



THE SUFFOLK LAWYER

THE OFFICIAL PUBLICATION OF THE SUFFOLK COUNTY BAR ASSOCIATION

DEDICATED TO LEGAL EXCELLENCE SINCE 1908

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Is LegalZoom and Others Like It Illegal?

By Glenn P. Warmuth

Just this morning on the way to work I heard a commercial for LegalZoom on the radio. I knew I would be writing this article today so I listened more carefully. According to LegalZoom's advertising, LegalZoom offers "an easier, less expensive option than using a

traditional lawyer." LegalZoom's advertisements consistently state that LegalZoom is not a law firm and that it "provides self-help services at your specific direction."

LegalZoom creates legal documents by having clients answer questions, which are posed to the client by a computer in the form of an online question-

naire. The computer uses a decision tree to determine what questions to ask. For example, if the client wants a will the computer may ask whether the client had children. If the client answers yes, then the computer will ask questions regarding the children. If the client answers no, the computer will move on to a different topic. At the end of the process the computer compiles the information and creates a draft of a will. The same formula is used to create other legal documents including trusts, leases, business formation documents, etc. Once the document is created a LegalZoom employee proofreads the finished document and makes formatting corrections.

The obvious question is whether these services violate New York's prohibition on the unauthorized practice of law, which is set out in Judiciary Law §478. LegalZoom equates the basic process



Glenn P. Warmuth

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Judiciary Night a big success once again

Photo by Barry Smolowitz



Enjoying Judiciary Night were from left, Executive Director Jane LaCova, Judges Randy Sue Marver and William B. Rebolini and SCBA President Donna England. See more photos on pages 20-21.

PRESIDENT'S MESSAGE

Being a SCBA Member is Important!

By Donna England

While I know that I am preaching to the choir, I would like to make all of you ambassadors of our association. And I'd like to give to you the facts and figures that make our membership so important to our profession.

This past month I attended the Long Island Hispanic Bar Dinner Dance, the Amistad Long Island Black Bar Association Gala and a monthly meeting of the Suffolk County Matrimonial Bar Association. The Hispanic and Amistad bars celebrated their heritage, culture and achievements over the past 50 years. Each event was enjoyable, entertain-

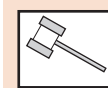
ing and informative. However, the success of the Hispanic and black legal community is due to the camaraderie and the spirit of joy that prevails.

The Matrimonial Bar strives to stay current in the ever changing law through legislation and case law. What's most important to the members is to get to know their fellow attorneys and judges, who practice matrimonial law and to share the trials and tribulations with each other. There is a strong esprit de corps among the attorneys who work in this emotionally charged and com-

(Continued on page 27)



Donna England



BAR EVENTS

Pro Bono Recognition Night

Thursday, Oct. 29, at 6 p.m.
Captain Bill's Restaurant, Bay Shore

The SCBA's Pro Bono Foundation working in concert with Nassau/Suffolk Law Services will honor the pro bono attorneys who assist the poor and disabled in our community.



SCBA's Holiday Party

Friday, Dec. 11, from 4 to 7 p.m.
Bar Center

Celebrate the season with friends and colleagues at the SCBA's annual holiday get together.

FOCUS ON
**PROFESSIONAL LIABILITY
DEFENSE**
SPECIAL EDITION



Suffolk County Bar Association

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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."

Write for The Suffolk Lawyer

Did you ever wonder how you could get involved in your bar association's monthly newspaper? Do you have a great idea for an article or believe your colleagues would benefit from information you've recently learned? Or do you just enjoy writing?

You too can write for *The Suffolk Lawyer*. Writing for the paper is open to all members and doing so is encouraged. *The Suffolk Lawyer* is a reflection of the fine members that belong to the Suffolk County Bar Association. Why not get involved? For additional information please contact Editor-in-Chief Laura Lane at scbanews@optonline.net or call (516)376-2108. Look forward to hearing from you!

Important Information from the Lawyers Helping Lawyers Committee

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

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 2015

05 Thursday	Animal Law Committee, 5:30 p.m., EBT Room
05 Thursday	Bench Bar Committee, 6:00 p.m., Board Room
06 Friday	Academy of Law meeting, 7:30 a.m., Board Room
09 Monday	Executive Committee meeting, 5:30 p.m., Board Room
10 Tuesday	Surrogate's Court Committee, 6:00 p.m., Board Room
11 Wednesday	Officers closed – Veterans Day
12 Thursday	Elder Law Committee, 12:15 p.m., Great Hall
16 Monday	Board of Directors meeting, 5:30 p.m., Board Room
17 Tuesday	Young Lawyers Committee meeting, 6:00 p.m., EBT Room
18 Wednesday	Education Law Committee, 12:30 p.m., Board Room
18 Wednesday	Leadership Development Committee, 6:00 p.m., Board Room
19 Thursday	Neuroscience & The Law Committee, 6:00p.m., Board Room

DECEMBER 2015

01 Tuesday	Surrogate's Court Committee, 6:00 p.m., Board Room
04 Friday	Academy of Law meeting, 7:30 a.m., Board Room
07 Monday	Executive Committee Meeting, 5:30 p.m., Board Room
10 Thursday	Elder Law Committee meeting, 6:00 p.m., Great Hall
11 Friday	SCBA's Holiday Party, featuring the Just Cause Band, 4:00 p.m. – 7:00 p.m. All invited to attend.
14 Monday	Board of Directors meeting, 5:30 p.m., Board Room



THE SUFFOLK LAWYER

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NEWS

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MATRIMONIAL/FAMILY

A Grandma's Boy? In New York, Unlikely

By Vesselin Mitev

Ask a lawyer, or another lawyer, or a law school student, or your plumber's assistant, what rights, if any, grandparents have when it comes to child custody or visitation, and you are liable to get four different answers, all of which are likely to be incorrect.

The popular "jailhouse" answer is that grandparents have essentially no rights to even visit their grandchildren; this is statutorily wrong (true at common law and no longer so), but nevertheless the pervasive, popular view. Two laws govern these proceedings: Domestic Relations Law Section 72 and Family Court Act Section 651, with DRL 72 providing the relevant language:

"1. Where either or both the parents of a minor child, residing within this

state, is or are deceased, or where circumstances show that conditions exist which equity would see fit to intervene, a grandparent or the grandparents of the child may apply..." to the court for visitation "rights," provided such visitation is in the child's best interests.

Subsection (2) also provides a catch-all clause of "extraordinary circumstances," which puts the onus on the grandparents to demonstrate, "to the satisfaction of the court," the existence of such circumstances (left undefined, except for one such circumstance), which is defined as:

"a prolonged separation of the respondent parent and the child for at least twenty-four continuous



Vesselin Mitev

months during which the parent voluntarily relinquished care and control of the child and the child resided in the household of the petitioner grandparent or grandparents..."

with the clarification that the court may find such extraordinary circumstances even where the separation was less than two years.

So what happens when a run-of-the-mill petition is brought by a grandparent alleging that said grandparent has not had visitation with the grandchildren (but not any extraordinary circumstances), but both parents are alive, and one parent objects to visitation? In such a case, none of the statutory automatic triggers apply, since neither parent is "deceased," nor has there been a

continuous separation from the parents and the children.

Regardless of which side of the petition one finds themselves, the next step is, although mandatory, many times glossed over either due to unfamiliarity with the law, or simple expedience in disposing of a case: the court, according to the court of Appeals¹ in *Emanuel S. v. Joseph E.*, must first determine the issue of standing before making any further determination.

In other words, before the court makes any inquiry into whether or not visitation would be in the child's best interests, the court must first determine whether the path to the courthouse is even available to the petitioner grandparent. In the above example, since both parents are alive and the children live with the parents, only the "equity" clause of DRL Section 72 remains as an option.

(Continued on page 25)

Meet Your SCBA Colleague *Laura C. Golightly*, a Hauppauge sole practitioner, and a litigator focusing on matrimonial and family law, entered the legal profession for the love of it and to help others.

By Laura Lane

You didn't go to law school after obtaining a bachelor's degree, right? No. I was actually doing some accounting work, but I made the decision to go to law school while I was going through my own divorce. I watched the attorneys, how they worked together and with the courts. There were things I didn't like about the process and I thought if I was an attorney maybe I could effect change and be of assistance to the clients.

So were you totally committed after your divorce to become an attorney? I considered getting a graduate degree in teaching but then I thought of applying to law school to see if I could get in. When I did get into Touro I thought it was meant to be. Had I not gone through the divorce I'm not sure if I'd have made my way to the legal profession.

Was there anyone instrumental in mentoring you? Professor Silverman ran the Family Law Clinic at Touro. He was of great assistance in helping me to become involved in the intern and extern programs. I ended up interning at Nassau/Suffolk Law Services where I met Margaret Schaesler, who later asked me to work in their domestic violence unit. Margaret is one of the best lawyers I know and had a huge influence on what type of lawyer I am today.

Backtracking, what did you do as an intern at Nassau/Suffolk Law Services? I worked in the Law Clinic and under the supervision of an attorney worked on orders of protection. Students would go to court on behalf of clients and litigate with the supervising attorney there. I got to be

an attorney before I was one. It was a great experience and I got plenty of court experience. I also signed up for a class where I was able to work in the Family Court Clinic to do child support litigation.

What do you enjoy about being an attorney? Every day is an adventure filled with surprises, no matter how much you prepare. I enjoy the contact with my clients and my colleagues. I enjoy getting the resolution of the case, settling the case one way or another.

As a litigator in the matrimonial and family law arena do you find you need to overcome any challenges? It can be disenchanting. The clients, who are often from difficult socioeconomic situations, are there for a reason and you try to get done what needs to be done. You need to know your boundaries and make sure the job doesn't affect your personal life.

You stayed at Nassau/Suffolk Law Services for three years. Why did you leave? Margaret left as supervising attorney and funding was always an issue since it is a non-profit. They weren't sure what unit would continue. I went to work for attorney Thomas Campagna who had an excellent reputation. I learned a great deal from him working as an associate. He had a big caseload, which was an excellent teacher.

In 2007 you began your own practice. Yes, that was always a dream of mine. I have gotten a lot of exposure in the last two jobs so I thought it was time to hang out my shingle. There were challenges, financial for one, because now I wasn't getting a steady paycheck.

When I moved into the suite in Hauppauge Margaret was there. She threw some work my way. Then the Family Court assigned me to the counsel panel and the Law Guardian panel. I represented children for the first time.

You closed your office when an opportunity to be a law clerk came your way for Justice John C. Bivona. Why? I thought I'd regret it if I didn't. It was such a unique appointment to be in the matrimonial part and be a Supreme Court Justice law clerk. I actually was surprised I was picked.

Why? I had been in his courtroom as an attorney and law guardian but the position was competitive. When I accepted the job I knew Justice Bivona's term would be up in a few years. At 76 he'd have to retire, so I knew the job was for a limited amount of time. Working for him was wonderful. The only reason why I left was because I wasn't comfortable waiting to see if another position would be open after he retired. Last June I went back to my own practice.

How did you get involved in the SCBA? I used to go to the Academy's CLEs but then one of the co-chairs of the Matrimonial Committee asked if I'd be a co-chair. I did that twice. Then I got more involved on the Bench Bar Committee, which was great. Donna England was on the Executive Board at the time and suggested I consider applying for a board position. I was turned down the first time but decided to try again to be a director. I was chosen this year.

How has your experience been as a director? It's been great. I believe mem-



Laura C. Golightly

bers need a voice and being on a committee or a director you can accomplish what needs to be changed. I am meeting people from different areas of law as a director, which I wasn't able to do before on the committees. It's opened up my legal professional network.

What do you like about being a member of the SCBA? Membership offers many benefits and support. You receive support from your colleagues. There are many committees and task forces working on issues that members have. The SCBA should be an attorney's go-to organization to help make us better attorneys.

Any other reasons why you'd recommend people join? It's important to belong to an organization like the SCBA. If you practice in Suffolk you want to take advantage of what the bar association has to offer. It's hard because people are busy, but that shouldn't prevent you from being a member and being as active as you can be. I've been lucky. The people I've worked with over the years have gotten me where I am today; including those I've known at the SCBA.

BENCH BRIEFS

By Elaine Colavito

SUFFOLK COUNTY SUPREME COURT

Honorable Paul J. Baisley, Jr.

Motion to renew granted; law office failure as reasonable justification for failure to present facts on prior motion; upon renewal, motion for partial summary judgment on issue of liability granted.

In *Steven J. DeMartino v. Thomas E. DiFolco and Kevin W. Gruber*, Index No.: 68753/2014, decided on September 30, 2015, the court granted plaintiff's motion for renewal of his prior motion for summary judgment and upon renewal granted partial summary judgment on the issue of liability.

By order dated June 8, 2015, this court denied a motion by plaintiff for partial summary judgment in his favor on the issue of liability, finding that plaintiff, whose affidavit stated that he and defendant were traveling in the same direction at the time of the accident, failed to meet his prima facie burden of eliminating triable issues from the case. Plaintiff now moved for leave to renew and reargue, arguing that the statement contained in his previously submitted affidavit that he and the defendant were traveling in the same direction at the same time of the

accident was a typographical error. In support of his application, he now submitted a corrected affidavit, which stated, in pertinent part, that the accident occurred when the defendant attempted to make a left turn from the westbound lane of Montauk highway into a nearby gas station and struck the side of plaintiff's motorcycle, which was traveling on the east bound side of the roadway.

In rendering its decision, the court noted that a motion for leave to renew was based upon new facts not offered on the prior motion that would change the prior determination and must contain a reasonable justification for the failure to present such facts on the prior motion. In granting the motion to renew, the court concluded that law office failure was a reasonable justification. Upon renewal, the court granted partial summary judgment on the issue of liability finding that a driver who had the right-of-way was entitled to anticipate that other drivers will obey the traffic laws requiring them to yield the right-of-way to an oncoming vehicle.

Motion for summary judgment denied; material issue of fact existed with regard to the training of Target employees as to the



Elaine Colavito

production, sales and service of Starbucks coffee and whether Starbucks had supervisory control over the manner and method that the Target employees served Starbucks coffee.

In *Lisa Ann Finti v. Target Corporation and Starbucks Corporation d/b/a Starbucks*, Index No.: 5797/2014, decided on May 7, 2015, the court denied the motion by defendant, Starbucks Corporation s/h/a Starbucks Corporation d/b/a Starbucks.

In rendering its decision, the court noted that plaintiff commenced this action to recover damages for personal injuries she allegedly sustained when a cup of coffee spilled onto her left hand at the Starbucks counter located within the South Setauket Target store. The complaint alleged in pertinent part that the defendant, Starbucks, owned and operated a coffee shop within the Target store and the failure to properly train its personnel caused an extremely hot cup of coffee with an improperly placed lid to spill and burn plaintiff.

Starbucks moved for an order granting summary judgment in its favor on the grounds that it did not own, manage, control, maintain or employ any personnel at the subject property at the time of plain-

tiff's accident. Plaintiff opposed the motion maintaining that substantial issues existed with regard to the operation and control of the Starbucks located within the Target store. The court noted that the parties' submissions established that the relationship between Target and Starbucks was governed by a licensing agreement. Unfortunately, that agreement had not been provided as defendants maintained that it was a trade secret and proprietary in nature.

In denying the motion, the court noted that an affidavit was submitted wherein it was stated that Starbucks was solely owned, operated, managed, maintained and staffed by Target, but conceded that Starbucks provided training to Target baristas. Here, plaintiff demonstrated that a material issue of fact existed with regard to the training of Target employees as to the production, sales and service of Starbucks coffee and whether Starbucks had supervisory control over the manner and method that the Target employees served Starbucks coffee.

Honorable Peter H. Mayer

Plaintiff affirmatively placed her physical and mental issue in condition; documents sought by defendants were material and necessary to defense.

(Continued on page 24)

INSIDE THE COURTS

Post-Felony Conviction Transfer of Firearms

By Stephen L. Ukeiley

It is well established under federal law that a felon may not possess a firearm (*see* 18 U.S.C. § 922(g)). However, the statute omits any instruction on how to dispose of the firearms following conviction. Thus, the issue arises whether a defendant may sell or otherwise transfer a firearm post-conviction without court approval. In what appears to be a case of first impression, the United States Supreme Court held unanimously, with limited restrictions, that a defendant has the right to oversee the disposal of his or her firearms post-felony conviction.

Convicted felons may not possess weapons

As a general matter, at the conclusion of a case the court may authorize the return of property obtained in connection with the investigation to its rightful owner or designee (*see, e.g., Rufu v. United States*, 20 F.3d 63 [2d Cir 1994]). However, Congress placed restrictions on the court's ability to return firearms with the enactment of 18 U.S.C. § 922(g). Section 922(g) makes it unlawful for a convicted felon to possess a firearm and/or ammunition. Under federal law, a "firearm" is defined as "any weapon (including starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive" or the frame or receiver of any such weapon, a firearm muffler or silencer, or any destructive device, including, but not limited to, bombs, grenades and propelled

rockets with a charge in excess of four (4) ounces (18 U.S.C. § 921(3),(4)).

The felony conviction need not be related to a weapons charge to invoke the mandatory post-conviction relinquishment. Towards this end, section 922(g) succinctly states that a defendant convicted of any felony is prohibited from "possessing" or "receiving" a firearm or ammunition. The transfer of the firearm is made more complex where the government is in possession of the weapon or where the defendant surrendered the firearm as a condition for his release pending trial. The latter was the situation in *Henderson v. United States* where the defendant, after serving his prison sentence, moved the court to have the firearms delivered to his friend, who intended to purchase them from the defendant. Alternatively, the defendant requested that they be transferred to his wife.

The underlying facts of the case were straightforward. The defendant was a former U.S. Border Patrol agent charged with felony distribution of marijuana. As a condition for his release, the defendant turned over to the FBI more than one dozen firearms with an estimated value of \$3,500 (135 S.Ct. 1780 [2015]; *see* Sam Hananel, *Supreme Court Says Convicted Felons Can Sell Their Guns*, May 18, 2015). When the defendant later plead guilty to the felony distribution of the



Stephen L. Ukeiley

marijuana charge, the court was prohibited from returning the firearms to defendant (*see* 18 U.S.C. § 922(g)). The District Court further refused to transfer the guns to either defendant's wife or to the friend of defendant. The federal court opined that permitting the defendant to dictate where the firearms would be transferred was tantamount to defendant's continued "possession," albeit constructively, of the guns which is expressly prohibited by law (135 S.Ct. 1780).

The legislative intent behind section 922(g) was to ensure that felons did not possess firearms for fear they would not use them in a responsible manner (*Small v. United States*, 544 U.S. 385 [2005]). In *Henderson*, the Supreme Court presumably granted certiorari to resolve the split on this issue in the Circuits. The Second (New York), Fifth (Louisiana) and Seventh Circuits (Illinois) had held that a similar transfer of firearms was permitted pursuant to section 922(g), while the Eighth (Missouri) and Eleventh Circuits (Georgia) prohibited such transfers.

In *Henderson*, the parties agreed that a "felon cannot evade the strictures of § 922(g) by arranging a sham transfer that leaves him in effective control of his guns" (*Henderson*, 135 S.Ct. at 1780). However, the defendant argued although the law prohibited him from "possessing" a firearm, it in no way, expressly or impliedly, deprived him of his right to own firearms or restrict

his ability to transfer, discard or otherwise dispose of his property. The government countered that the transfer of firearms to a friend, associate or close family member contravenes the spirit and intent of section 922(g) as it was likely probable that the defendant would select recipients who were willing to grant him access to the firearms beyond the purview of the court. In other words, the government sought an order that excluded the defendant from the transfer process altogether, and, in the process, eliminated the temptation of defendant having control or influence over the firearms.

