at collecting information with our eyes. Judges and jurors are no different. Visual aids can take the form of flow charts, entity charts, genograms and anything else the forensic accountant feels can visually put forth his opinions in the matter.

As with depositions, the forensic accountant can assist retaining attorneys at trial by preparing questions for the opposition's financial witnesses. Attorneys can often attain distinct advantages at the negotiating table and at trial by being able to present quantifiable data in clear, cohesive terms. Retaining a qualified forensic accountant can play a vital role in helping the attorney achieve these goals.

Note: Andrew P. Ross, CPA, CFE, CVA, PFS, is a Partner at Gettry Marcus CPA, P.C. He is a Certified Public Accountant, Certified Fraud Examiner and Certified Valuation Analyst and a member in the firm's Business Valuation & Litigation Services Group. With over 30 years of experience, Mr. Ross provides audit, tax, and litigation services to his clients, many of whom are in the service, manufacturing, and wholesale industries. Andy can be contacted at aross@gettrymarcus.com or (516) 364-3390 x246.

Note: James Stewart, CPA, is an associate at Gettry Marcus CPA, P.C. and a member of the firm's Business Valuation & Litigation Services Group. Mr. Stewart provides forensic accounting services in variety of litigation matters. Jimmy can be contacted at jstewart@gettrymarcus.com or (516) 364-3390 x215.

[1] Use of the indefinite pronoun "his" and "him" throughout this article are used to mean both men and women. There is no intended disrespect to any individual who may feel she is not possibly covered by the usage of this term.

Managing Email in Outlook 2013 (Continued from page 12)

folder *and* label them with a specific category), click ***Add Action***. You can also assign a keyboard shortcut to the Quick Step using the Shortcut key box. When you are finished creating your Quick Step, click ***Save***.

When you create new Quick Steps, they appear under the Outlook **Home** tab at the top of the gallery in the Quick Steps group. You can rearrange your Quick Steps using the Manage Quick Steps dialog box.

Once your Quick Step is created, it will be much easier to take action on your email messages. For example, if I want to copy an email message from my Inbox to my Action folder, rather than clicking on ***Move***, then ***Copy to Folder*** and then choosing my Action folder, I can simply click on my ***Action*** Quick Step.

While Rules and Quick Steps can help you organize and manage your email inbox, you'll still need an efficient way to deal with those messages and take action in a timely manner. Don't forget to schedule time to take action on those email messages!

Note: Allison C. Shields, Esq. is the President of Legal Ease Consulting, Inc., which provides practice management, marketing and business development, coaching and consulting services for lawyers and law firms nationwide. Learn more at her website, www.LawyerMeltdown.com or blog at www.LegalEaseConsulting.com. This article was adapted from the upcoming Law Practice Division book, "How to Do More in Less Time: The Complete Guide to Increasing Your Productivity and Improving Your Bottom Line," by Allison C. Shields and Daniel J. Siegel and previously appeared on the Law Technology Today blog.

In Memoriam: Dorothy Paine Ceparano *(Continued from page 1)*

monthly meeting following Dorothy's death. For 25 years, Dorothy had taken her seat in the Bar Association's boardroom just to the right of whoever was then serving as the Academy Dean. It was strange not seeing her there. For so many years, Dorothy had "presided" over our monthly meetings. Not officially of course, that was the role of the Academy Dean. But we all knew that, while the Dean acted as the *official* chair, it was really Dorothy who, to borrow a well-known phrase from computer technology, ran things "in the background."

At that meeting, current Dean, the Hon. James Flanagan, decided to honor Dorothy by asking the 40 or so Academy volunteers present whether they would like to speak about their memories of her. Each of us did. There was more than a little emotion in the voices of those who spoke, and by the time we all finished, there were more than a few of us who seemed to be fighting back tears. One person, I don't remember who, nor is it important, said something that I thought "captured" Dorothy particularly well. Dorothy, this person said, was one of those rare individuals about whom *nobody* had a bad word to say.

The description was not surprising. On a personal level, she was always kind, friendly and gracious to everyone she met. I never heard her say a bad word about anyone. Dorothy had a way of lighting up with enthusiasm when you walked into her office. And she was never too busy to stop whatever she was doing and speak with you.