Gun transfer or sale

The Supreme Court limited its decision to matters where the court was in possession of the firearms at issue, or otherwise capable of supervising their transfer, following a felony conviction. In those circumstances, Justice Kagan, writing for the unanimous court, reasoned that 18 U.S.C. § 922(g) merely prohibited possession of firearms and ammunition, actual and constructive. Accordingly, provided the trial court was satisfied that the intended recipient, whether an independent gun dealer or individual, was legally permitted to possess the weapons and would not grant defendant access or influence over them, then the court may heed the wishes of the defendant and transfer the firearms to the recipient of defendant's choosing (*Henderson*, 2015 U.S. at 3199, *13-14).

(Continued on page 24)

SCBA Honors Judiciary and Former Chief Administrative Judge Hon. A. Gail Prudenti

Photo by Barry Smolowitz

By Sarah Jane LaCova

The Suffolk County Bar Association held its annual Judiciary Night at the Larkfield in East Northport on October 8, 2015. This year was a very special event, as the Board of Directors chose to honor our former

Chief Administrative Judge, the Honorable A. Gail Prudenti, one of “our own” – a long time member of the Association who has had an extraordinary judicial career. Justice Prudenti has entered a new chapter in her life bringing her love of the law and public service experiences to the Maurice A. Dean School of Law at Hofstra University.

More than 200 members and guests of the Association attended the memorable evening to honor Judge Prudenti and the members of Suffolk County’s judiciary, who have dedicated themselves to public service on the bench. Justice Prudenti acknowledged some of members of the judiciary she has known and worked with over the years. In particular, we would like to thank our Presiding Justice Randall T. Eng, who braves the Long Island Expressway for hours to come to our special events, and our District Administrative Judge C. Randall Hinrichs for his dedicated service to



Enjoying Judiciary Night from left was, Justices Randy Sue Marver and William B. Rebolini, District Administration Judge C. Randall Hinrichs and past SCBA President Arthur E. Shulman.

the citizens of Suffolk County and for his continued friendship to the Bar Association.

SCBA President Donna England said Judiciary Night is always a special occasion, and we are so very fortunate to have in our county a dedicated and engaged judiciary committed to professionalism, compassion and

the administrative of justice.

Many kudos to the Larkfield, whose chefs prepared culinary magic for our guests and we appreciated how the maitre d’ and staff worked so diligently and were always courteous and cooperative. They all contributed to making our Judiciary Night a spectacular evening.

The Suffolk Lawyer wishes to thank Professional Liability Defense Special Section Editor Vincent Messina for contributing his time, effort and expertise to our November issue.



Join our Leadership

Nominating Committee Seeks Candidates for SCBA 2016-17 Board of Directors

Each year the membership of the SCBA elects a President Elect, two Vice Presidents, a Treasurer, Secretary and four Directors. The Directors’ terms are for three years, and the officer positions are for one year. The next election will take place on Monday, May 2, 2016 at the SCBA’s Annual Meeting.

The Nominating Committee is now seeking nominations for the Directors’ positions (four with terms expiring 2019). The basic requirements for eligibility for election to the Board of Directors is that the person has to be an active member of the association for at least five years and a member of a committee, task force, recognized foundation of the association, an officer of the Suffolk Academy of law, or any combination thereof, for at least four years during such period.

If you are interested and willing to assume an active leadership role in the SCBA, please send your resume addressed to the SCBA Nominating Committee, Attn: Arthur E. Shulman, at Bar Headquarters or email jane@scba.org.

— Jane LaCova, Executive Director



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Mechanics' Liens 101

By Jarrett Behar

When an architect performs work on a project and does not get paid, his or her remedies are not limited to suing the client for breach of contract. The New York Lien Law provides a powerful additional tool for the unpaid architect, especially when the project involves an investment property or a construction loan that needs to be refinanced post-completion. While a mechanic's lien can be filed on both private and public projects, this article will focus on private projects for non-governmental entities. These types of projects generally come in two forms so far as a mechanic's lien is concerned: a commercial project and a single-family dwelling.

Benefits of filing a lien

The major benefit of filing a mechanic's lien is that the architect's right to be paid will be secured by the real property that he or she worked to improve. Thus, to the extent that the client does not have any assets and cannot pay the architect's fee, in the event that there is equity in the real property, the architect would be able to foreclose on the lien and get paid from the proceeds of an eventual foreclosure sale. That right can be an effective tool in assisting an architect in getting paid from an unwilling client.

In addition, to the extent that the client is not the owner of the real property, the mechanic's lien will provide an architect with an additional party from which to seek payment. The only caveat is that the architect will want to ensure that his or her contract with the non-owner client specifically states that the work is being performed with the real property owner's consent or, even better, has the owner's signed acknowledgement that this is the case. This will prevent a future claim from the owner that the work was performed without his or her consent, which could invalidate the lien.

Mechanic's liens will take priority over any mortgage that has not yet been

recorded as of the date that the lien was filed. As a result, an owner seeking to refinance a construction loan would likely have to deal with any outstanding mechanic's lien prior to obtaining new financing. Similarly, a new owner would take subject to outstanding mechanic's liens if they were not satisfied prior to or at closing.

All mechanic's lienholders on a piece of real property take in proportion to each other regardless of when the individual liens are filed. So, for example, if a piece of real property was worth \$2 million and had a pre-existing \$1 million mortgage, then there would be a pool of \$1 million from which all mechanic's lienholders would get paid. In this example, if an architect had a \$200,000 mechanic's lien out of \$2 million in total liens, then the architect would recover 10 percent of the \$1 million pool available for the mechanic's lienholders for a total of \$100,000.

Types of services covered

Essentially, mechanic's liens are intended to cover labor and services provided in the course of permanently improving a piece of real property. The term "improvement" is a defined term and specifically includes "the drawing by any architect or engineer or surveyor, of any plans or specifications or survey, which are prepared for or used in connection with such improvement..." In addition, although not specifically identified in the Lien Law, courts have held that mechanic's liens also cover construction supervision or superintending. It does not, however, cover costs incurred for the solicitation of bids and the securing of contractors and subcontractors.

As a result, in addition to being able to file a lien for all of the work that the architect performs designing the project, to the extent that the architect is also charged with project supervision



Jarrett Behar

responsibilities – for example, reviewing and approving contractor applications for payment — the costs for these services may be included in the lien amount.

What the lien needs to state

The preparation of a Notice of Mechanic's Lien can be technical, and it is encouraged that architects use their counsel to ensure that it is done properly. That being said, the notice should state:

- The name and address of the lienor (in this case, the architect);
- The name and address of the lienor's attorney, if any;
- The name of the client;
- The name of the owner of the real property and the interest of that owner (for example, "fee simple");
- A description of the labor performed or materials furnished;
- The agreed value or price for the labor and/or materials and the amount unpaid for each;
- The dates that the first and last items of work were performed and/or materials were furnished;
- A description of the property subject to the lien, usually by address and block and lot if available; and
- A notarized, signed verification by the lienor or his agent that the statements contained in the lien are true to his or her knowledge, except as to matter stated to be alleged on information and belief, and that as to those matters he or she believes it to be true.

When and where you need to file the lien

If the real property is a "single-family dwelling," then an architect has four months from the last date that services were rendered to file the Notice of Mechanic's Lien with the clerk for the county in which the real property is located. For all other private projects, an architect has eight months from the last date that services were rendered to file. If that date falls on a weekend or a public holiday, the filing may be completed on the next succeeding business day.

The lien needs to be filed in the office of the county clerk where the real property is situated. Then within five days before, or 30 days after the filing, the lien needs to be served on the owner and the client (if different) by, among other methods, certified or registered mail addressed to the owner's and client's last known place of business. An affidavit attesting to such service should be filed with the same county clerk no later than 35 days after the notice was filed.

How long the lien lasts

The mechanic's lien will be valid for one year from the date of filing. Other than for a lien on a single-family dwelling, a lienor may obtain a single one year extension as of right by filing an extension with the county clerk. For any extensions of a lien on a single-family dwelling, or for a second extension on other real property, a court order extending the lien must be obtained. If no legal proceeding to foreclose on the lien is brought prior to expiration of the lien, then the lien will automatically expire.

Enforcing the lien

Assuming that the simple filing and service of the lien does not get the architect paid, he or she will have to commence a legal proceeding to foreclose on the lien prior to the lien's expiration. The architect can include breach of contract and related claims in the same lawsuit, even if the client and the property owner are separate parties. When the suit is commenced, a Notice of Pendency will also have to be filed with the county clerk. This notice puts the world on notice of the architect's secured claim against the real property and operates to protect that secured interest during the pendency of the lawsuit, even after the lien would have otherwise expired.

A mechanic's lien can be a powerful tool in assisting an architect in getting paid on a particular project. The requirements of the lien law are highly technical and it is recommended that an architect have counsel prepare, file and arrange for enforcement of the lien, especially when a large amount of unpaid fees hangs in the balance. Particular attention should be paid to the client's and/or owner's financing requirements. In the event that the architect has not been paid a significant amount and believes that the owner is in the process of obtaining financing or refinancing secured by its real property, it is advisable to file a lien as soon as practicable to ensure that there is sufficient equity in the property to satisfy the architect's claim.

Note: Jarrett M. Behar is a member of the law firm Sinnreich Kosakoff & Messina LLP. He practices in the areas of commercial litigation, construction law and professional liability defense, and has represented architects in the filing of mechanic's liens and prosecution of lien foreclosure and related contractual claims. For additional information concerning this article or other issues of significance to architects, please feel free to contact Jarrett M. Behar at jbehar@skmlaw.net.

BRIEFS

Academy Happenings

Bankruptcy forms are changing

Find out the latest on Thursday, Dec. 3 from 5 to 7 p.m. Light supper and 3 credits.

New Maintenance Rules Legislation

Be aware of these important new rules on Tuesday, Dec. 1, from 6 to 9 p.m. Light supper and 3 credits.

SIDNEY SIBEN'S AMONG US

On the Move...

David Welch of Huntington has joined the law firm of Roe Taroff & Taitz in Bohemia as an associate.

Joshua D. Brookstein has joined the firm of Sahn Ward Coschignano, PLLC as an associate. Mr. Brookstein concentrates his practice in litigation and appeals, criminal defense, zoning and land use, and municipal law.

Announcements, Achievements, & Accolades...

Karen Tenenbaum, tax attorney of the Melville tax law firm, Tenenbaum Law, P.C., was recently quoted in two articles featured in Bloomberg BNA's Daily Tax Report, "Does New York State Overreach in Its Tax Enforcement?" and "New York Practitioners Look for 'Moderate' Policies as New Tax Commissioner Confirmed."

Jaime Linder of Tenenbaum Law, P.C., wrote an article on the topic of "E-Commerce in New York State: Sales Tax Tips" that was published by Avalara, a company that provides cloud-based sales tax compliance solutions.

Karen Tenenbaum, Yvonne Cort and **Brad Polizzano** of Tenenbaum Law, P.C., recently spoke on the topic of "Coping with Levies, IRS Liens, and NYS Warrants" for the New York State Society of Enrolled Agents, Nassau/Suffolk Chapter.

James F. Gesualdi, P.C., celebrated the one-year anniversary of "Excellence Beyond Compliance: Enhancing Animal Welfare Through the Constructive Use of the Animal Welfare Act," Maurice Bassett (2014), challenging everyone to work together towards excellence in animal welfare by asking one simple question, *What can we do TODAY to improve the well-being of animals?* (Named Finalist, 2014 National Indie Excellence® Book Awards, Animals/Pets category.) For more information on Gesualdi and his book go to <http://excellencebeyond-compliance.com/>



Jacqueline Siben

Congratulations...

For the second consecutive year **Genser Dubow Genser & Cona** was honored by HIA as a finalist of the Business Achievement Award, small business category.

Frederick K. Brewington of The Law Offices of Frederick K. Brewington has been selected to the list of New York Metro Super Lawyers for 2015. He was recognized in the practice areas of Civil Rights, Criminal Defense and Employment Litigation: Plaintiff.

James M. Wicks, a partner at Farrell Fritz has been selected to the 2015 *New York – Metro Super Lawyers* Top 100 list. This is the third consecutive year Jim was selected for inclusion. He has been selected to the *Super Lawyers* list annually since 2008 in the Business Litigation practice area.

Condolences...

To the family of Acting Family Court Judge, the Honorable **Philip Goglas** on the recent passing of his father, William Goglas. Please send condolences to Hon. Philip Goglas, 39 Oak Street, Central Islip, NY 11722.

To the family of **Howard Wurman** who died suddenly. We send our condolences to Rochelle, Robert Wurman and his colleagues.

To the family of **Justice Peter J. Graham** who died on October 13. Justice Graham was the longest-serving judge in the history of the Village of Port Jefferson, taking the bench in 1983.

It is with deep sorrow that we report the passing of **Rose Marie Czygier**, wife of Suffolk County's Surrogate's Court Judge the Honorable John M. Czygier, Jr. In lieu of flowers, donations may be made to either of the following organizations in Rose Marie's name: East End Hospice, P.O. Box 1048, Westhampton Beach, N 11978 or Peconic Bay Medical Center Foundation, 1300 Roanoke Avenue, Riverhead, NY 11901, checks made payable to PBMC Foundation.

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No Liability to Architect for Failing to Explain Restrictive Covenant

By Michael Stanton

Is an architect required to discover, interpret and explain a restrictive covenant as part of the duties she or he owes to a client? Under the facts presented in a pending Supreme Court, Nassau County case, the answer is no.

In *Quinn v. Marzovilla*,¹, the plaintiff homeowners sought declaratory and injunctive relief against their defendant neighbors. The plaintiffs alleged that the defendants' planned home renovation violated the terms of a restrictive covenant dating from 1950 that was entered into among the then owners of six adjoining lots bordering Reynolds Channel in Long Beach, New York.

After the defendants' renovation resulted in the potential encroachment beyond the limits of the restrictive covenant, a restraining order was issued stopping work. The restraint was ultimately lifted, and the defendants were permitted to proceed with their renovation. The court, however, cautioned the defendants that they

proceeded at their own risk, as there was no question that they had notice of the restrictive covenant because it appeared in their title report when they purchased the property. Accordingly, the defendants were left with the prospect of suspending work, or moving forward under the understanding that they could be forced to tear down their work if the covenant were ultimately enforceable.

The defendants opted to commence a third-party suit against their architect, under the theory that the architect had committed professional malpractice by allegedly failing to discover, interpret

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and explain to the defendants the legal significance of the restrictive covenant at an early stage of their home renovation.

According to the defendants, the architect had a legal and professional duty to discover, interpret and explain the restrictive covenant in providing architectural services to the defendants.



Michael Stanton

The architect appeared in the action and immediately moved for summary judgment. He submitted an expert affidavit asserting that architects have no particular expertise in discovering and analyzing legal land use restrictions, and therefore have no duty to explain any such restrictions to their clients. Even assuming any such duty existed however, the architect further claimed that he discharged any such obligation simply by advising the homeowners of the covenant's existence. Moreover, he argued that the homeowners were chargeable with notice of the restrictive covenant because it appeared in their title report when they purchased the property.

The Supreme Court, Nassau County held that the homeowners had notice of the restrictive covenant through their title report, meaning their architect was not liable for his alleged failure to discover, interpret and explain the restriction. The court also held that the plain-

tiffs had not submitted an expert affidavit indicating that architects in general have a professional obligation to ascertain the existence and legal significance of land use restrictions. As such, the court awarded the architect summary judgment dismissing the complaint.

Although the court did not go so far as to hold that architects in general have no duty to discovery, interpret and explain land use restrictions, it did find that no such duty existed under the facts presented in this case.

NOTE: Michael Stanton is an associate with Sinnreich Kosakoff & Messina, LLP, and has a broad range of litigation experience. Mr. Stanton joined the firm in 2014, and handles all aspects of litigation in federal and state courts. His practice involves commercial litigation, municipal law, and the representation of design professionals. He can be reached at, mstanton@skmlaw.net.

¹ Supreme Court, Nassau County Index No.: 12199/2013

The Never Ending Exposure of Design Professionals

By Annalee J. Cataldo-Barile

In a decision rendered more than two decades ago by the Court of Appeals of the District of Columbia, the court observed that "[e]xcept in the middle of a battlefield, nowhere must men coordinate the movement of other men and all materials in the midst of such chaos and with such limited certainty of present facts and future occurrences as a huge construction project." In considering issues related to construction litigation, the court was merely recognizing the inherent problems associated with construction, and the likelihood that such projects will invariably lead parties to the steps of the courthouse.

Given the inherent conflicts associated with construction, it must be understood that architects, engineers and land surveyors face risks every time they undertake to perform professional services. Unfortunately for design professionals, unlike other professionals in New York State, their exposure never ceases. Although, New York State has a Statute of Limitations of three years for claims of negligence by an owner against a design professional, design professionals are never truly relieved of responsibility for project services performed at any point in their careers. Specifically, New York law allows

third parties who have suffered injuries as the result of improper professional services to institute a lawsuit against architects, engineers or land surveyors subject to limited exceptions, within three years of the date of personal injury, wrongful death or property damage. In effect, design professionals who provide services in New York State may remain exposed to claims by parties other than the party who hired them indefinitely. For example, the architect of the Empire State Building can be sued for personal injury that occurs today and which arises from the original design services.

In neighboring states, including Connecticut and New Jersey, legislatures have enacted laws creating definitive time limitations for pursuing claims against design professionals. No other New York State professionals face the same continuous exposure, which effectively serves to haunt architects, engineers and land surveyors well into their retirement years.

In an effort to minimize the exposure of design professionals, New York State promulgated Section 214-d of the Civil Practice Law and Rules known as the Statute of Repose. By virtue of this statute, a third-party pursuing claims



Annalee J. Cataldo-Barile

against an architect, engineer or land surveyor, who last provided services more than 10 years ago, must establish by substantial evidence the existence of a valid claim in order to pursue an action against the architect, engineer or land surveyor. Although this statute is helpful, it can be easily overcome, thus creating a continuous exposure for the design professional. Conversely, New Jersey has adopted a Statute of Repose, which provides that no claim can be pursued against a design professional that last provided services more than 10 years ago. While, Connecticut has a similar Statute of Repose precluding claims against design professionals for services provided more than eight years ago. The clear language of the legislation adopted in New Jersey and Connecticut ultimately serves to free the design professional from the never ending exposure currently facing design professionals in New York.

Absent a meaningful modification to the current state of the law in New York, the design professional will never be relieved from potential exposure for any project. It is for this reason that architects, engineers or land surveyors would be well advised to press the Legislature to address this apparent inequity.

Note: Annalee J. Cataldo-Barile has over 25 years' experience as a litigator and is a partner with the law firm of Sinnreich Kosakoff & Messina LLP. She is the General Counsel to the New York Society of Architects. Ms. Cataldo-Barile is also an affiliate member of The American Council of Engineering Companies ("ACEC") of New York - Long Island Chapter and focuses her practice on representing architects, engineers and land surveyors in litigation and by providing contract reviews throughout the New York Metropolitan area and Long Island. She may be reached at (631) 650-1200 or abarile@skmlaw.net.

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Be Aware of the Potential for Strict Liability in Actions Relating to Excavation

By Lisa Perillo

New York City Administrative Code ("Code"), Title 28, Chapter 7, §§ 3309.4, 3309.4.1 and 3309.1 require certain protections for adjoining properties or structures during excavation work. If buildings are "adjoining," Code Section 3309.4 provides that:

Whenever soil or foundation work occurs, regardless of depth of such, *the person who causes such to be made shall*, at all times during the course of the work and at his or her own expense, preserve and protect from damage any adjoining structures, including but not limited to footings and foundations, provided such person is afforded a license in accordance with the requirements of Section 3309.2 to enter and inspect the adjoining buildings and property, and to perform such work thereon as may be necessary for such purpose. If the person who causes the soil or foundation work is not afforded a license, such duty to preserve and protect the adjacent property shall devolve to the owner of such adjoining property, who shall be afforded a similar license with respect to the property where the soil or foundation work is to be made.