But Dorothy's personal qualities were not the main reason she was held in such great affection and admiration by those of us who came to know her. It was the remarkable way in which she performed her role as the Academy's Executive Director that earned her the respect and admiration of the hundreds of attorneys and others who worked with her over the years.

From an organizational, administrative and interpersonal point of view, she was extraordinary. Each year the Academy typically offers over 100 substantive CLE programs. Judging from the evaluation forms collected at the end of these programs, they have been almost uniformly well received. Dorothy's consistent ability over a 25 year period to act as the catalyst and the focal point for recruiting enthusiastic volunteer attorneys, generating program topics, collecting, organizing and publishing CLE materials, while simultaneously ensuring that the Academy remained fiscally viable, was recognized, appreciated and admired by all who worked with her.

One of Dorothy's primary roles was to get the word out on Academy programs to the Academy's target "market," the attorneys of the Suffolk County Bar Association, and to make sure that an advertised program was described in a way that was both accurate and appealing. Dorothy, a former English teacher, was a master at it. All one had to do was to provide Dorothy with a few words to describe an upcoming CLE program and she would create a program flyer that would not only capture the program's essential topics and objectives but that also would make the reader feel the program should not be missed.

I remember reading that Steve Jobs liked to describe Apple Computer's products as the *perfect intersection of form and function*. I think that was the way that Dorothy approached the job of creating Academy and CLE publicity. A perfect illustration of this was the opening paragraphs of her September column for *The Suffolk Lawyer*, her last, entitled "Changing Times at The Suffolk Academy of Law." She begins this beautifully written and informative article by quoting short passages from Shakespeare and Victor Hugo: "Resisting alteration 'when it alteration finds' may, as Shakespeare tells us, be an apt definition of love. For continuing legal education, however, Victor Hugo may be more on point..." This was vintage Dorothy. If you have a chance, read or re-read this article and see if you don't agree about her almost poetic manner of expression.

Speaking of *The Suffolk Lawyer*, those of us who have been around the Bar for a while remember that for 10 years Dorothy served our Bar Association simultaneously as both the Academy's Executive Director and, almost incredibly, as Editor-In-Chief of *The Suffolk Lawyer.* She began her stint in both roles in 1996 when the prior editor retired. Dorothy was asked to take over for a "few months" until a new editor could be found. Well, as fate would have it, a few months turned into 10 years. During these 10 years, Dorothy served our Association in both of these pivotal roles with dedication and academic and journalistic excellence.

Just before she handed over the reins to our current Editor-in-Chief, Laura Lane, in 2006, I remember asking Dorothy how she was able to handle both of these labor-intensive responsibilities, which were fraught with multiple recurring deadlines. At that time I was serving as Academy Dean and so had firsthand knowledge of the enormous time and effort it took to make sure just the Academy ran smoothly. This point was driven home when I often saw Dorothy working in her office as I was leaving the Bar after an evening CLE program. She replied to my question in her typical matter-of-fact style that she often found herself working until sunrise and that she spent three weekends each month making sure that copy for *The Suffolk Lawyer* was sent to the publisher on time for publication.

I've been told that Dorothy never complained that serving as Editor for a "few months" had morphed into 10 years but that she simply performed both her Executive Director and Editor-in-Chief roles without fuss and, characteristically, without fanfare.

The many attorneys who knew Dorothy know that our Bar Association has been privileged to have had Dorothy Paine Ceparano serve as our Academy's Executive Director and our newspaper's editor for the past many years. We know that she was in large part responsible for helping our Association to establish a reputation for professional academic and journalistic excellence throughout the state. We recognize that, with her passing, we have suffered an enormous loss.

On a personal level, I am grateful and feel privileged that I came to know and become friends with Dorothy, and I will sorely miss her. After hearing the sincere and heartfelt sentiments of my fellow Academy volunteers and others concerning this remarkable woman, I know these sentiments are shared by many.

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

13 Thursday — **Representing Veterans**, 6:00 – 9:00 p.m. Sign in and Registration at 5:30 p.m.

14 Friday — **Meeting of Academy Officers & Volunteers**, 7:30- 9:00 a.m. Breakfast Buffet. All SCBA members welcome**.**

18 Tuesday — **Real Property Update** 6:00 – 9:00 p.m. (Live & by Webcast). Light Supper. Sign in and Registration at 5:30 p.m.
Curriculum Committee Meeting – 5:30 p.m.

DECEMBER

3 Wednesday — **NYS Residency Audits: A View from the Inside Out**, 9:00 – 11:00 a.m. Breakfast. Sign in and Registration at 8:30 a.m.

5 Friday — **Meeting of Academy Officers & Volunteers**, 7:30 – 9:00 a.m. Breakfast Buffet. All SCBA members welcome.

8 Monday — **Annual School Law Conference** at Hyatt Regency – Hauppauge. 9:00 a.m. – 3:30 p.m. Continental Breakfast and Lunch. Sign in and Registration at 8:30 a.m.

11 Thursday — **Vacating Defaults in Foreclosures** (Live & by Webcast. Light dinner. Early start at 4:30 p.m. Registration and sign in.

Debtor Slammed for Outrageous Conduct *(Continued from page 23)*

"Attornatus Privatus," signed them purportedly as a judge of the state court.

Upon receiving the debtor's notice and these fabricated documents, Judge Trust determined that the state court could not have entered them. He then brought a *sua sponte* order to show cause as to why the debtor should not be sanctioned for acting in bad faith, vexatiously, wantonly, or for oppressive reasons and attempting to mislead this court, among other things.

In response to the order to show cause, the debtor filed over 500 pages of exhibits, which Judge Trust noted were "irrelevant to his affirmative representation to this Court that the Foreclosure Judgment had been vacated." In his lengthy affidavit, the debtor referred to his so-called "judgment" as a "Judgment of the Court of Record."

At the show cause hearing, when questioned by Judge Trust as to the validity of the so-called "judgment," the debtor insisted that it was a lawful judgment.

When Judge Trust asked him what court entered his "judgment," the debtor replied, "The People's Court!" The debtor could not explain why he made the papers he prepared to look as they had been entered by the state court.

Judge Trust determined that the debtor had created his own court and manufactured his own court orders, something that the state court had previously warned him against in the strongest terms.

Judge Trust quoted the state court judge who previously admonished the debtor as having "evidently conjured up an alternative legal universe in which he is the sovereign and the courts merely exist as ministerial bodies to do his bidding."

"Debtor's conduct before this Court was entirely without color of law and clearly motivated by improper purposes," stated Judge Trust. "His goal was to mislead this Court into keeping this bankruptcy case open, so that he could continue to obtain the protections of the automatic stay."

Also noting his displeasure at the debtor for his courtroom behavior, Judge Trust commented that the debtor exhibited disrespect for the Court by repeatedly interrupting the Court through the show cause hearing. The debtor continuously objected to opposing counsel's argument, even objecting before counsel began to speak. The debtor refused to stand when addressing the Court, despite several reminders to do so, and disrespectfully asked the Court inappropriate questions, such as "Why don't you ask me what you don't understand?" The debtor even objected to the Court's rulings while they were being made. Judge Trust reprimanded the debtor at the hearing for his improper courtroom conduct.

In addition to sanctioning the debtor $10,000 for the debtor's conduct in attempting to mislead the court and for his repeated lack of respect for the Court and the bankruptcy process, Judge Trust also awarded attorney's fees to the mortgagee.

Interestingly, at the show cause hearing, Judge Trust stated that the debtor should be held in contempt. However, "upon further review," he determined that a monetary sanction was more appropriate.

Not only did the judge dismiss the case, he prohibited the debtor from filing another case for at least a year.

I don't recall a single case in this district where a judge was as piqued and infuriated by a debtor as this one.

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-nine years. He has offices in Melville, Coram, Patchogue and Valley Stream. (516) 496-0800. He can be reached at CraigR@CraigRobins-Law.com. Please visit his Bankruptcy Website: www.BankruptcyCanHelp.com and his Bankruptcy Blog: www.LongIslandBankruptcyBlog.com.