The predecessor of this code provision was interpreted as imposing strict liability on the "person who causes" the excavation – usually the building owner and the general contractor. There is some legal precedent interpreting this revised section as similarly imposing strict liability. As such the "persons" to whom this Section applies may be liable regardless of the care exercised.¹ If so, whether or not adequate precautions were taken to protect against damage may simply be immaterial to liability.

It appears that the question is yet unsettled as to whether a design professional involved in an excavation project can be strictly liable as a "person who caused" the excavation in question. There is legal precedent for finding a design professional, like an architect or an engineer, can be subject to strict liability.² However, there is also contrary authority focusing on the property owner and the contractor performing the work.³ At the very least this issue presents a question of fact affecting the likelihood of success of a motion for summary dismissal and careful review of the scope of the design professional's



Lisa Perillo

involvement in the planning of the excavation work should be analyzed and considered.

NOTE: Lisa Perillo is an associate at Sinnreich Kosakoff & Messina, LLP. She joined the firm in 2011 and concentrates her practice in commercial and real property/land-use litigation, as well as municipal and construction law, and the representation of design professionals. Ms. Perillo is admitted to the New York Bar as well as the Southern and Eastern District of New York; and is a member of the New York State and Suffolk County Bar Associations.

¹ See *Yemen Corp. v. 281 Broadway Holdings*, 18 N.Y.3d 481 (2012); and *Am. Security v. Church of God of St. Albans et al.*, 230 Misc. 3d 274, 956 N.Y.S.2d 799 (Sup. Ct. Queens 2012).

² *Am Security*, 230 Misc. 3d, at 280 (finding the architect who prepared the excavation plan was a "person who causes an excavation to be made" and liability would also attach); and *Am. Sec. Ins. Co. v. Church of God of St. Albans*, 42 Misc. 3d 1218(A), 984 N.Y.S.2d 630 (Sup. Ct. 2014) (same).

³ See, *87 Chambers, LLC v. 77 Reade, LLC*, 122 A.D.3d 540, 541, 998 N.Y.S.2d 15, 17 (1st Dep't 2014) (finding that the design professional at issue (there an architect): "was not 'the person who caused an excavation or fill to be made' within the meaning of that provision [§ 3309.4]". Indeed, BSKS was neither the owner of the 77 Reade Street property nor the contractor who performed the excavation.").

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Make Sure You Let the Clock Run Out on Potential Malpractice Claims

By Jarrett M. Behar

In 1996, the New York State Legislature amended the New York State Civil Practice Law and Rules to apply a three year limitations period to all non-medical malpractice actions, regardless of whether they were based on breach of contract or tort. Thus, except for the unusual circumstance where an architect specifically agrees in his or her contract to produce a specific result, i.e. some sort of government approval, LEED certification, etc., a claim will be untimely if it is brought by the client more than three years after the relationship with the architect ended.

Note that this does not mean three years from the end of construction if the architect's relationship with the client ends sooner. For example, the architect's contract may only extend to the design phase of the con-

tract, or the relationship may be terminated prior to the contemplated end of services due to a dispute. In any event, it is always advisable to issue some sort of written communication specifically acknowledging the date on which the architect's engagement is complete. Sometimes a matter of one day can be the difference between being exposed in a lawsuit and being able to have a potential matter dismissed, or not even commenced, as time barred.

The caveat to that is what is known as the "continuous treatment doctrine." Even though an architect has completed his or her services for a client, the three year statute of limitations can be extended (or "tolled" in legal terminology). This can occur if the architect continues to consult with the client or pro-



Jarrett Behar

vide services on the project and has the potential to extend the statute of limitations through the end of that consultation.

The most common area where this comes up is when a potential issue arises with a project after the architect has completed his or her work, and the architect returns to the project to consult on potential corrective action. Even if the consultation or potential corrective action does not relate directly to the architect's original services, the door can be opened to the argument that the three-year statute of limitations has been extended and did not start to run until the end of that consultation.

As a result, once an architect's services are complete, the architect should think twice about returning to the project, especially when returning involves some sort of problem that has

arisen. This is especially true where the time to initiated claim has nearly run out and going back would revive a claim that would have otherwise been untimely. It is advisable that an architect that is contemplating consulting on a previously completed project consult with his or her attorney before returning to the site, performing any services, or issuing a preliminary opinion or advice.

Note: Jarrett M. Behar is a member of the law firm Sinnreich Kosakoff & Messina LLP. He practices in the areas of commercial litigation, construction law and professional liability defense, and has represented architects in the filing of mechanic's liens and prosecution of lien foreclosure and related contractual claims. For additional information concerning this article or other issues of significance to architects, please feel free to contact Jarrett M. Behar at jbehar@skmlaw.net.

FOCUS ON PROFESSIONAL LIABILITY DEFENSE SPECIAL EDITION

COURT NOTES

By Ilene Sherwyn Cooper

Appellate Division-Second Department

Attorneys censured

David Grossman: By affirmation on notice to the respondent, the Grievance Committee advised the court that the respondent entered a plea of guilty in the District Court, Suffolk County, to driving while impaired by drugs, an unclassified misdemeanor. By decision and order, the court, on its own motion, authorized the Grievance Committee to institute a disciplinary proceeding against the respondent and the matter was referred to a Special Referee. The referee sustained one of the two charges against the respondent. The Grievance Committee and the respondent moved, and cross-moved,

respectively, to affirm, in part, and disaffirm, in part, the referee's report. The court sustained the referee's report as to the charge that was sustained, and found that he improperly declined to sustain the second charge against the respondent. In his plea, the respondent admitted that he operated a motor vehicle after ingesting cocaine, for which he was sentenced to three years probation, fined and surcharged, and had his license revoked for a period of six months.

In determining the appropriate measure of discipline to impose, the court considered the isolated nature of respondent's conduct, his voluntary efforts at rehabilitation, the testimony of character witnesses, and his unblemished disciplinary record.



Ilene S. Cooper

Accordingly, under the totality of circumstances, the respondent was publicly censured for his professional misconduct.

Attorneys disbarred

David Warren Denenberg: On January 21, 2015, upon a plea of guilty in the United States District Court for the Eastern District of New York, the respondent was convicted of eight counts of mail fraud. Conviction of a felony under federal law is essentially similar to the New York felony of grand larceny in the second degree. Accordingly, by virtue of his conviction of a felony, the respondent ceased to be an attorney and was automatically disbarred from the practice of law in the State of New York.

Raymond G. Lavalley: On February

27, 2015, the respondent pled guilty in the Supreme Court, New York, to conspiracy in the fourth degree, a class E felony. As a result, the Grievance Committee moved to strike the respondent's name from the roll of attorneys. The respondent neither opposed the motion nor submitted any papers in response. Accordingly, by virtue of his conviction of a felony, the respondent ceased to be an attorney and was automatically disbarred from the practice of law in the State of New York.

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.



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WHO'S YOUR EXPERT

Court of Appeals Affirms Abuse in Admitting Expert Testimony *Refuses to Vacate Criminal Conviction*

By Hillary Frommer

This summer, the Court of Appeals determined whether a trial court abused its discretion by permitting an expert witness to testify beyond the scope of his qualifications.

In *People v Inoa*,¹ the defendant was indicted and tried for the murder of two individuals. The People's theory was that the defendant and the victims were rivals in the drug business, and that the defendant sought to reclaim his drug territory from the victims. As part of their case in chief, the prosecution presented the testimony of several witnesses, including a police detective (Detective Rivera) who had been involved in the overall investigation and ultimate "take down" of the drug gang with which the defendant was allegedly affiliated. Detective Rivera testified about his familiarity with many of the gang members, including the lingo they used and their speaking voices. The prosecution also had the court qualify Detective Rivera as an expert in decoding telephone conversations. In that context, Detective Rivera testified about the meaning of certain

code words, which the jury heard from wiretaps. In his expert capacity, Detective Rivera also interpreted certain conversations that were not encoded.

The defendant was ultimately convicted of murder and he appealed. On appeal, the defendant argued that the detective's expert testimony as to non-encoded conversations was beyond the scope of permissible expert testimony because he was "essentially a summation witness, put on the stand to tie together all the strands of the prosecution's case for the jury much as a prosecutor would in summing up."² The appellate division disagreed, finding that the trial court properly received the detective's expert testimony, but stated that even if parts of the testimony was erroneously admitted, the error was harmless.³

Although the decision to admit expert testimony is discretionary, and reviewable by the state's highest court "only where discretion has not been exercised or has been abused," the court granted leave to appeal to the Court of



Hillary A. Frommer

Appeals finding in cases, like this one, "in which an expert so palpably overtakes the jury's function to decide matters within its unaided competence, that abuse may be found."⁴ That being said, the court affirmed the Appellate Division's decision.

The court first noted that there is nothing categorically improper about introducing a police officer as an expert witness in a criminal trial, but it did note a gross difference between cases where the expert police witness was actually involved in the criminal investigation and those where the expert police officer was wholly uninvolved. The court further noted that if Detective Rivera had been qualified only to testify as to encoded messages, there would be no issue with his testimony, as such testimony is the proper subject for an expert. However, the detective's testimony presented as problematic because he was qualified to testify as to conversations generally, which enabled him, as an expert, to explain "the meaning of virtually everything that was said" on the record-

ed conversations, regardless of whether they were encoded.⁵ In beginning its analysis, the court then considered two cases decided by the Second Circuit,⁶ in which a police officer involved in the criminal investigation also testified as an expert witness, and gave testimony beyond the scope of his expertise. The court noted two problems with the expert testimony in those cases: the experts premised their testimonies on inadmissible hearsay, which violated the defendant's constitutional right to confront the witnesses against him; and the police experts essentially instructed the jury on how to resolve the factual issues presented. The Court of Appeals discussed whether those two factors were present in the case before it.

It first found that the defendant in *Inoa* did not have a constitutional "confrontation" problem because the principal out-of-court statements that Detective Rivera relied on in his testimony came from witnesses who also testified at trial and were subject to cross-examination. As to the second consideration, the court noted that Detective Rivera testified about very

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MEDICAL MALPRACTICE

The Medical Malpractice Conference Part of Suffolk County

By Peter H. Mayer

Commencing in 2013, the Supreme Court part over which the undersigned presides was designated as an Office of Court Administration (OCA) early settlement conference part for all medical malpractice cases where Physicians Reciprocal Insurers (PRI) was the responsible carrier. Typically, these would include all institutional defendants included within the North Shore-Long Island Jewish system as well as all attending physicians covered by PRI.

The genesis of the program came about as a result of a meeting between Chief Administrative Judge C. Randall Hinrichs, myself, and representatives of the plaintiff's bar, as well as a separate meeting with representatives of Physicians Reciprocal Insurance and the North Shore LIJ system. The protocols of the program were designed after careful consideration of the input provided by these stakeholders.

There is no requirement that the case be either pre note or post note as any case, regardless of status, may be placed on the calendar. Moreover, participation in the program is entirely voluntary. The Court conducts these conferences every six to eight weeks

on Thursday afternoons, with the calendar consisting of no more than five or six cases. The program began with its first conference on May 30, 2013 and has continued through the time of this writing. Present at these conferences are the lawyers representing the parties and the claims representative for PRI as well as, from time to time, risk management representatives from an institutional party.

Certain prerequisites must be met before any case can be calendared. As most practitioners know, most all medical malpractice policies covering individual physicians are "consent" policies, meaning that the carrier representative and/or his or her counsel are precluded from entering any settlement conversations unless the insured physician consents in writing to such discussions and the potential settlement of the claim. Obviously the court cannot and will not calendar any such case unless the carrier or defense counsel has first obtained such consent.

Secondly, the defendant or defendants' carriers and their lawyers have to have at least reached the conclusion



Peter H. Mayer

that the case has some degree of monetary value that they are willing to pay to settle the case. There is no minimum dollar amount required, but rather, a determination before seeking the court's assistance that there is money in the file.

Finally, in multi defendant cases, the individual and/or institutional defendants must have determined their percentage of the global responsibility before coming to court. This court has had a number of experiences where a settlement has been reached globally, only to then have the co defendants fighting over what percentage of the total they are willing to absorb. Very often these squabbles are based on jealousies between the parties or carriers and have nothing to do with the evidence in the case. Therefore, the court insists that this be determined before calendaring the matter and rendering assistance.

All attorneys appearing on behalf of a party must have full, complete, and absolute authority to settle the claim on the day of the conference. The parties are not allowed to adjourn the case in order to take the offer home in order to

discuss or reflect upon it. Although the parties are encouraged to be in court, I don't insist upon it, but in lieu thereof, lawyers must have immediate access to the client in order to obtain their consent. It is always a better practice, however, to have the number for settlement in mind before arriving in court with the client's unqualified consent to settle for that particular number. If the number is lower than that for which consent has been obtained, immediate access is a necessity.

Having the party present facilitates solutions to other problems that can occur. Counsel, for example, may agree that the number proposed is appropriate for the case, but he or she is having trouble convincing the client as the client has an unreasonable belief as to the value of the case. In these situations, the court is more than happy to talk to the client with counsel in order to bring him or her to a realistic understanding of the potential risks of going to trial, the court's assessment of the value of the case, and evidentiary issues that may bear upon these questions.

This part scheduled five cases on its first set of conferences May 30, 2013 and held subsequent settlement confer-

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TAX

Investing in N.Y. Real Estate – It's Not Just for Foreigners

By Louis Vlahos

We frequently hear about the many wealthy foreigners who acquire investment interests in New York real property and the complex tax considerations relating to such investments. Yet, we sometimes forget that there are many US persons outside of N.Y. who are drawn to an investment in N.Y. real property for the very same reasons.

Every now and then, however, New York's Department of Taxation (the "Tax Department") reminds us that the tax rules applicable to such an investment by a US person who is not a N.Y. resident can be just as daunting.

A recent advisory opinion (TSB-A-15(5)I) illustrated the application of these tax rules. Taxpayer owned stock in an S corporation operating in N.Y. The S corporation owned N.Y. real estate, and derived 69 percent of its income from an active parking operation and 31 percent from real estate rentals. The company had been in business for over 20 years and had no plans to liquidate. In 2012, the taxpayer, who had been a resident of another state and had never been active in the business, sold her entire 33 percent interest in

the S corporation back to the corporation pursuant to a stock redemption plan and received an interest-bearing installment note from the corporation as part of the purchase price for the stock sale.

The taxpayer asked the Tax Department whether the gain from the stock redemption and the interest income on the installment note payments were subject to N.Y. personal income tax.

Disposing of intangible property: an interest in N.Y. real property

In general, a non-N.Y. resident is subject to N.Y. personal income tax on his or her N.Y. source income that enters into his or her federal adjusted gross income. Tax Law § 631(a).

N.Y. source income is defined as the sum of income, gain, loss, and deduction derived from or connected with N.Y. sources. Tax Law § 631(b)(1). For example, where a non-N.Y. resident sells real property or tangible personal property located in N.Y., the gain from the sale is taxable in N.Y.

Under N.Y. tax law (the "Tax Law") (Sec. 631(b)(2)), income derived from



Louis Vlahos

intangible personal property, including interest and gains from the disposition of such property, constitute income derived from N.Y. sources only to the extent that the property is employed in a business, trade, profession, or occupation carried on in N.Y. 20 NYCRR Sec. 132.5(b).

From 1992 until 2009, this analysis also applied to the gain from the disposition of interests in entities that owned N.Y. real. TSB-M-92-(2)I.

However, in 2009, the Tax Law (Sec. 631(b)(1)(A)(1)) was amended to provide that items of gain derived from or connected with N.Y. sources include items attributable to the ownership of a N.Y. interest in N.Y. real property.

For purposes of this rule, the term "real property located in" N.Y. was defined to include an interest in a partnership, LLC, S corporation, or non-publicly traded C corporation with 100 or fewer shareholders that owns real property located in N.Y. and has a fair market value ("FMV") that equals or exceeds 50 percent of all the assets of the entity on the date of the sale of the taxpayer's interest in the entity.

Only those assets that the entity owned for at least two years before the date of the sale of the taxpayer's interest in the entity are used in determining the FMV of all the assets of the entity on the sale date.

The gain or loss derived from N.Y. sources from a nonresident's sale of an interest in an entity that is subject to this rule is the total gain or loss for federal income tax purposes from that sale multiplied by a fraction, the numerator of which is the fair market value of the real property located in N.Y. on the date of the sale and the denominator of which is the FMV of all the assets of the entity on such date.

For most non-N.Y. residents, the rule before the 2009 amendment would have yielded the preferred tax result. Nonresidents who owned interests in partnerships, for example, and that had gains on the sale thereof could, in many cases, sell their partnership interests without triggering N.Y. income tax.

The department's opinion

The Tax Department determined that, if the valuation conditions in the Tax Law were satisfied (Sec. 631(b)(1)(A)(1)), a

(Continued on page 22)

ENTERTAINMENT

The Need to Regulate Fantasy Sports

By Michael Pernesiglio

Fantasy sports is a multi-billion dollar industry whereby individuals draft a fantasy team and compete with others for monetary awards. A fantasy team's performance is based on its player's real statistics, via point accumulation, relative to the player's real-life statistics. There are many different ways a fantasy league can be structured, however, a common practice is to have weekly matchups against other league members. The winner of the fantasy league owns the best record over the course of the regular season.

Some draw a strong comparison between fantasy sports and online sports gambling or online poker. In 2006, the Unlawful Internet Gambling Enforcement Act was enacted ("UIGEA"), which outlawed financial companies from transferring money to online gambling sites; however, so-called "games of skill" were exempted.¹ It is under this exemption, which launched two of the world leaders in daily fantasy sports betting: Draft Kings, Inc. and Fan Duel Inc. (collectively referred to as "Daily Fantasy Sports Leagues").

Before the creation of the Daily Fantasy Sports Leagues ("DFS"), individuals owned fantasy teams for an entire season. However, and based on the exemption found in the UIGEA, the DFS innovated fantasy sports by allowing individuals to draft *daily* fantasy teams. Now each day individuals can draft a fantasy team for that particular day and accumulate points based on their players' performances for that one day. Each team's potential earning capacity increases with the more points a team scores.

For the first time ever, individuals had the ability to earn a handsome living by accurately predicting which *players* would perform well for just one day, as opposed to betting on the outcome of games. As the popularity of the DFS's grew, they began receiving financial support and interest from professional sports leagues such as Major League Baseball² and owners of other professional sports franchises such as Robert Kraft of the New England Patriots and Jerry Jones of the Dallas Cowboys.³ As such, the DFS has become a multi-billion dollar industry,



Michael Pernesiglio

which is not subjected to any outside regulation or governmental control. However, as the DFS's popularity increases, there is a strong need for government regulation as there is simply too much money exchanging via the DFS. For example, each Sunday during National Football League season, an individual can enter a \$20 league on Draft Kings, Inc. and potentially win \$1.2 million.

Recently, the DFS came "under scrutiny when it was widely learned that Draft Kings, Inc. employee, Ethan Haskell, published data revealing what players were included on most rosters. The next day, September 28, 2015, Haskell finished second in a million-dollar fantasy contest on competing daily fantasy site FanDuel and won \$350,000."⁴

Clearly this instance raised serious issues as to the legitimacy and credibility of the DFS. For starters, how did this employee gain access to such valuable information and further, why are employees of the DFS even permitted to participate in these fantasy contests

to begin with? Since the incident, Draft Kings, Inc. conducted an "internal investigation." On October 9, 2015, they announced that "While our investigation reflected absolutely no wrong doing on our part, [the incident] has still pushed us to reevaluate our process." As such, Draft Kings, Inc. now prohibits employees from participating in any fantasy league on any DFS site, among other changes.

Regardless, what transpired is tantamount to insider trading in that Haskell obtained highly sensitive information, which was not made readily available to the public. With this information, Haskell determined which players were rarely selected by other competing entries and then tailored his team around a group of rarely selected players, thus giving him an unfair competitive advantage. Although Haskell's players still had to perform at a high level to win, Haskell was basing his selections on information that only he had, and that only he obtained through his employment at Draft Kings, Inc.

Further, the consequences of Haskell's illegitimate team extend far beyond the issue of the improper disclo-

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VEHICLE AND TRAFFIC

Review of the DMV Permanent License Revocation Regulations

By David A. Mansfield

The three-year anniversary of the Department of Motor Vehicles permanent revocation regulations is an appropriate time for a review of 15 NYCRR Part §136.5 or the “three strikes” rule for alcohol or drug related driving convictions or incidents which results in a permanent revocation or denial of a driver license/privilege application.

The regulations went into effect on September 25, 2012. The “three strikes rule” is applied to those individuals with three or four alcohol/drug driving related convictions or incidents within 25 years from the date of the most recent revocable offense or the date from the time when their license was revoked but not restored.

15 NYCRR Part §136.5 provides a 25 year look back period for those individuals applying for reinstatement of their driver’s license after an alcohol

or drug driving related license or privilege revocation. Administrative findings of refusals to submit to a chemical test not arising out of a conviction on the underlying criminal charge have the full force and effect of a conviction as an alcohol or drug related driving offense within the meaning of the regulations.

The 25-year look back period will determine whether the revocation is truly permanent.

The driving record must contain no more than one or more serious driving offenses, which is defined under Part §136.5(a)(2) as either a fatal accident or more than one five point or higher violation, or the accumulation of 20 or more points 15 NYCRR Part §131 within the look back period. Should your client have three or four DWI



David Mansfield

convictions or incidents and not more than one serious driving offense or a fatal accident, the period of revocation would be an additional five years after the revocation for the most recent conviction or incident. Your client would then be eligible to be approved with a problem driver restriction for five

years with a restricted-use license under Vehicle and Traffic Law §530 and Part §135 and operation of a motor vehicle with an ignition interlock device §1198.

An individual with five or more alcohol/drug driving related incidents is subject to lifetime driving record review. Their license/privilege application can only be approved if the Department of Motor Vehicles finds unusual, extenuating and compelling circumstances.

The denial letters can be appealed to the Driver Improvement Unit within 30 days of the date of the denial based upon unusual, extenuating and compelling circumstances. But experience has shown that it is unlikely the Department of Motor Vehicles will grant that application.

The appeal is sent in letterform to the Department of Motor Vehicles Driver Improvement Bureau outlining the unusual, extenuating and compelling circumstances that the application should be granted. The better practice is to send the correspondence by certified mail with a return receipt requested. Only the Driver Improvement Bureau can consider the unusual, extenuating and compelling circumstances, which may apply in your client’s case, to preserve the issues for appeal and judicial review. A denial by the Driver Improvement Bureau is

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PRO BONO

Pro Bono Attorney of the Month – Karen G. Silverman

By Ellen Krakow

The Suffolk Pro Bono Project (the Project) is very pleased to honor Karen G. Silverman as its Pro Bono Attorney of the Month for her continuing commitment to pro bono on behalf of our matrimonial and family law clients.

Ms. Silverman has a solo practice in Commack, New York, where she exclusively represents clients in divorce and family court matters. Her law career, however, began in New York City in 1987 as a commercial litigation associate at Kronish Lieb Weiner and Hellman (now Cooley LLP). She worked at Kronish Lieb for three years, before moving to Long Island in 1990, where she started practicing matrimonial law at Labert Lang & Willen. It was eight years later that Ms. Silverman decided to go out on her own, establishing the Law Offices of Karen G. Silverman.

Originally from Pittsford, New York, Ms. Silverman obtained a B.A. from SUNY Albany in 1984 and a J.D. from SUNY Buffalo in 1987. Like many young attorneys who start their careers in New York City, she left Kronish Lieb and the city soon after becoming a parent. Ms. Silverman is grateful for the experience she had as a junior litigation associate with a large firm. “Kronish Leib taught me how to write, and they trained me to be meticulous and careful in my work,” she explained. “It was a great

learning opportunity for a new lawyer.”

Ms. Silverman has done over 180 hours of pro bono work for the Project since taking her first case in 2003. She has also done a considerable amount of other pro bono work outside of the Project over the years. Asked why she devotes so much of her practice to pro bono clients, she replied, “It’s very important that we help those less fortunate. The Project allows me the chance to use the skills I have to do that.”

Ms. Silverman finds the pro bono work very rewarding, and in fact still hears from time to time from one of her past clients. This client was 18 had been forced out of her home by her unstable mother when Ms. Silverman took her case. She helped the client obtain child support and tuition assistance. The client went on to graduate from the University of North Carolina, Chapel Hill and now works in New York City. Noted Ms. Silverman, “That one was a real success story!”

Ms. Silverman has had many successes with her pro bono cases and is a loyal contributor to the Project. Maria Dosso, Director of Communications and Volunteer Services at Law Services, commented, “Karen never seems to hesitate to take a case and jumps right in. We’re very fortunate to have an attorney of her caliber as an active participant in the program with a strong desire to

give back.”

In addition to assisting the Project, Ms. Silverman is involved with the Mariposa Foundation DR. This organization promotes the education of girls in the Dominican Republic. She has traveled to the Dominican Republic several times to see, firsthand, the work being done there.

It is perhaps the fact that Ms. Silverman is the mother of three daughters that drew her to the Mariposa Foundation. Her oldest daughter, Samantha, who is 26, earned her Bachelor’s degree from SUNY Buffalo and plans to return to nursing school and specialize in geriatric care. Her middle daughter, Allison, 23, is a second year law student, attending Fordham Law School on scholarship. Allison interned last summer for a federal judge and will work as a summer associate at Chadbourne & Parke in the upcoming year. Her youngest daughter, Rachel, is 21 and a senior at SUNY Buffalo, with plans of attending dental school after graduating.

Ms. Silverman lives in Huntington, New York and is a member of the Huntington Lawyers Club and the Suffolk County Bar Association. She is also a member, past president and former director of the Matrimonial Bar Association.

The Pro Bono Project greatly appreciates all that Karen Silverman has done on behalf of its clients over the past two years and looks forward to

working together with her in the future. It is with great pleasure that we honor her as Pro Bono Attorney of the Month.

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

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

FUTURE LAWYERS FORUM

Can you Cope with Law School?

By George Pammer

People do not normally ask themselves that question. Most students that enroll in law school exhibit type A personalities. We would add stress to our lives as undergrads, waiting until the final hour before starting a paper, going to the best parties and sporting events, all while managing to earn strong grades. Stress was something that everyone else had. You got this!

Then you began law school and the world changed. Right now, most 1L's are preparing their Memorandum of Law and the late hours are just beginning. All of the research for the memo, along with all the reading in your other classes, is starting to take its toll. These are not the only stresses that law students face. Many students have responsibilities outside of paying a huge sticker price for school, including other financial obligations, family issues and for some, even children of their own. Students, especially those in evening programs, have other stresses including a 40 hour workweek on top of everything else. At times, the weight of all this can feel like it is too much to bear for one individual.

Some students will turn to drugs and/or alcohol to try to relieve the stress. "It is just a little something to get over the hump," they say, or "as soon as the semester is over I will stop." Then they find themselves

using even more than when they were in school. Sometimes just asking for help seems to be a huge task in itself; it is as if they almost have to admit they cannot do it alone. Newsflash; you can't do this alone!

Law school is a program of "we." It is here we join study groups, we make new friends, we discuss cases, we discuss research, we sit in class, and we attend conferences and school events. Honestly, in law school, there is not much other than final exams that you need to do alone. Coping with stress is another "we" activity.

The American Bar Association has established "The Commission on Lawyers Assistance Programs in an effort to provide information on stress, depression, alcoholism, drug addiction and suicide. The ABA has developed a "Substance Abuse and Mental Health Toolkit for Law Students and Those Who Care About Them."¹ The commission is a collaborative effort of the ABA Law Student Division, the ABA Commission on Lawyer Assistance Programs (CoLAP) and the Dave Nee Foundation. Some of the statistics that the commission sites from a 2014 survey that they conducted are:

- 89.6 percent of respondents have



George Pammer

had a drink of alcohol in the last 30 days.

- 21.6 percent reported binge drinking at least twice in the past two weeks.
- 20.4 percent have thought seriously about suicide sometime in their life.
- 6.3 percent have thought seriously about suicide in the last 12 months.
- 17.4 percent of respondents screened positive for depression with 20 percent indicating that they have been diagnosed with depression at some time in their life.
- Roughly, one-sixth of those with a depression diagnosis had received the diagnosis since starting law school.

The New York State Bar Association started the Lawyers Assistance Program (LAP)² addressing issues such as problem drinking, substance abuse, depression, anxiety and stress. They can be reached at 1.800.255.0569 or email nysbalap@hushmail.com. These resources are all confidential and are there to help students and attorneys cope with issues that can not only derail your career, but may just save your life.

The NYSBA LAP reports warning signs include, but are not limited to, absenteeism, confusion and difficulty concentrating, lowered efficiency, poor relationships with colleagues, issues with personal conduct, and issues with

family relations. Knowing the signs and asking for help is not a sign of weakness, but to the contrary, a sign of strength. For those that may be suffering or have family members that are suffering, it does not need to end badly. There have been far too many instances where these concerns end in suicide. A permanent solution to a temporary problem is never the answer. If you or someone you know may be contemplating suicide, utilize the National Suicide Prevention Lifeline, 1-800-273-TALK (8255). This is available 24 hours a day, 7 days a week.

"None of us got where we are solely by pulling ourselves up by our bootstraps. We got here because somebody bent down and helped us pick up our boots." Thurgood Marshall.

Note: George Pammer is a third year law student at Touro Law School. George is a part-time evening student and the president of the Student Bar Association. He has also held the position of vice-president in the SBA as well as in the Suffolk County Bar Association – Student Committee, where he was one of the founding members.

¹ "Substance Abuse and Mental Health Toolkit for Law Students and Those Who Care About Them." It can be accessed at http://www.americanbar.org/content/dam/aba/administrative/lawyer_assistance/lsc_colap_mental_health_toolkit_new.authcheckdam.pdf

² <http://www.nylap.org/>

TRUSTS AND ESTATES UPDATE

By Ilene Sherwyn Cooper

Summary Judgment in Accounting Proceeding

In *In re Lowe*, the court was confronted with an accounting by JP Morgan Chase Bank as executor and trustee of the trusts created under the decedent's will. Although objections to the account were initially filed by the decedent's spouse, his daughter, and his two grandchildren, after many years of litigation all the objectants, but for the decedent's daughter, settled with the fiduciary.

The decedent died on February 23, 1986, and his will was admitted to probate on April 4, 1986. Ancillary probate was granted in California on the same date the will was admitted to probate in New York, and ancillary letters testamentary issued to the corporate fiduciary on June 6, 1986. The assets of the decedent's estate included a valuable parcel of real property located in California that was the subject of a long-term lease agreement, which expired on July 23, 2014. Pursuant to the pertinent provisions of his will, the decedent created several trusts for the benefit of his wife, daughter and grandchildren. Significantly, the trust created for the benefit of the decedent's daughter

provided for principal distributions to her in five equal installments at stated ages, commencing on December 27, 1989, and concluding on December 27, 2009.

The thrust of the objections asserted by the daughter were addressed to the fiduciary's failure to sell the real property located in California, which constituted a portion of the principal of the testamentary trust created for her benefit, as well as legal fees and commissions. More particularly, the objectant claimed that the fiduciary's retention of the realty constituted a breach of fiduciary duty, the payments to the fiduciary's counsel were unreasonable, and that commissions or payments to the fiduciary relating to the rents or management of the subject property were excessive.

The fiduciary moved for summary judgment dismissing the objections, and any related claims for damages or surcharges, and the objectant opposed and cross-moved for summary relief in her favor.

With regard to the principal issue involving the California realty, the record revealed that offers had been



Ilene S. Cooper

made by a corporate purchaser to purchase the property as early as 2005, for a gross selling price of \$41,330,000.00. Additional offers by the same purchaser were thereafter made, with the highest offer being \$43,750,000.00. After the national decrease in value in the real estate market, a final offer by the purchaser, in January 2009, was to purchase the property for \$34,000,000.00.

Despite the foregoing, none of the foregoing offers resulted in a sale of the property. Indeed, the court noted that although the fiduciary recommended to the beneficiaries that the property be sold, and although the decedent's spouse agreed to the sale, the decedent's daughter vigorously opposed any sale, and even threatened to bring a suit to enjoin any effort to bring a sale to fruition. The daughter's deposition testimony confirmed that she objected to any sale of the property and wanted to keep it in the family in order to preserve her father's legacy. The court found that since the daughter's individual interest in the property vested upon her attaining each of the ages set forth in the testamentary trust for a distribution of principal, she had the power, as

a co-owner, to prevent its sale, and the fiduciary, under California law, lacked the authority to bind any of its co-tenants to a contract of sale.

Accordingly, based upon the foregoing, the court held, as a matter of equity, that the decedent's daughter could not hold the fiduciary responsible for its inability to sell the California property, when it was her obstructionist behavior that precluded its sale. The court therefore held she was estopped from contending that the property should have been sold and granted the fiduciary summary judgment dismissing the objections by the decedent's daughter on this issue.

On the other hand, the court denied the fiduciary's request for summary relief on the issue of legal fees, finding that the record was insufficient to determine their reasonableness.

Finally, the court granted summary judgment on the issue of commissions, concluding that the objectant had failed to demonstrate any basis for denying commissions in their entirety, or for not awarding same in the amount sought.

In re Lowe, NYLJ, June 16, 2015, at p. 27 (Sur. Ct. Suffolk County).

Continued SCPA 1404 Examinations
(Continued on page 26)

ADR

Learning From *National Football League Management Council v. National Football League Players Association*

By Lisa Renee Pomerantz

The Federal Arbitration Act, 9 U.S.C. §§1-16 established a national policy favoring arbitration, and limited the scope of judicial review of arbitral decisions to determining whether basic due process protections were afforded. The only grounds for judicial vacating of an award are:

- Where the award was procured by corruption, fraud, or undue means;
- Where there was evident partiality or corruption in the arbitrators, or either of them;
- Where the arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
- Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject

matter submitted was not made.”

AAA rules and training emphasize the importance of maintaining arbitrator neutrality, providing a fair and adequate process for the parties to make their cases and adhering to contractual limitations on arbitral powers. These fundamental principles were ignored by Commissioner Roger Goodell acting as the arbitral authority in hearing New England Patriots quarterback Tom Brady’s appeal of his four game suspension for his role in the deflation of game balls in a playoff game. As a result, Judge Richard Berman granted the motion of the National Football League Players Association to vacate the award.

The NFL Collective Bargaining Agreement governed the arbitration. It permitted the commissioner to hear disciplinary appeals, although in other significant cases, such as the Ray Rice



Lisa Pomerantz

domestic violence case, an independent arbitrator was appointed. Of note, prior to the hearing, Goodell professed confidence in the results of the NFL’s investigation that was the basis for ruling on appeal. Although the court did not explicitly find that that Goodell was “partial,” it did find that the arbitral process prejudiced Brady and that the arbitral decision exceeded the scope of the parties’ agreement.

Specifically, Brady was denied access to investigative files, including witness notes, and also was denied the opportunity to call as a witness one of the lead investigators, the NFL’s General Counsel. The NFL on the other hand, had access to this information.

The court also found that the Collective Bargaining Agreement did not authorize the four game suspension. The only policy regarding equipment tampering distributed to the players authorized fines and not suspen-

sions as punishment. Moreover, there was no evidence that any player had ever been punished for merely being “generally aware” of the wrongful conduct of others, which was the factual basis for the imposition of the penalty in this case. The fact that the domestic violence policy, which did not cover this kind of infraction, specifically authorized suspensions did not support the conclusion that a suspension was authorized in this case.

The court also found that Brady’s action in disposing of his cell phone and thereby obstructing the investigation did not warrant a suspension. There was no written policy obligating cooperation, and the arbitrator had vacated the only prior decision imposing a suspension for such obstruction.

Note: Lisa Renee Pomerantz is an attorney in Suffolk County. She is a mediator and arbitrator on the AAA Commercial Panel and serves on the Board of Directors of the Association for Conflict Resolution.

ENVIRONMENTAL

2015 Brownfield Cleanup Program Reform

By Lilia Factor

New York’s Brownfield Cleanup Program (“BCP”), whose goal is to encourage private sector cleanups of contaminated properties, has seen many changes over the years. The latest amendments took effect on July 1, 2015 and include changes to eligibility criteria, tax credits and a new streamlined program for lightly contaminated sites.¹

The old definition of a “brownfield site” was “real property, the redevelopment of which is being complicated by the presence or suspected presence of a contaminant.” As of July 2015, a “brownfield” means “any real property where a contaminant is present at levels exceeding the soil cleanup objectives or other health-based or environmental standards, criteria or guidance adopted by DEC that are applicable based on the reasonably anticipated use of the property, in accordance with applicable regulations.” While the new standard eliminates some of the discretionary vagueness of the prior definition, it also means that applicants will likely be required to do more environmental testing, such as a Phase II investigation, to show the levels of contaminants on site. The costs of such pre-application investigations are not eligible for tax credits under the BCP.

The 2015 amendments create the BCP-EZ program for lightly contaminated sites. This is intended to be a streamlined program whose goal is to

give parties that only want a liability release, and not the tax credits, to conduct a cleanup under Department of Environmental Conservation (“DEC”) oversight. This option has not existed for many years, ever since the Voluntary Cleanup Program had been phased out. The DEC is currently drafting regulations to be added to 6 NYCRR Part 375 and estimates that the BCP-EZ track will be available by the summer of 2016. It remains to be seen whether some of the public notice and review requirements, which characterize the regular BCP process, will be revamped and consolidated to make this option attractive for applicants.

The good news for current volunteers in the BCP is that they will no longer be charged for state oversight costs incurred as of July 1, 2015. These costs add a heavy financial burden on the party conducting the cleanup and, unlike actual remediation costs, are not subject to that party’s control. The DEC’s bills, when they do come, are poorly itemized and nearly impossible to challenge.

The other critical component of the BCP is the tax credits. A participating site becomes eligible for tax credits upon completing the cleanup and earning a Certificate of Completion (COC). The 2015 amendments extend the deadline to earn a COC until December



Lilia Factor

2017 for sites accepted into the program prior to June 23, 2008, and until December 2019 for sites accepted after that date and before July 1, 2015. All of these sites can apply for tax credits under the old regime. On the other hand, sites accepted into the BCP from July 1, 2015 and before 2023 must obtain a COC by March 31, 2026, and will be subject to the new tax credit provisions.

The new rules include a restriction on tax credits for sites located in New York City. Specifically, in cities with populations larger than 1,000,000, the tangible property credit component (TPCC) will only be available for sites that meet one or more of three eligibility criteria: 50 percent or more of the site is in an Environmental Zone, which is a defined area with high poverty and/or unemployment levels; the site is financially “upside down” or is “underutilized;” or the site will be used for an affordable housing project. In this context, “upside down” means that the cleanup costs are more than 75 percent of the property’s appraised value as if uncontaminated. “Underutilized” is defined in proposed DEC regulations to be finalized by July 2016.² The availability of tangible property tax credits for properties outside of New York City is not affected. However, there is now a greater tax incentive to clean up sites in designated Brownfield Opportunity

Areas, sites that are used for manufacturing, and sites that are being remediated to the highest — “unrestricted” soil and groundwater cleanup standards, known as Track 1.

Another change involves the Site Preparation Credit. Under the old rules, this credit was available for certain construction costs, such as the installation of a foundation. Now, the only costs allowed would be those directly associated with investigation, remediation or qualification for a COC. This is still a broad category that includes excavation, demolition, PCB, lead and asbestos removal, soil vapor mitigation, dewatering and other costs. Sites accepted into the BCP after July 1, 2015 will not be allowed to claim real property tax and environmental remediation insurance credits, which were rarely used. Also, payments of developer fees can now only be claimed when they are actually paid, not in advance.

The following sites are not eligible for entry into the BCP: sites listed as Class 1 or 2 in the Registry of Inactive Hazardous Waste Disposal Sites where a viable responsible party has been identified; sites on the USEPA National Priorities List (NPL); hazardous waste treatment, storage, or disposal facilities permitted under the Resource Conservation and Recovery Act that are owned by a viable responsible party; sites subject to a cleanup order under Article 12 of the

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TOURO

Municipal Liability for Failure to Adapt to Climate Change? Not Yet.

By Sarah J. Adams-Schoen

Local governments are often referred to as “on the front line” of climate change adaptation. This characterization makes sense given that “[l]and use patterns are determined, infrastructure is designed and provided, and many other development issues are decided at the local level, where natural hazards are experienced and losses are suffered most directly.”¹ Furthermore, local governments have an array of tools in their toolbox that can help adapt their communities to climate change-related conditions including building codes; land use, zoning, and subdivision regulations; comprehensive, capital improvement, transportation, floodplain management, storm-water management, and open space plans; facilities needs studies; population growth and future development studies; and economic development plans. Municipal regulation of the form and placement of building stock in particular offers an opportunity to create more resilient infrastructure and patterns of development. But, failure to proactively plan for rising seas, higher storm surges and more frequent and intense storms will result in further investment in infra-

structure and patterns of development that, at best, fail to adapt to hazards, and, at worst, exacerbate hazards.

The current state of the law, however, creates uncertainty about whether municipalities have a duty to mitigate foreseeable climate related hazards. The International Panel on Climate Change’s most recent projections suggest that failure to promptly and aggressively mitigate and adapt to climate change will significantly diminish the ability of coastal communities to moderate harms like flooding and foreclose some opportunities to do so in the future. Given the clear role for local governments in adaptation planning and implementation, some question whether local governments will soon face liability for failure to plan for and implement hazard mitigation measures.² Because the consequences of destructive storms are foreseeable and at least in part attributable to failures in the legal system, Professor Maxine Burkett argues that local governments could face tort liability for failure to adapt to climate change.

So far, in the United States, plaintiffs’ claims against local governments



Sarah Adams-Schoen

have not extended to negligent failure to adapt to climate change. Rather, typical claims have involved plaintiffs injured by flooding alleging that the municipalities’ negligent design, construction, or operation of flood control structures caused the plaintiffs’ injuries.³ Liability in these

cases has tended to hinge on whether the municipality’s conduct was statutorily immune, and, if it was not, whether the plaintiffs proffered sufficient proof of negligence and causation. In at least one instance, plaintiffs injured by flooding brought an action against a county government claiming that the county’s negligent regulation of development *on an adjacent property* caused plaintiffs’ damages.⁴ The court held that the county owed no duty to homeowners to ensure that development of an adjoining subdivision would not create a risk of flooding the homeowners’ property.

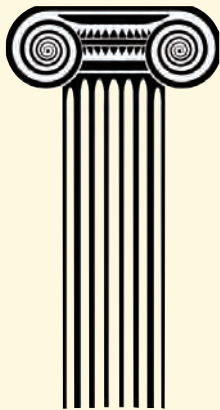
The Fifth Circuit ultimately rejected tort theories of liability in the Katrina litigation as violative of governmental immunity under the Flood Control Act and discretionary-function exception to the Federal Tort Claims Act. But, in the

U.S. Court of Federal Claims case *St. Bernard Parish Government v. United States*, the court essentially expanded Takings Clause liability to encompass governmental negligence that exacerbates weather-related damage to property.⁵ Relying in large part on the U.S. Supreme Court’s 2012 decision in *Arkansas Game & Fish Commission*,⁶ the court ruled in *St. Bernard Parish* that the U.S. Army Corps of Engineers’ failure to properly maintain the Mississippi River–Gulf Outlet (“MR–GO”), a 76 mile long navigational channel constructed, expanded and operated by the Corps, resulted in a taking of private property without just compensation in violation of the Takings Clause because it exacerbated flood damage from Hurricane Katrina and several subsequent storms, and, although only temporarily, wrongfully deprived landowners of the use of their property. Because *St. Bernard Parish* involved affirmative governmental actions (i.e., negligent expansion and maintenance of the navigational channel), the case leaves open the question of whether a government entity could be liable for failing to prepare for sea level rise, storm surges and other climate-related risks.

Notwithstanding the lack of clarity in

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LAND TITLE LAW

Boob Job: Dubious Evidence of ‘Celebrity Enhancement’

By Lance R. Pomerantz

Proof of damages in diminished value cases is typically as dry as a good martini. Disputes usually center on capitalization rates, highest and best use, or suitable comparators. In a recent Connecticut case, however, the amount of damages was affected by a dose of Hollywood “Wow Factor.” *First American Title Insurance Company v. 273 Water Street LLC*, Docket No. 35882 (Appellate Court, May 5, 2015).

The facts

In 2004, 273 Water Street, LLC (“Water Street”) paid \$6,000,000 for 3.5 acres of waterfront land in the Town of Old Saybrook, Borough of Fenwick (“the Borough”). The property had formally been the summer home of actress Katharine Hepburn. Water Street also purchased title insurance.

Water Street was informed that the Borough claimed title to a 30 foot wide discontinued road that ran through the property in February 2005. The title insurer (“First American”) approved the claim and promptly tendered a check in the amount of \$14,000 to cover the diminution of value occasioned by the defect. Water Street refused the check, claiming damages of approximately \$5,000,000. First American brought a declaratory judgment action to determine the extent of its

obligations under the policy.

During the pendency of the litigation, the parties negotiated with the Borough and reached an accommodation regarding the road. The Borough agreed to convey fee title to the 30 foot discontinued road to Water Street, which in turn conveyed to the Borough a six-foot-wide limited-use easement in the same area. Presumably, this arrangement reduced the loss payable under the policy. The jury nevertheless awarded \$2.2 million to Water Street.

The Glam Factor

On appeal, First American claimed the trial court erred in admitting into evidence opinion testimony of Frank Farricker. Farricker, a real estate broker, was an “expert witness” for Water Street, who advanced his theory of “celebrity enhancement” to the property’s original value.

First American had argued that Farricker’s testimony was based on “junk science” and should have been excluded based on *State v. Porter*, a 1997 case in which the Connecticut Supreme Court explicitly adopted the *Daubert* test to determine the admissibility of scientific evidence.

The trial court had found Farricker qualified as an expert witness on the sub-



Lance R. Pomerantz

ject of real estate values, and he testified that celebrity status of a property “can greatly affect its value.” Although not an appraiser, he testified that the “celebrity status of the Hepburn home” enhanced the property’s value, so that its market value was greater than its value as determined by standard methods of appraisal.

Rather than characterizing “celebrity enhancement” as an innovative scientific technique subject to *Porter* scrutiny, the Appellate Court determined that

“Farricker’s proposed testimony concerned a real estate appraisal. [A] real estate appraisal is not scientific evidence... His testimony was premised on a human factor that was readily observable and understandable.”

In addition to the *Porter* challenge, First American argued that the celebrity enhancement testimony aroused the emotions of the jury and left the jury with the impression that the value of the property was enhanced by “some amorphous amount.” The court summarily disposed of that contention, stating that a real estate appraisal based in part on a celebrity enhancement theory was not likely to arouse in the jury feelings of hostility or sympathy, nor did it reflect unfavorably on First American.

What’s the big deal?

Traditional appraisal methodology is implicitly undermined by the rationales enunciated in this decision. The Court acknowledges that Farricker lacks the training, experience and credentials of a real estate appraiser, yet allows him to opine on the fact that celebrity ownership can have a material effect on a property’s value. At best, it would seem Farricker is qualified as an expert to speak to the “celebrity enhancement” to asking price or marketing methods, rather than fair market value.

Giving *per se* significance to the mere incidence of prior ownership by a celebrity or other notable on a property value can have far-reaching consequences in other contexts, such as condemnation or tax certiorari. Given the outsize influence of “celebrity” in our larger society, care should be taken in jury selection, cross examination of “celebrity enhancement experts,” and effective use of rebuttal experts when these situations arise.

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

OPINION - POLICY/CONSTITUTIONAL

Rethinking Pretrial Detention and Speedy Trial

Judge Lippman’s call for reforms after Kalief Browder

By Cory Morris

Pretrial detention is not a problem for defendants, so long as they have money. Innocent until proven guilty, Kalief Browder did not have the \$3,000 to make bail so he had to go to jail.

“In 2010, at the age of 16, he was arrested after being accused of stealing a backpack. He would spend three years in New York City’s Rikers Island (“Rikers”) prison, more than two of those years in solitary confinement.”¹ Charged with robbery, grand larceny and assault, “because Browder was still on probation, the judge ordered him to be held and set bail.” The only plausible reason to set bail was to ensure Browder’s return to court and/or to prevent a future crime by Browder. Eventually, released without a trial over 1,000 days later, the exposure to Rikers coupled with the theft of the last of his teenage years caused this young man to take his own life.

Rikers made Browder suicidal.

Before Rikers, Browder maintained a 3.5 grade point average as a high school sophomore. Once introduced to Rikers, he was greeted by gang members, beatings by guards, and placed in solitary confinement. During and after Rikers, Browder attempted suicide on multiple occasions. Not only did the criminal justice system fail him, it made him sick.

Before Browder died, his lawyer, Paul V. Prestia, stated that “[Browder] didn’t get tortured in some prison camp in another country. It was right here.”²

If stories like this make Chief Judge Lippman call for Bail Reform, what does it then say about our treatment of defendants’ constitutional rights, the courts that oversaw his prosecution and the prison system of which he was subjected?

The reality is that freedom isn’t free; preventative detention occurs with very little information beforehand and



Cory Morris

without any finding of guilt. We call it bail and bail costs money. How can we continue to tolerate a justice system based on the monetary worth of a defendant rather than true guilt or innocence? Should it not be that 10 guilty men go free before one innocent be jailed?

“Judge Lippman said the judiciary could no longer wait for lawmakers to act to address a system he said punishes people for being poor.”³ Indeed, the same New York Times article reported, “[f]our out of 10 people on Rikers Island are there because they cannot afford bail.” We should take instruction from Judge Lippman as well as react to stories like Kalief Browder’s. Judge Lippman said, he would set up an automatic review of all bail determinations made at arraignment in criminal court, appointing a judge in each borough to take a second look at those decisions within 10 days

to see if bail should be reduced. We too should join in this review, perhaps prompted by criminal defense attorneys, probation officers and others who had an opportunity to speak with the defendant after the brief process, which occurs before and at arraignment.

Removing “dangerous” youth from society should not be a reason to incarcerate. Over 30 years ago, *Schall v. Martin*, 467 U.S. 253 (1984) was decided, overruling the Second Circuit opinion that New York’s Family Court Act provision allowing pretrial detention of youth was unconstitutional. The New York statute (N.Y. Fam. Ct. Act § 320.5(3)(b)) allowed for the detention of juveniles if there was a likelihood that the youth would reoffend in the interim or to ensure their return to court. *Schall* evoked a dissenting opinion authored by Justice Marshall that highlighted the problems with both the failure of the justice system to examine

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Judiciary Night Memorable for All

Photos by Barry Smolowitz



CONSUMER BANKRUPTCY

Bankruptcy Stays and the Chap 13 Repeat Filer

Recent decision helps debtors who neglect to reinstate stay

By Craig D. Robins

Before Congress drastically modified the Bankruptcy Code in 2005, a number of debtors abused the bankruptcy system by filing serial Chapter 13 cases, always on the eve of foreclosure, to stay the foreclosure sale.

This placed the burden on the lender to bring a motion for relief from the stay. However, some debtors learned that they could game the system by filing again and again, causing great anguish to the lenders, some of whom had to wait years to get relief.

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) addressed this problem by shifting the burden to the debtor when there are repeat filings. Now, pursuant to section 362(c)(3), if a debtor files a second Chapter 13 petition within a year, the automatic stay only lasts for 30 days. The debtor then has the burden of bringing a motion to extend the automatic stay and must demonstrate to the court that he or she is entitled to have the stay continued.

However, the requirements for successfully bringing this motion can be quite tricky, and many a practitioner has learned this the hard way. If counsel does not bring the application correctly, then the stay will not be extended.

In order to extend the 30-day stay, section 362(c)(3)(B) requires the debtor to bring a motion, which is heard and granted before the expiration of the 30-day period. If the Debtor neglects to do so, then according to the statute, the stay automatically terminates *with respect to the debtor* on the 30th day after filing. As will be seen, these highlighted words have great significance.

This statute creates tremendous pressure on debtor's counsel, who must essentially file such a motion within days of filing the petition. In

addition, counsel must obtain a hearing date that is within the 30-day period, and cannot adjourn the hearing date unless the new date is also within that 30-day period.

At the hearing, counsel must demonstrate that the debtor filed the current bankruptcy in good faith. This usually involves showing that there has been a change in circumstances such that the debtor has overcome whatever problems that caused the prior case to be dismissed.

If the debtor does not bring the 30-day motion in a timely manner, even if it is unopposed, the court will not grant the requested relief. That was the lesson that counsel recently learned in a pending Central Islip Bankruptcy Court case. Counsel must have been most upset because if there is no stay, then a foreclosing mortgagee can continue a foreclosure proceeding and the bankruptcy becomes for naught.

However, it was not the end of the world, as counsel saw in the written decision from Judge Louis A. Scarcella, who decided that motion sitting in the Central Islip Bankruptcy Court. *In re Hale*, (U.S.B.C. E.D.N.Y., Case No. 15-71021-las, August 3, 2015).

In the *Hale* case, the debtor had a previous Chapter 13 petition dismissed in the one-year period prior to filing. Debtor's counsel filed his motion to extend the stay about six weeks after filing. This was clearly two weeks too late. Thus, the automatic stay had already expired on the 30th day after the petition was filed. Accordingly, Judge Scarcella denied the motion because it was not filed nor heard within the 30-day period.

Yet, all was not lost. Judge Scarcella pointed out that there is controversy, based on the wording of section 362(c)(3)(A), whether termination of the stay applies to property of the estate



Craig D. Robins

as well as to the debtor. He found that the automatic stay only terminates with respect to the debtor and his property, but not property of the estate. Consequently, a mortgagee would still be required to bring a motion for relief from the stay, as a debtor's home is property of the estate.

In reaching this holding, Judge Scarcella noted that even though the Second Circuit has not yet addressed this issue, there is an emerging majority view that termination of the automatic stay under section 362(c)(3) does not extend to actions against the property of the estate, which, as a practical matter, encompasses the lion's share of assets in play. This is all due to the wording of the statute, which states, "the stay automatically terminates *with respect to the debtor* on the 30th day after filing."

Judge Scarcella and other judges analyzing this statutory language find this wording clear, plain and unambiguous. "We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there..."

This flies in the face of the minority view, which seeks to preserve the congressional intent behind the statute of deterring and preventing abusive serial

filings.

However, Judge Scarcella commented that at first blush, the minority view has some appeal, given the objectives of the 2005 amendments to abusive serial filings. However, he observes that BAPCPA's drafting was inartful and the framework labyrinthine. Accordingly, he went with the view that places greater importance upon the plain meaning of the statutory language.

The decision is clearly a win for debtors as it essentially preserves the stay regardless of whether counsel brings the 30-day motion properly and perhaps acts as an indictment of the poorly worded BAPCPA statute.

Thus, in *Hale*, even though counsel failed to bring the 30-day motion in a timely manner, there is still a stay against property of the estate, which effectively prevents a mortgagee from continuing a foreclosure proceeding without first bringing a motion for relief.

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

Brownfield Cleanup Program (Continued from page 16)

Navigation Law or under Title 10 of ECL Article 17 (petroleum contamination and bulk storage); and sites subject to any on-going state or federal enforcement actions regarding solid/hazardous waste or petroleum. Thus, a property owner or buyer who is considering conducting a cleanup would have to apply for the BCP before violations and other government enforcement actions preclude this option. The advantages of the voluntary cleanup are not only the tax credits, albeit reduced by the recent amendments, but also the eventual liability release and the cooperative, rather than punitive framework, for the remediation process.

According to the DEC, more than 190 contaminated sites have been remediated in the past 10 years through the BCP. Whether or not the amended law achieves a faster pace of remediation, as is hoped, will depend on how much economic sense and legal certainty it can provide to would-be devel-

opers and owners of New York's many brownfields.³

Note: Lilia Factor is Counsel to Campolo, Middleton & McCormick. She is a member of the environmental practice group, concentrating her practice on environmental compliance, civil litigation, and appellate work. Currently, Lilia serves as co-chair of the Environmental and Green Industries Committee of the Hauppauge Industrial Association and Chair of the Environmental Committees of the Suffolk County Bar Association and the Suffolk County Women's Bar Association.

¹ Part BB of Chapter 56 of the Laws of 2015, amended and added new language to Environmental Conservation Law Article 27, Title 14 (Brownfield Cleanup Program) and certain other laws.

² <http://www.dec.ny.gov/regulations/101915.html>.

³ Additional funds are available for municipally owned contaminated sites through the Environmental Restoration Program, which is outside the scope of this article.

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PRACTICE MANAGEMENT

Engagement Agreements 101

By Allison C. Shields

Aside from the ethical rules, the single most important document that defines the attorney-client relationship is the retainer agreement or engagement letter.

New York does not require attorneys to provide an engagement agreement for all matters, such as those where the fee is expected to be less than \$3000, or where the attorney will be rendering services that are the same as services previously provided to and paid for by the client. But regardless of the type of matter, the value of the deal or anticipated award, a written engagement agreement or retainer letter is a smart move in all matters. It can protect both lawyer and client. It makes the relationship clear to the client, helps the client to value the lawyer's work, and memorializes the agreement and the scope of work to be performed in the event that any dispute should arise later.

Each jurisdiction may have its own rules about what must be included in an engagement agreement, but in addition to what is mandated, there are additional subjects that may be prudent for lawyers to include. Topics to be covered in the engagement agreement include the following:

Who is the client?

The engagement letter should clearly state who is being represented pursuant to the agreement, and in some cases, should also indicate who is *not* being represented. In instances where the attorney represents a particular employee but not the business (and vice versa), or where the attorney represents one member of a family but not others, it may be best to specifically state who the attorney does *not* represent, to note that those people's interests may not be aligned with the client's interests and to indicate how conflicts will be handled.

In some cases, the client is not the one footing the bill for the representation. The engagement agreement should set forth the rules of confidentiality, and to whom the duty of confidentiality is owed and explain attorney-client privilege.

Scope of work

The retainer agreement should accurately and specifically reflect the work that will be performed for the client. Even a retainer agreement for a 'simple' real estate matter may not be that simple. For example, what happens if the first deal falls through? How many



Allison M. Shields

contracts is the lawyer willing to review (or prepare) for the quoted fee? If the client does request additional services not covered under the original engagement agreement's scope of work, be sure to document both the additional services and the fee and obtain the client's consent. Be aware that many jurisdictions will apply greater scrutiny to revised or amended agreements once the confidential relationship has been established.

Exclusions

In addition to covering work that is included in the representation, the agreement should also advise the client what is *not* included in the representation. For example, if the agreement covers a litigation matter, does it include working on an appeal, or is that excluded?

Fees and costs

The agreement should memorialize the method that will be used to calculate the attorney's fee, who will be responsible for expenses, how frequently bills will be sent, and the timing and method of payment. The client should be advised when they should expect to receive the bill and also when

they are expected to make a payment. When billing by the hour or under any method by which the fee will not be known until the work is completed, the client should be provided with an estimate or budget.

When are the lawyer's fees considered earned if an up-front retainer is paid? Are any fees nonrefundable? Will the client be billed in stages? Will the retainer be a "replenishing" or "evergreen" retainer? What is the fee structure? Will payments be required in advance (i.e. 30 days before trial, etc.)? All of these questions should be answered in the retainer agreement or engagement letter.

Another issue to consider is whether the fee quoted will apply to the entire engagement or is subject to change, and if so, under what circumstances? If a modification becomes necessary, the lawyer may be required to show that any modification of an existing fee agreement, especially a modification sought by the lawyer, was reasonable under the circumstances at the time of the modification and that it was explained to and accepted by the client.

The agreement should detail the ways in which the firm accepts payments (i.e. credit cards, check only, electronic payments, etc.), as well as

(Continued on page 31)

Rethinking Pretrial Detention and Speedy Trial (Continued from page 18)

these offenders in detail before issuing detention and the failure of the system to convict a youth after he or she served that term of pretrial detention—just like Browder. In New York, this is coupled with the unsightly problem that "only New York and North Carolina automatically treat 16 and 17-year-old offenders as adults in the criminal justice system."⁴ Indeed, as the Amicus Brief of the American Psychological Association stated in *Schall*, the finding is overwhelming that no diagnostic tools accurately predict dangerousness to any reasonable degree, nevertheless *beyond a reasonable doubt*.

The Constitutional Right to a Speedy Trial is now a legal fallacy. One of over 5,000 cases, Browder languished as the People continued to answer ready for trial. "The problem is compounded by defense attorneys who drag out cases to improve their odds of winning, judges who permit endless adjournments, prosecutors who are perpetually unprepared."⁵ In response, "Judge Lippman said he would order judges to periodically review the strength of the prosecution's case and the people's readiness to go to trial with the idea that the judge would then consider lowering or eliminating bail if the

prosecution's case has weakened." These reviews might avert another tragedy like the death of Mr. Browder. Judge Lippman also said, "[a]ttorneys should work with the judiciary to ensure that the defendants' constitutional rights are protected irrespective of clogged calendars, court delays and illusory answers of readiness."⁶ The prosecution in Browder's case lost their key witness. Over 1,000 days elapsed and yet the People continued to push a case in which they were obviously not ready for trial.⁷ This is not a unique problem. Indeed, the Court of Appeals addressed this, again, in 2014, holding that the People's illusory response of readiness should be time counted against them for the purposes of calculating speedy trial time and, ultimately, dismissal.

Reforms need to come from legislation. Nicholas Turner, the president of the Vera Institute of Justice, said the state was still relying on cash bail to ensure defendants do not skip town, rather than modern risk-assessment surveys and other tools for determining who is likely to return to court. Turner thinks that changing the underlying system would require legislation. In addition, judges need to protect the constitutional rights of defendants, like

Browder, whose cases languish for years without prosecution. Both prosecutors and defense attorneys need to be mindful of their ethical duties to their clients and, above all, their role as officers of the court. It is likely the legislation will need to address these issues. Lastly, aside from the fact that Kalief Browder should never have suffered pretrial detention, he should have received medical treatment for his suicide attempts.

The Constitutional safeguards designed to protect Browder failed. He lost his liberty, his sanity and ultimately his life. It failed him as it continues to fail others. Browder was not innocent until proven guilty but punished summarily. He had no right to any trial and no right to bodily integrity as he suffered solitary confinement and physical abuse. You can hear it in the young man's voice in a video interview before took his own life: "No apology, no nothing, they just said 'Oh, case dismissed', don't worry about nothing like ... what do you mean don't worry about nothing, you just took over three years of my life."⁸ While this coverage may be unique, his story is not.

Note: Cory Morris is a civil rights attorney, holding a Masters Degree in

General Psychology and currently the Principal Attorney at the Law Offices of Cory H. Morris. He can be reached at <http://www.coryhnmorris.com>.

¹ Amy Goodman and Denis Moynihan, *Kalief Browder, Albert Woodfox and the Torture of Solitary Confinement*, DemocracyNow (June 11, 2015), http://www.democracynow.org/blog/2015/6/11/kalief_browder_albert_woodfox_and_the.

² Democracy Now, *Traumatized by 3 Years at Rikers Prison Without Charge as a Teen, Kalief Browder Commits Suicide*, Youtube (Jun. 8, 2015), <https://www.youtube.com/watch?v=Zd6hCmgmj44>.

³ James C. McKinley, Jr., *State's Chief Judge, Citing 'Injustice,' Lays Out Plans to Alter Bail System*, New York Times (Oct. 1, 2015), http://www.nytimes.com/2015/10/02/nyregion/jonathan-lippman-bail-incarceration-new-york-state-chief-judge.html?_r=1.

⁴ Katrina vanden Heuvel, *Adolescents Do Not Belong in the Adult Legal System*, The Nation (Mar. 23, 2015), <http://www.thenation.com/article/opportunity-has-come-keep-adolescents-out-adult-legal-system/>.

⁵ Jennifer Gonnerman, *Before the Law*, The New Yorker (Oct. 6, 2015), <http://www.newyorker.com/magazine/2014/10/06/before-the-law>.

⁶ See *People v. Sibbles*, 22 N.Y.3d 1174, 1177, 985 N.Y.S.2d 474 (2014).

⁷ See Thomas M. Obrien, *The Undoing of Speedy Trial in New York: the 'Ready Rule'*, (N.Y.L.J. January 14, 2014).

⁸ Ch. 7 News, *Teen Thrown In Violent New York Prison For Years Without Ever Having Been Convicted*, Youtube, <https://www.youtube.com/watch?v=sGjHm92CqRE>

Medical Malpractice Conference for Suffolk County (Continued from page 12)

ences on July 22, September 19, and December 5 of 2013. A total of 21 cases were settled out of the 22 scheduled yielding a success rate of 95 percent.

The Court held settlement conferences on 24 cases on five separate dates in 2014 and successfully disposed of 19 for a success rate of 75 percent.

The court has held four conferences to date and settled 13 out of 17 scheduled cases for a success rate of 76 percent in 2015.

Therefore, since the program commenced, this part has settled 53 out of 63 cases for a success rate of 84 percent.

The court is very proud of these results, as they were higher than expected. This degree of success would not be possible without the input and hard work of many people including Larry Voightsberger, Chief Clerk of the Calendar Control Part, my secretary, Jill Meise, my law secretary, Ray Voorhees and my courtroom staff clerk Deana Borger and Senior Court Officer Connie Raber. I must also take a moment to thank the plaintiff's and defendant's bar, as well as the claims adjusters, particularly Ms. Cindy Vigilanti of PRI, who have participated in these sometimes difficult settlement discussions in good faith with a sincere desire to reach a resolution that serves the interest of justice for both the plaintiff and defendant. Experience dictates that in the final analysis, it is the realistic understanding of what the true value of the case is, as well as a good faith desire to resolve the dispute by the lawyers and the clients that leads to a successful settlement of the dispute between the parties.

I would invite counsel representing plaintiffs against a defendant physician whose coverage is provided by PRI or

who is an institution within the North Shore LIJ system to confer with the claims adjuster, risk manager and/or defense lawyer to determine if there is a reasonable belief that court assistance has a probability of success. It would seem that having such a conference would be extremely prudent considering that 87 percent of all medical malpractice cases tried in 2014 resulted in defendant's verdicts.

Finally, nothing encompasses the proper state of mind in which counsel should enter these conferences than a statement from one of my favorite 20th century philosophers, Mick Jagger,

who said, "You can't always get what you want, but if you try, you just might get — what you need."

NOTE: The Hon. Peter H. Mayer worked as an Assistant District Attorney in Suffolk County from 1973 to 1981, serving under District Attorneys George Aspland, Henry Wenzel, Henry O'Brien and Patrick Henry. Justice Mayer entered private practice in 1981 under the firm name of Clayton & Mayer in Suffolk County, focusing in the area of federal and state criminal defense. In 1994, Justice Mayer relocated to Glenwood Springs, Colorado, where he

continued to maintain his private practice in federal and state criminal defense. He returned to Suffolk County in 1997 and accepted a position as Assistant County Attorney. Thereafter, he returned to Suffolk County private practice, concentrating in federal and state criminal and civil matters. In January 2006, Justice Mayer took the bench as a New York State Supreme Court Justice for the Tenth Judicial District, Riverhead, New York, where he presides over civil matters. In addition to his position as director of the Suffolk County Bar Association, Justice Mayer is co-chair of SCBA's Veterans Committee.

Abuse in Admitting Testimony (Continued from page 11)

few "code words." Rather, his testimony was, "in large part," an explanation of "what the conversations referred to based upon the investigative reconstruction in which he had taken part." The problem, the court found, was that it is for a jury to interpret the evidence, not an expert. It stated, "[t]rials, by design, are not decided by those preschooled in the matter litigated, however thorough their extra-judicial education may have been; they are, to the contrary, decided independent of case-specific preconception on the basis of the evidence introduced during the proceeding itself in accordance with the rules of admissibility."⁷ If a police officer presents his factual knowledge to the jury, he, as an expert, does not aid the jury in its fact finding, but instead, tells the jury what facts are needed to support the criminal charges.

Upon considering all of the evidence presented at trial, the court found that all

of the testimony of the eyewitnesses was "utterly compelling," and indeed what "anchored" the prosecution's case. That testimony, the court specifically noted, included one witness's extensive explanation of the taped conversations. Thus, the court concluded that given all of that evidence, "the general import of what was being discussed on the prison tapes" would have been self-evident ... and not in need of express, much less expert clarification."⁸

The court determined that Detective Rivera's "summation testimony" was harmless, and affirmed the Appellate Division. Although dicta, the court stated that had the evidence presented at trial been different, or had there been a constitutional confrontation issue, there could have been a reversal, and advised the trial courts to "be vigilant against the serious risks that" using government agents as expert summation witnesses raise.

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

¹ 25 NY3d 467 [2015].

² *Id.* at 471.

³ 108 AD3d 765 [1st Dept 2013].

⁴ 25 NY3d at 471.

⁵ *Id.* at 472.

⁶ *United States v Mejia*, 545 F3d 179 [2d Cir 2008] and *United States v Dukagjini*, 326 F3d 45 [2d Cir 2002].

⁷ 25 NY3d at 475.

⁸ *Id.* at 476.

Investing in New York Real Estate (Continued from page 12)

portion of the gain on the redemption of the taxpayer's stock in the S corporation, reflected in the principal payments on the installment note, would be N.Y. source income subject to N.Y. personal income tax. The portion of the gain that constituted N.Y. source income would be determined by multiplying the amount of the gain by a fraction, the numerator of which was the FMV of the N.Y. real property on the date of the redemption sale and the denominator of which was the FMV of all of the corporation's assets (owned for at least two years) on the date of the redemption sale. To the extent that this gain was payable to the taxpayer under an installment payment agreement (the note), a portion of each installment payment would be taxed as N.Y. source income when it was received (thereby deferring the tax liability). As to the interest paid on the note, the Tax Department con-

cluded that the note, and not the corporation's real property, was the income-producing property. Because the note was intangible personal property, and the interest received by Taxpayer was not income attributable to property employed in a business or trade carried on in N.Y., the interest was not subject to N.Y. personal income tax.

What's a nonresident seller to do?

As in any sale transaction, a price must be established for a taxpayer's interest in an entity. This may entail negotiations between the buyer and seller. In each case, it will behoove the seller to understand and to try to quantify the costs (including taxes) of the sale in advance of any discussions. This will enable the seller to settle on the appropriate sales price: one that will yield the desired after-tax economic result.

In the case of a non-N.Y. resident with an interest in an entity that owns at least some N.Y. real property, the taxpayer will need to determine whether the entity meets the 50 percent threshold described above. In some cases, depending upon the entity's business or investment purpose, not to mention the level of authority possessed by the non-N.Y. resident, it may be possible to periodically adjust the entity's investment holdings — being mindful of the two-year "anti-stuffing rule" — so as to fall short of the threshold. Of course, any such adjustments must make sense from a business or investment perspective.

Where the nonresident has little control over the entity, it may be possible to "time" the sale of his or her interest, taking advantage of a drop in real estate values or of an increase in the value of other assets held by the entity

(for example, securities). However, this option may be impractical in cases where, for example, a shareholders or operating agreement restricts the sale of interests in the entity.

The important point is to recognize at the inception of one's investment in an entity that there may be an issue on a subsequent disposition of the investment, to try to account for the ultimate tax cost when pricing the acquisition of the investment and/or its later sale, and to try to secure the periodic valuation of the entity's underlying assets so as to facilitate any decision as to a disposition and to support one's reporting position in the event of a sale.

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.

Successful Law Student BBQ at the SCBA

Photos by Barry Smolowitz



Several law school students enjoyed an opportunity to meet judges and attorneys at the Suffolk County Bar Association when they attended the Law Student BBQ. President Donna England spoke to the students thanking them for coming, adding, "These young people are our future, and I told them that the people they were meeting that night might be part of their legal career for many years to come."



FREEZE FRAME



Couldn't Be Prouder

SCBA member Diane McClernon and husband Bob celebrated the graduation of their son Steven, who graduated Summa Cum Laude from St. Joseph's College with a BA in Child Study last May.

What is Freeze Frame and how can SCBA members be included

They say a good picture tells a story. Why not share your good news with your colleagues at the Suffolk County Bar Association. Send photos of the important events or people in your lives to *The Suffolk Lawyer*. Did you have a baby? Are you a new grandparent? Did your child graduate? Was there a marriage celebration in your family? These are but a few examples of the types of photos that can be included in Freeze Frame. Get the word out by sending photos and captions to Editor-in-Chief Laura Lane at scbanews@optonline.net.

Bench Briefs (Continued from page 4)

In *Joanne Budah v. Philip Rosa and Michele Posa*, Index No.: 22935/2012, decided on December 5, 2014, the court granted the defendants' motion to compel the plaintiff to provide authorizations relating to her prior medical conditions and treatment.

In rendering its decision, the court noted that under the liberal discovery provisions of the CPLR, a party who affirmatively placed his or her physical or mental condition in issue has effectively waived the physician-patient privilege and must, therefore, provide duly executed and acknowledged written authorizations for the release of pertinent medical records. Here, the court stated that despite plaintiff's claim that the alleged injury was limited to her right knee, her pleadings made broad allegations of physical and mental injuries. Based upon the broad allegations of physical and mental injuries, the plaintiff had affirmatively placed her physical and mental condition in issue. Consequently, the documents sought by the defendants were material and necessary to the defense of plaintiff's claims.

Motion to preclude denied; motion for protective order granted; although the failure of a party to challenge a notice for discovery and inspection within the time specified by CPLR §3122 foreclosed inquiry into the proprietary of the information sought, an exception existed as to demands, which were palpably improper.

In *Leon J. Hochheider and Leon J. Hochheider, Co., Inc. v. Steven Alin and Pension Design Services, Inc.*, Index No.: 28100/2013, decided on July 8, 2015, the court denied plaintiffs' motion for preclusion and granted the defendants' motion for a protective order.

In deciding the motions, the court rejected plaintiffs' arguments that the defendants waived their right to challenge the demands for disclosure made in the notice of discovery and inspection. The court pointed out that although the failure of a party to challenge a notice for discovery and inspection within the time specified by CPLR §3122 foreclosed inquiry into the proprietary of the information sought, an exception existed as to demands, which were palpably improper. The court further stated that a disclosure request will be considered palpably improper if it was vague or was overly broad and burdensome. Notices for discovery and inspection are overly broad where they fail to specify the documents sought with "reasonable particularity." Courts have held that the use of descriptions "any," "all," or "any and all" renders the notice for discovery and inspection palpably improper. Where a discovery demand is overly broad, pruning of the demand by the court will be inadequate to correct the demand's deficiencies. Accordingly, the motion for preclusion was denied and the motion for a protective order was granted.

School District to promptly submit to

Chambers a copy of all of defendant's educational records to be reviewed by the court in camera for determination as to what, if any, records should be disclosed as evidence material and necessary in the prosecution or defense of this action in accordance with CPLR §3101(a); the Buckley Amendment was intended to protect records relating to an individual student's performance without a demonstrated need for disclosure.

In *Michael Maloney v. Longwood Central School District and Michael Combs*, Index No.: 9993/2013, decided on May 12, 2015, the court granted the motion to compel to the following extent: the defendant, School District was to promptly submit to Chambers a copy of all of defendant Combs' educational records demanded, to be reviewed by the court in camera for determination as to what, if any, records should be disclosed as evidence material and necessary in the prosecution or defense of this action in accordance with CPLR §3101(a).

The issue in this matter was whether certain student education records must be disclosed, or whether such records were barred from disclosure by 20 USC §1232g, commonly known as the "Buckley Amendment." In deciding the application, the court noted that the Buckley Amendment was intended to protect records relating to an individual student's performance without a demonstrated need for disclosure. The court further stated that reports of prior incidents involving violent behavior, however, may be material and necessary to determine whether school officials had actual or constructive notice of similar conduct, which could constitute a basis for imposing liability. However, the court pointed out that since reports of prior violent incidents may include information which was deemed confidential pursuant to provisions other than the Buckley Amendment, the court may examine those reports in camera and redact the confidential matter prior to disclosure.

Honorable William B. Rebolini

Motion to amend the caption to add additional defendant granted; allegations of negligence proposed to be asserted against additional defendant arose out of the care and treatment provided to the plaintiff in pertinent part, during the same time period and at the same medical facility as the claims that are set forth against the remaining defendant.

In *Bibiana Reilly and Brendan Reilly v. Jean-Marie Bosch, R.N., Theodore L. Goldman, M.D., T.L. Goldman, M.D., PLLC, Felicia T. Callan, M.D., John R. Wagner, M.D., John Wagner, P.C., Mitchell Kramer, M.D., Suffolk OB/GYN Group, P.C., Huntington Medical Group, P.C., Mary Jean Collarini, R.N. and Huntington Hospital*, Index No.: 9272/2011, decided on September 18, 2014, the court granted plaintiffs' motion to amend the summons and complaint to add an additional defendant.

The court pointed out that the plaintiff

moved for leave to file and serve an amended summons and complaint naming Elisa C. Felsen-Singer, D.O. as a party defendant and since the statute of limitations had expired, deeming that the relation-back doctrine applied to the claims against Dr. Felsen-Singer. In granting the application, the court noted that the allegations of negligence proposed to be asserted against Dr. Felsen-Singer arose out of the care and treatment provided to the plaintiff in pertinent part, during the same time period and at the same medical facility as the claims that are set forth against the remaining defendants. In addition, the court stated that Dr. Felsen-Singer was an employee or member of the Huntington Medical Group, P.C., who participated in a collaborative work arrangement to provide care and treatment to patients of other medical groups, including patients of WGM Obstetrics and Gynecology, P.C. Moreover, the court concluded that as the physician who cared for the plaintiff at the hospital from the time of her admission until orders were given for a caesarean section, and the physician with whom Dr. Goldman discussed the care of the plaintiff, it could reasonably have been concluded by Dr. Felsen-Singer that she would have been named as a defendant, had her involvement in the plaintiff's care been more clearly set forth in the hospital records.

Motion to compel disclosure denied; impossible for the court to determine whether the records were subject to disclosure as no effort had been made to link plaintiff's alleged drug use to either the cause of the underlying accident or to

plaintiff's ability to recover from the injuries sustained as a result of the accident.

In *Victor Sabatino v. Simon Property Group, Inc., and Mall at Smith Haven, LLC*, Index No.: 32092/2012, decided on April 20, 2015, the court denied plaintiff's motion for disclosure of certain medical records, without prejudice.

In rendering its decision, the court noted that the burden of proving that a party's mental or physical condition is in controversy is on the party seeking to examine hospital records, in this case, no records and no affirmations had been submitted. As such, it was impossible for the court to determine whether the records were subject to disclosure as no effort had been made to link plaintiff's alleged drug use to either the cause of the underlying accident or to plaintiff's ability to recover from the injuries sustained as a result of the accident.

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, PLLC in Uniondale. Ms. Colavito concentrates her practice in matrimonial and family law, civil litigation and immigration matters.

Transfer of Firearms (Continued from page 4)

Significantly, if the transfer involved a legitimate sale, then the defendant is permitted to recoup the proceeds. Alternatively, if the court is not satisfied that the defendant's intended recipient would refrain from relinquishing control over the weapons, or abide by the court's requirements, then the court may transfer the firearms to an independent gun dealer of its choosing (*Id.*, at *15).

Since the issue of whether the defendant's intended recipients – his friend or wife – were likely to give defendant access or control over the firearms, the matter was remanded for further proceedings. The court did not provide any further guidance or instruction, but it is evident that the decision is to be made on a case-by-case basis. Any infractions or violations of the court's ruling by the recipient may result in charges for aid and abet.

Conclusion

Federal law makes it unlawful for a defendant convicted of a felony to possess a firearm and/or ammunition. Where the trial court is in possession of the defendant's firearms, upon conviction, the court may direct the transfer of

the firearms to the person or entity of defendant's choosing provided it is satisfied the recipient will not permit access or otherwise allow defendant to exert influence or control over the firearms. Defendant may recoup profits from the sale of his or her weapons.

Note: Stephen L. Ukeiley, formerly a Suffolk County District Court and Acting County Court Judge, is the Principal Law Clerk to the Honorable Richard I. Horowitz, Court of Claims Judge and Suffolk County Acting Supreme Court Justice. Mr. Ukeiley is also an adjunct professor at both the Touro College Jacob D. Fuchsberg Law Center and New York Institute of Technology. He is a frequent lecturer and author of numerous legal publications, including The Bench Guide to Landlord & Tenant Disputes in New York (Second Edition)®.

** The information contained herein is for informational and educational purposes only, and the result of independent research unrelated to any case or motion, pending or otherwise, before Judge Horowitz. This column should in no way be construed as the solicitation or offering of legal or other professional advice. If you require legal or other expert advice, you should consult with an attorney and/or other professional.*

Grandma's Boy in New York (Continued from page 3)

The court would then be required to determine whether, in its discretion, circumstances exist that would “see fit” for it to intervene into the zealously guarded, Constitutionally protected sphere of discretion as to how to raise one’s children. Necessarily that means a hearing on the issue of standing; and, following such a hearing, if the court determines that there are no equitable reasons to allow the petition, the case must be dismissed.

While the Court of Appeals seemingly dispatched of the technical argument that ordering grandparent visitation upon an otherwise intact “nuclear” family is unconstitutional, holding that DRL 72 applied not to fill “some void in the nuclear family created by death, divorce, or similar disability or by forfeiture resulting from neglect,”ⁱⁱ it also held that the living parent(s)’ objection would be a heavy factor to consider before granting standing.

Nor is it sufficient for a bare-bones petition to simply allege, in talismanic fashion, that the grandparent(s) love and care for their grandchildren, as the *Emanuel* Court explicitly held:

“It is not sufficient that the grandparents allege love and affection for their grandchild. They must establish a sufficient existing relationship with their grandchild, or in cases where that has been frustrated by the parents, a sufficient effort to establish one, so that the court perceives it as one deserving the court’s intervention. If the grandparents have done nothing to foster a relationship or demonstrate their attachment to the grandchild, despite opportunities to do so, then they will be unable to establish that conditions exist where ‘equity would see fit to intervene.’ The evidence necessary will vary in each case but what is required of grandparents must always be measured against what they could reasonably have done under the circumstances.”

This “could’ve, would’ve, should’ve” approach is perhaps one of the few times that a court has so clearly invited a line of speculative questioning as probative to a matter in dispute, should the issue of standing require a hearing. A cross-examiner’s

dream, to be sure, since anything goes.

“Q: Now, ma’am, it says here you love your grandchildren, correct?”

A: Of course.

Q: You miss them terribly, true?

A: Yes.

Q: You know their phone numbers, right?

A: Yes.

Q: And their birthdays, yes?

A: Yes.

Q: Now it says here that you haven’t spoken to them in over a year, is that correct?

A: Yes, more than a year.

Q: Now, how many times did you call each of your two grandchildren over this past year?

A: Well ... I don’t know ... on their birthday, and on Christmas...

Q: So we agree, they have one birthday each, right?

A: Yes.

Q: And Christmas comes once a year, correct?

A: Yes.

Q: And last year had 365 days in it, am I correct?

A: Yes.

Q: And you missed your grandchildren so terribly that you only called them twice out of those 365 days; do I have that right?

A: Yes, but ...

Q: And there was nothing stopping you from dialing the phone on those other 363 days, am I correct?”

Parenthetically, a conclusory, bare bones petition that does not demonstrate a “sufficient existing relationship” or a “sufficient effort to establish one” should be dismissed at the outset, rather than be referred to a hearing; since the petitioner is bound by their pleading, what is not alleged in the document should not be allowed to be proven at trial.

Note: Vesselin Mitev is a partner at Ray, Mitev & Associates, a New York litigation boutique with offices in Manhattan and on Long Island. His practice is 100 percent devoted to litigation, including trial, of all matters including criminal, matrimonial/family law, Article 78 proceedings and appeals.

¹ *Matter of Emanuel S. et al. v. Joseph E. et al.*, 78 NY2d 178 (1991)

² *Id.*

LegalZoom (Continued from page 1)

outlined above as a computerized equivalent of a will making kit. Will making kits do not violate New York’s prohibition against the unauthorized practice of law so long as the nonlawyer does not give personalized legal advice¹.

In *Janson v. LegalZoom, Inc.*² the court noted “LegalZoom customer service representatives are repeatedly informed that giving legal advice to a customer will result in dismissal, and that even approaching giving legal advice to a customer will result in discipline up to and including dismissal.” Presumably these strict instructions are given in an effort to avoid any appearance that LegalZoom is giving personalized legal advice.

The *Janson* case is one of many disputes, which have arisen in different states with respect to the issue of whether LegalZoom is engaged in the unauthorized practice of law. In *Janson*, a Missouri case, the court considered, mainly in dicta, whether LegalZoom’s conduct constituted the unauthorized practice of law. The court opined that LegalZoom’s computerized questionnaire was different than a fill in the blank will making kit because with a will making kit the onus is on the client to read the instructions and fill in the blanks. The court noted that “LegalZoom’s internet portal service is based on the opposite notion: we’ll do it for you.” The court cited LegalZoom’s advertisements, which promised, “we’ll prepare your

legal documents” and “ ‘LegalZoom takes over’ once customers ‘answer a few simple online questions.’ ”

In *Janson* the court found that LegalZoom was selling services and not goods. In contrast, a will making kit would be considered goods. The court explained that because LegalZoom’s services were based on questions asked by a computer, which had been programmed by a human, there was “little or no difference” between the LegalZoom’s computer program and what a human attorney would do in order to create the same document. Putting a computer between the programmer and the client did not change the nature of the services provided. Although they were discussed at length, the court did not rule on these issues in the *Janson* case. After this decision was issued the case was settled.

Starting in 2010 LegalZoom began to offer prepaid legal service plans. According to LegalZoom: “These plans provide their members with access to attorneys licensed in their states who have contracted with LegalZoom to provide plan members certain legal advice and services defined in the plans.”³ A review of the LegalZoom website shows that three attorneys in the Legal Plan Attorney Directory identify themselves as New York attorneys. Interestingly, while all three are registered in New York, a search of the New York State Attorney Registration Directory shows that all

three live in California.

If you create a will using LegalZoom’s software you can pay \$69 for the basic will package or you can pay \$79 for the comprehensive package which includes a 30-day trial of LegalZoom’s “attorney advice” product, which allows the client to “speak with an independent attorney on an unlimited number of new legal matters.”⁴ If the client continues the attorney advice product for \$14.99 per month they are then entitled to an “Annual legal checkup with an attorney” to “Ensure your estate plan and other legal documents are up-to-date.”

North Carolina is the current focal point of LegalZoom litigation. One function of the North Carolina State Bar is that it registers prepaid legal service plans. According to LegalZoom, the North Carolina State Bar refused to register LegalZoom’s prepaid legal service plan and sent LegalZoom a cease and desist letter indicating that LegalZoom’s online document service constituted the unauthorized practice of law. LegalZoom filed a lawsuit against the North Carolina Bar Association in 2015 seeking \$10,500,000 in damages and injunctive relief based on allegations of unreasonable restraint of trade and monopolization.⁵ A review of the docket in that case shows that the North Carolina State Bar filed a motion to dismiss on August 20, 2015. The terse five page motion asserts failure to state

a cause of action, statute of limitations and that the State Bar has immunity as an agent of the state.

LegalZoom has not been welcomed in New York with open arms. Former New York State Bar Association president Glen-Lau Kee wrote of LegalZoom’s success: “We cannot let the market alone drive and determine the nature of the legal profession.”⁶ Current New York State Bar Association President David Miranda was recently quoted as saying of LegalZoom and other services like it: “You talk about the law like it’s a business ... It’s not. It’s a profession.”⁷

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

¹ *State v. Winder*, 42 AD2d 1039 (4th Dept. 1973).

² *Janson v. LegalZoom.com, Inc.*, 802 F. Supp. 2d 1053 (W.D. Mo. 2011).

³ *LegalZoom.com, Inc. v. North Carolina State Bar*, MDNC, Case No. 15-cv-439.

⁴ <http://www.legalzoom.com/legal-wills/wills-pricing.html>

⁵ *LegalZoom.com, Inc. v. North Carolina State Bar*, MDNC, Case No. 15-cv-439.

⁶ <http://www.nysba.org/workarea/DownloadAsset.aspx?id=55585>

⁷ http://www.abajournal.com/mobile/article/disruptive_innovators_try_to_convince_skeptical_attorneys_of_the_need_to_co

Review of the DMV Permanent License Revocation Regulations (Continued from page 14)

appealable within 60 days to the Department of Motor Vehicles Appeals Board by filing DMV Form AA-33A.

There is an option to go straight to an administrative appeal to contest the legality of the regulations as applied to your client, but the Department of Motor Vehicles will not consider the unusual, extenuating and compelling circumstances, which are important to your client. A denial of the administrative appeal is subject to judicial review by a CPLR Article §78 lawsuit in state Supreme Court filed within four months of the date of the adverse determination.

Reported cases of CPLR Article §78 challenges to the regulations have not met with success: *Matter of Funes v. New York State Department of Motor Vehicles*, 2013 NY Slip Op 31082 (U), *Gaebel v. New York State Department of Motor Vehicles*, 43 Misc 3d 185, 2013 NY Slip Op 234404, *Matter of Brown v. New York State Department of Motor Vehicles*, 44 Misc 3d 182, NY Slip Op 24082, *Matter of Acevedo v. New York State Department of Motor Vehicles* 2014 NY Slip Op 30422 (U), *Matter of Nicholson v. Appeals Board of Administrative Adjudication Bureau*, 2014 NY Slip Op 31537 (U), *Argudo v. New York State Department of Motor Vehicles*, 2014 NY Slip Op 32357 (u). In the *Matter of the Application of Araujo v. New York State Department of Motor Vehicles*, 5057/14, NYLJ 1202670156299 at *1 (Sup., NA

Decided September, 9 2014), *Matter of Rothschild v. N.Y. Department of Motor Vehicles*, 2015 NY Slip Op 51351 (U) 000260-2015, NYLJ 1202738316730 at*1(Sup. RO, Decided August 14, 2015).

No evidence was taken at a hearing, which mandates that Special Term decide the case without a CPLR §7804(g) transfer to the Appellate Division. *Yezeck v. State Department of Motor Vehicles Appeals Bd.* 62 A.D. 3rd 107, 879 N.Y.S. 2d 571 (2 Dept 2009).

A summary of the decisions by Supreme Court, Special Term and the Appellate Division have relied upon the long standing principle that a driver's license is a privilege and not a right and as such, the state is entitled to impose reasonable regulations.

The cases have cited Vehicle and Traffic Law §510(5) (6) for the proposition that the Commissioner has discretion to restore a driver license or privilege. The courts have been reluctant to substitute their judgement for that of the Department of Motor Vehicles.

Legal arguments of retroactivity or that administrative rulemaking in this area has violated Legislature prerogative has so far failed to persuade Special Term or the Appellate Division. *Matter of NYC C.L.A.S.H v. New York State Office of Parks, Recreation and Historic Preservation* 125 A.D.3d 105, 2014 NY Slip Op 09085, the Appellate

Division, Third Department, recently reversed a successful challenge to regulations banning outdoor smoking in state parks and found the actions were appropriate within the rulemaking authority. This case is instructive of an appellate court's reasoning in balancing the right to make reasonable regulations against the legislative purview or prerogative.

The Appellate Division, Fourth Department, has upheld the permanent revocation regulations. *Matter of Shearer v. Fiala*, 124 A.D. 3d 1291, 2015 NY Slip Op 0051,lv. den., 25 N.Y. 3d 909. The panel rejected arguments that Part §136 was legislative in nature or in conflict with any look-back period in the Vehicle and Traffic Law. The decision found that the 25 year look back period was correctly applied in denying the petitioner's driver license application. The Court of Appeals denied a motion for leave to appeal.

The Third Department recently upheld the regulations turning aside legal arguments concerning retroactivity, ex post facto application, legislative preemption and statutory conflict. *Matter of Acevedo v. New York State Department of Motor Vehicles*, cite as *Acevedo*. DMV, 520060, NYLJ 1202734171346 at 1* (App. Div., 3rd Dept Decided August 6, 2015). The Appellate Division also rejected chal-

lenges in *Matter of Dahlgren v. New York State Department of Motor Vehicles*, 124 A.D. 3d 1400 (App. Div., 4th Dept.), *Matter of Scism v. Fiala*, 122 A.D. 3d 1197, 2014 NY Slip Op 8283 (App. Div 3rd Dept).

The Second Department has weighed in and reversed Special Term to uphold the determination of the Department of Motor Vehicles permanent denial of a driver license application. *Matter of McKevitt v. Fiala*, A.D.3d _ 2015. The case was remitted to Supreme Court to determine whether unusual, extenuating and compelling circumstances exist to order the Department of Motor Vehicles to depart from the general policy of permanent denial. Defense counsel may wish file the appeal within 30 days of the denial letter under unusual, extenuating compelling circumstances. Your client may believe that such circumstances apply to their case. The courts have repeatedly upheld the regulation for "three strikes" rule.

The Department of Motor Vehicles permanent revocation regulations are the subject of continuing legal challenges based upon many legal arguments with the final chapter yet to be written.

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

Trusts and Estates Update (Continued from page 15)

In *In re Pridgen*, the court, *inter alia*, was confronted with a request by a potential objectant for the continued SCPA 1404 examinations of the attorney-draftsman of the propounded instrument, an attesting witness and the proponent. It appeared that the proponent and the attorney-draftsman had been examined, but that the sole surviving attesting witness could not be located, and thus her examination did not take place as contemplated with the draftsman and the proponent. The movant, thus, maintained that the examinations were not completed, and that she was entitled to depose the attesting witness, whose address the draftsman had represented she would provide, but had not to date. Further, the movant maintained that the draftsman failed to bring the decedent's entire file to her examination, and represented that she would do so in the event her examination was continued. Additionally, the movant claimed she was entitled to the continued examination of the proponent with regard to a parcel of real property purportedly belonging to the decedent at death.

The court denied the movant request for the continued examination of the proponent, finding that she had appeared for her examination initially and brought all demanded documents

in her possession. To the extent that further information was sought with regard to the subject real property, the court held that the proponent was not obligated to procure same. On the other hand, the court noted that the attorney draftsman had failed to produce all requisite documents prior to her initial examination, but instead, mailed the balance of her the decedent's file to movant's counsel after its completion. Under these circumstances, the court found that the movant could not be foreclosed from examining the draftsman with respect to the additional documents produced. Moreover, the court held that the movant was entitled to the examination of the only surviving attesting witness, whom she was attempting to locate through the aid of a private investigator.

In re Pridgen, N.Y.L.J., June 12, 2015, at p. 42 (Sur. Ct. Bronx County).

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

In Anticipation of Expanded Mandatory E-filing THE SUFFOLK COUNTY SUPREME COURT and THE SUFFOLK COUNTY CLERK

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- Working copies
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- Orders, judgments and satisfactions
- More ...

Faculty: Jeffrey Camucci, Statewide Coordinator for E-filing
Thomas Clavin, Court Clerk Specialist
David Grier, Deputy County Clerk

Time: Monday, November 16, 2015
1:00 p.m. – 2:00 p.m. (Riverhead) (registration begins at 12:30)
6:00 p.m. – 7:00 p.m. (Hauppauge) (registration begins at 5:30)

Locations: Suffolk County Center
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310 Center Drive
Riverhead, NY 11901
Suffolk County Bar Association
Great Hall
360 Wheeler Road
Hauppauge, NY 11788

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For questions, call (631) 852-2334 or (631) 852-2016 or the NYSCEF Resource Center at (646) 386-3033.

C. Randall Hinrichs
District Administrative Judge

Judith A. Pascale
Suffolk County Clerk

President's Message (Continued from page 1)

plicated area of practice.

Over the past month the Suffolk County Bar Association has hosted several events, including the Council of Committee Chairs, a meeting of our 45 plus chairs who will plan and execute the coming year's programs, identify the problems in their specific areas or in court and answer the needs of their specific committee. These chairs are our future leaders of the bar association and the counsel usually meets twice a year to guide the chairs with their plans. Committees are the backbone of our organization ... they function to gather information, study issues, reach a consensus, and make recommendations to our Board of Directors. For long-term effectiveness, an association must have strong committees.

We also held our annual Judiciary Night, a celebration of our judiciary and a means of strengthening our relationship as practicing attorneys with the judiciary. It is a wonderful opportunity for attorneys to meet judges in an informal setting free from the constraints of the courtroom.

This year we were proud to honor our former Chief Administrative Judge, the Honorable A. Gail Prudenti, who has been a faithful member of our association and an extraordinary jurist. I would also like to take this opportunity to thank our Presiding Justice the Honorable Randall T. Eng, who has been such a strong supporter of our association. We thank him for braving those long hours on the Long Island Expressway to attend so many of our events.

I was proud to represent the Suffolk County Bar Association at the Bronx County Bar Association's annual gala, which was held at the Villa Del Mar and attended by 600 people. It is so interesting to learn about our neighboring bar associations and to collaborate on major issues affecting all lawyers in the state. The Presidents of the City Bar of New York, New York State Trial Lawyers, Richmond County Bar Association and the Network of Bar Leaders in NYC joined me. We were all introduced to their audience. Many of the attorneys attending were personal injury lawyers and when I told them that I was representing Suffolk County they said they loved coming to Riverhead and find our bench and bar to be very professional and courteous at all times.

Our Law Student BBQ was held at our bar association and open to all members. The goal was to have an informal setting for law students to get to know attorneys and judges in

our association. There was a terrific turnout from the students as well as attorneys and judges. These young people are our future, and I told them that the people they were meeting that night might be part of their legal career for many years to come.

In the weeks to come I will be attending the House of Delegates meeting at the New York State Bar Association in Albany. The House is the governing body of the State Bar and the SCBA is granted delegates based upon the amount of members we have in the State Bar from Suffolk County. Presently we have five delegates. Out of the 62 counties in the state, some counties have no representation based upon their size; Suffolk is one of the larger groups.

The House meets four times a year and votes upon the positions of certain specific issues that the State Bar will take. The State Bar is the largest bar in the state with 75,000 members. Last year Suffolk County led the charge to oppose the Chief Judge's position to mandatory pro bono reporting.

Many of the house meetings spark lively debates. While one might imagine that the members would be divided between urban, suburban and rural lines it has been my experience that the House is divided between big firms, smaller firms and solo practitioners. Suffolk County gets a large voice at the State Bar and over the last several years we have worked diligently to build a good relationship with the president and incoming president of the State Bar. We also have members who hold prestigious positions in the State Bar; our past president John Gross is the Director of the New York State Bar Foundation; past president Scott Karson is Vice President from Tenth Judicial District and past president A. Craig Purcell is a member of their Nominating Committee and is co-chair of their Committee on the Tort System. The NYSBA President comes to a joint Board of Directors Meeting with Nassau County Bar Association in the spring. Scott Karson has been our delegate to the American Bar Association (ABA) for many years.

Associate Judge of the Court of Appeals, the Hon. Jenny Rivera spent the day with us in Suffolk County. This was a wonderful opportunity to personally meet a judge from the highest court of the state and to learn the workings of the Court of Appeals. The dinner was without charge to make this program available to all members, (there was a small charge for option-

al CLE).

Judge Rivera met our judiciary and members of the board and Academy officers and other members for lunch. Our District Administrative Judge the Honorable C. Randall Hinrichs led a tour at the Cohalan Court Complex in Central Islip, followed by a meeting with Dean Salkin, the faculty and students of Touro Law and then came back to the Bar Center for dinner and the CLE with members of the Bar.

Lastly, the Board of Director's have voted to create a task force with a specific purpose. Their mission will be to propose a plan to obtain funding for a full time 18b administrator including staff. Our current administrator, David Besso has worked tirelessly to maintain our 18b program. Mr. Besso has received five grants from indigent legal services in order to improve the voucher system, provide CLE for the members on the list, and provide first day appearance for D11 and the street arraignment part. The arraignment and street arraignment parts created 2,200 more vouchers per year. Once a full time administrator is approved we will be seeking and reviewing applicants for that

new position.

Your Board of Directors approved the creation of a committee to explore the feasibility of creating a panel to conduct arbitration and mediation through the Bar Association. The board has reconstructed the Task Force on Judicial Screening to review the current bylaws and to review and update the candidate's questionnaire.

It is my belief that what we do at the Suffolk County Bar Association is very different then what takes place at the specialty bars. Being a member of the Suffolk County Bar Association is being part of your profession. It not only gives you the opportunity to continue to learn and to be with your fellow attorneys, but also gives you a voice. Membership provides our members with an opportunity to address the court and the Office of Court Administration with issues we have as members of the bar, as well as a forum to solve those issues.

Now that you have all the information, it is my hope that you will spread the news to your fellow colleagues and that you will continue to stay involved, or become even more involved in the activities of the Suffolk County Bar Association.

Need to Regulate Fantasy Sports (Continued from page 13)

sure of sensitive information; now individuals have alleged that the DFSL's advertising may be false or misleading. If an illegitimate team wins money, then that team aggrieves all legitimate teams as the illegitimate team's monetary award reducing the total amount of money available for distribution to legitimate entries, thus altering the originally advertised amount.

The U.S. Department of Justice and FBI as of Oct. 15, 2015, are in the preliminary stages of an investigation into daily fantasy sports operators. The Justice Department is investigating into whether daily fantasy games are a form of gambling that falls outside the purview of the exemption.

Note: Michael Pernesiglio is a solo practitioner of a general practice with a primary focus in foreclosure defense,

criminal law, vehicle and traffic hearings, transactional law, and sports and entertainment representation. Michael is an active member of the Suffolk County Bar Association and is currently enrolled in the Suffolk County Pro Bono Foreclosure Settlement Conference Project, the Assigned Counsel Defender Plan of Suffolk County and occasionally makes pro bono appearances at Nassau County Supreme Courts and the Nassau County Bar Association.

¹ <http://www.wsj.com/articles/fbi-justice-department-investigating-daily-fantasy-sports-business-model-1444865627>

² <http://www.bizjournals.com/newyork/blog/techflash/2015/04/mlb-becomes-equity-investor-in-draftkings.html>

³ <http://osgsports.sportsblog.com/posts/5028189/finally-trouble-for-draft-kings-and-fan-duel-as-employees-cheat-.html>

⁴ http://espn.go.com/chalk/story/_/id/13825667/new-york-attorney-general-eric-schneiderman-launches-inquiry-draftkings-fanduel

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SUFFOLK ACADEMY OF LAW

OF THE SUFFOLK COUNTY BAR ASSOCIATION

FALL 2015 CLE

FALL 2015 CLE

The Suffolk Academy of Law, the educational arm of the Suffolk County Bar Association, provides a comprehensive curriculum of continuing legal education courses. Programs listed in this issue are some of those that will be presented during the fall of 2015.

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

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

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

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

MCLE requirements.

NOTES:

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

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

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

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

membership dues.

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

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

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

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

INQUIRIES: 631-234-5588.

SEMINARS & CONFERENCES

Evening Program and Reception AN EVENING WITH COURT OF APPEALS JUDGE JENNY RIVERA October 26, 2015, 6:00 -9:00 p.m.

Judge Jenny Rivera of the Court of Appeals visits the Suffolk County Bar. Join us for a reception and dinner followed by a CLE presentation in which J. Rivera will discuss the transition from legal advocate and educator to the bench. The evening is FREE for SCBA members, however, there is a fee if you wish to receive CLE credits.

Faculty: Hon. Jenny Rivera, NYS Court of Appeals
Time: 5:30 p.m. (reception); 7:15 p.m. CLE presentation **Pre-registration is required.**
Location: Suffolk County Bar Association, 560 Wheeler Road, Hauppauge, NY
MCLE: 1 Hour (Professional Practice) [Transitional or Non-Transitional]; \$35

Full Day Program HOT BUTTON ISSUES IN MATRIMONIAL LAW November 6, 2015, 9:00a.m. - 4:00 p.m.

This full day program will discuss the hottest issues and newest cases in matrimonial law.

Faculty: Ellen Bruno, Dr. Robert Goldman, Professor Lewis Silverman, Lynn Zimmerman, Esq., Robert Venduro, Esq., Margaret Shaeffer, esq., Dr. William Kaplan, Robert Cohen, Esq., Daren McGuire, Esq.
Time: 9:00 a.m. – 4:00 p.m. (Registration from 8:30 a.m.)
Location: Suffolk County Bar Association, 560 Wheeler Road, Hauppauge, NY

MCLE: 6 Hours (5 Professional Practice; 1.5 Skills) [Transitional or Non-Transitional]; \$159

Afternoon Program CRIMINAL LAW AND PROCEDURE UPDATE November 6, 2015, 1:00 p.m. - 4:00 p.m.

This is a joint program with the Nassau County Bar Association. The program will be held in the Central Jury Room at the Nassau County Supreme Court. The program will address developments in federal and state case law and recent statutory changes

Faculty: Hon. Mark D. Cohen, Court of Claims, Acting Supreme Court Justice, Suffolk County; Kent Moston, Esq., Attorney in Chief, Legal Aid Society of Nassau County
Time: 1:00 p.m. – 4:00 p.m. (Registration from 12:30 p.m.)
Location: Central Jury Room, Nassau County Supreme Court, 100 Supreme Court Drive, Mineola
MCLE: 3 Hours (2.5 Professional Practice; .5 Ethics) [Transitional or Non-Transitional]; \$115

Evening Program VTL UPDATE November 12, 2015, 6:00 -8:30 p.m.

David Mansfield provides his yearly update on the Vehicle and Traffic Law.

Faculty: David Mansfield, Esq.
Time: 6:00 p.m. – 8:30 p.m. (Registration from 5:30 p.m.)
Location: Suffolk County Bar Association, 560 Wheeler Road, Hauppauge, NY
MCLE: 2.5 Hours (Professional Practice) [Transitional or Non-Transitional]; \$75

Evening Program- East End VTL UPDATE – EAST END November 18, 2015, 6:00 -8:30 p.m. – NEW DATE!

David Mansfield provides his yearly update on the Vehicle and Traffic Law specifically for an East End audience.

Faculty: David Mansfield, Esq.
Time: 6:00 p.m. – 8:30 p.m. (Registration from 5:30 p.m.)
Location: Bridgehampton National Bank, Community Room, 2200 Montauk Hwy, Bridgehampton, NY 11932
MCLE: 2.5 Hours (Professional Practice) [Transitional or Non-Transitional]; \$75

Evening Program PATENTS, TRADEMARKS AND COPYRIGHTS FOR THE NON-IP LAWYER November 17, 2015, 6 p.m.-9 p.m.

This program is for all non-intellectual property lawyers who might encounter intellectual property issues in their everyday practice. The program will cover contractual issues, intellectual property issues that arise in sale of a business, copyright issues that arise in non-IP cases, patentability of computer programs and business methods, as well as trademark issues.

Faculty: Frederick J. Dorchak, Esq., John F. Vodopia, Esq., Robert G. Gingham, Esq., William F. Gormley, esq., Irwin S. Izen, Esq., Martin I. Saperstein, Esq., Thomas A. O'Rourke, Esq.
Time: 6:00 p.m. – 9:00 p.m. (Registration from 5:30 p.m.)
Location: Suffolk County Bar Association, 560



SUFFOLK ACADEMY OF LAW

OF THE SUFFOLK COUNTY BAR ASSOCIATION

Wheeler Road, Hauppauge, NY
MCLE: 3 Hours (3.0 Professional Practice)
 [Transitional or Non-Transitional]; \$90

Evening Program **AUTO LIABILITY UPDATE** November 19, 2015, 6:00 -9:00 p.m.

Our annual Auto Liability Update provides insights into new cases.

Faculty: Professor Michael Hutter, Albany Law School, Jonathan Dachs, Esq.
Time: 6:00 p.m. – 9:00 p.m. (Registration from 5:30 p.m.)
Location: Suffolk County Bar Association, 560 Wheeler Road, Hauppauge, NY
MCLE: 3 Hours (Professional Practice)
 [Transitional or Non-Transitional]; \$125

Evening Program **NEW MAINTENANCE RULES LEGISLATION** December 1, 2015, 6:00 -9:00 p.m.

Come and learn about the brand new maintenance rules and legislation and what it means to your clients.

Faculty: Hon. Andrew Crecca, Eric Keeper, Esq., Elaina Karabatos, Esq.
Time: 6:00 p.m. – 9:00 p.m. (Registration from 5:30 p.m.)
Location: Suffolk County Bar Association, 560 Wheeler Road, Hauppauge, NY
MCLE: 3 Hours (Professional Practice)
 [Transitional or Non-Transitional]; \$90

Evening Program **EVALUATING NURSING HOME NEGLECT CASES** December 2, 2015, 6:00 -9:00 p.m.

This program explores how to advise clients with nursing home neglect cases from three perspectives: the plaintiff's perspective, the defense perspective, and the perspective of the expert witness.

Faculty: David Grossman, Esq., Keith Kaplan, Esq., Alexander Weingarten, MD
Time: 6:00 p.m. – 9:00 p.m. (Registration from 5:30 p.m.)
Location: Suffolk County Bar Association, 560 Wheeler Road, Hauppauge, NY
MCLE: 3 Hours (2 Professional Practice; 1 Ethics) [Transitional or Non-Transitional]; \$90

Evening Program **NEW BANKRUPTCY FORMS – WHAT YOU NEED TO KNOW** December 3, 2015, 5:00 -7:00 p.m.

New Bankruptcy forms go into effect on December 1 – don't wait to find out what's included, how to complete them properly and how they'll affect your clients.

Faculty: TBD
Time: 5:00 p.m. – 7:00 p.m. (Registration from 4:30 p.m.)
Location: Suffolk County Bar Association, 560 Wheeler Road, Hauppauge, NY
MCLE: 2 Hours [Transitional or Non-Transitional]; \$90

Full Day Program **ANNUAL SCHOOL LAW CONFERENCE** December 14, 2015, 9:00 a.m. - 4:00 p.m.

Additional information to follow.
Location: Nassau County Bar Association, 15th and West Streets, Mineola, NY

FALL 2015 REGISTRATION FORM

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

Sales Tax Included in recording & material orders.

COURSE	SCBA Member	SCBA Student Member	Non-Member Attorney	12 Sess. Pass	CLE Bundle	DVD	Audio CD	Printed Course Materials
An Evening with Judge Jenny Rivera of the Court of Appeals	\$35 (CLE only)	\$0	\$45 (if space permits)	No	No	N/A	N/A	N/A
VTL Update (East End)	\$75	\$0	\$100	Yes	Yes	\$100	\$100	\$25
VTL Update	\$75	\$0	\$100	Yes	Yes	\$100	\$100	\$25
Annual Criminal Law and Procedure Update (held in Nassau County)	\$115	\$0	\$155	Yes	Yes	\$140	\$140	N/A
Hot Button Issues in Matrimonial and Family Law (Full Day)	\$159	\$0	\$184	2 uses	Yes	\$184	\$184	\$25
Patents, Trademarks and Copyrights for the Non-IP Lawyer	\$90	\$0	\$120	Yes	Yes	\$115	\$115	\$25
Auto Liability Update	\$125	\$0	\$150	Yes	Yes	\$150	\$150	\$25
Evaluating Nursing Home Neglect Cases	\$90	\$0	\$120	Yes	Yes	\$115	\$115	\$25

**** MATERIALS:** All materials will be provided electronically via an internet link to a PDF. Bring your laptop or other mobile device if you wish to access the materials during the program. Printed materials can be provided for an additional charge (see above) and must be ordered in advance.

FINANCIAL AID: Call 631-234-5588 for information.

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

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ACADEMY OF LAW NEWS

Get Your CLE Credits Any Time, Anywhere, Through the Academy

Realizing you're a bit short on CLE credits for your upcoming biennial registration? Had a conflict for a recent Academy program that prevented you from attending?

Did you know that you could get

CLE credits any time, from anywhere, through the Suffolk Academy of Law?

In addition to our live CLE programs, many of which are webcast live so you can take them while sit-

ting at your desk in your office, at home on your laptop, or on the go on your tablet or mobile device, the Academy offers a full list of recorded programs that you can access online through the SCBA website. Navigate to our online offerings through the MCLE tab and go to "Online video replays and live webcasts," or go directly to www.scba.inreachce.com and simply search for the program or practice area you want.

If you're not comfortable with our online options, the Academy also offers DVDs or CDs of past programs. We're working on our recorded catalog now - under the MCLE tab on the SCBA website, go to "DVDs and Audio CDs of prior programs" to see our available offerings, and check back frequently as we add new programs. Or contact Nicolette at the

Academy who can help you make selections that make sense for you and your practice.

The Academy currently has programs available in over 35 practice areas from Alternative Dispute Resolution through Veterans programs and everything in between. For example, if you missed any of these recent programs, they're available on demand, on DVD or CD:

- Residential Real Estate Nuts and Bolts to Advanced Practice, Part 1
- CPLR/Civil Practice Update with Professor Patrick Connors
- Part 36 Receivership Training and Update
- Law in the Workplace Conference
- Henry Miller "On Trial" - Summations

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.

OCTOBER

26 Monday **An Evening with Court of Appeals Judge Jenny Rivera**, 5:30 p.m. (reception); 7:15 p.m. (CLE presentation); 1 credit, \$35. Evening includes Free wine reception and seated dinner for SCBA members.

NOVEMBER

6 Friday **Hot Button Issues in Matrimonial Law – Full Day Program**, 9:00 a.m.-4:00 p.m., 6 credits, \$159. Continental breakfast and a light lunch will be served

6 Friday **Criminal Law and Procedure Update**, 1:00-4:00 p.m. ***This program will be held in Nassau County in the Central Jury Room, Nassau Supreme Court.* 3 credits \$115

12 Thursday **VTL Update (Hauppauge)**, 6:00-8:30 p.m., 2.5 credits, \$75. A light supper will be served

17 Tuesday **Patents, Trademarks and Copyrights for the Non-IP Lawyer**, 6:00-9:00 p.m., 3 credits, \$90. A light supper will be served

18 Wednesday **VTL Update on the East End**, 5:30-8:00 p.m., 2.5 credits, \$75. A light supper will be served

19 Thursday **Auto Liability Update**, 6:00-9:00 p.m., 3 credits, \$125. A light supper will be served

DECEMBER

1 Tuesday **New Maintenance Rules Legislation**, 6:00 p.m.-9:00 p.m., 3 credits, \$90. A light supper will be served

2 Wednesday **Evaluating Nursing Home Neglect Cases**, 6:00 p.m.-9:00 p.m., 3 credits, \$90. A light supper will be served

3 Thursday **New Bankruptcy Forms – What You Need to Know**, 5:00-7:00 p.m., 2 credits, \$60. A light supper will be served

14 Monday **Annual School Law Conference**, 9:00 a.m.-4:00 p.m., *This program will be held at the Nassau County Bar Association.* More information to follow.

Please note: Materials for all Academy programs are provided online and are available for download in PDF format prior to or at the time of the program. Printed materials are available for an additional charge.

Stay Up to Date on the Very Latest Changes in the Law

The Academy has two important programs scheduled in early December on recent major changes in the law.

First, on December 1, the Academy will present a three credit evening program covering the **New Maintenance Rules Legislation**, featuring Hon. Andrew Crecca, Erick Keeper, Esq., and Elaina Karabatos, Esq. These new rules have already gone into effect and will have a significant impact on matrimonial actions involving maintenance, so this is a must-attend!

Next, on December 3, we will

present a program on the **New Bankruptcy Forms** – this program will cover the new forms that go into effect on December 1. Don't wait to find out how these forms will affect your matter and how to ensure they are completed properly.

For more information about our other upcoming programs, including November's VTL Update and Auto Liability Update, please see the center spread in this issue of the *Suffolk Lawyer*, or access the flyers for these programs through the Academy calendar at scba.org.

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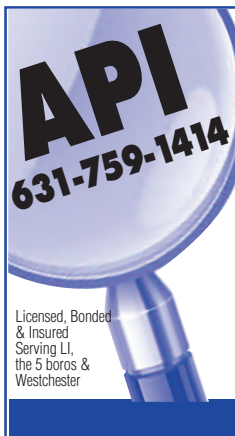
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Engagement Agreements 101 (Continued from page 21)

the terms and conditions of using these payment methods

Other issues to consider include: What are the consequences for the client's late payment or failure to pay? Will work stop until the account is current? Will the client be charged interest?

In addition to the lawyer's fees, will there be costs incurred during the course of the engagement that will be the client's responsibility? Will the client pay those costs up front or will the law firm pay them and seek reimbursement from the client? What kinds of costs will be incurred (filing fees, expert witness fees, court reporter's bills, etc.) and when will the client be expected to pay these costs?

The duties and responsibilities of the parties

The agreement should set forth not only the lawyer's obligations to the client, but also the client's obligations to the lawyer: to cooperate with the lawyer, respond to requests, provide necessary documents and information in a timely manner, preserve data, and more.

Some lawyers may wish to include information about which attorney or attorneys will be staffing the client's matter and/or to reserve the right to make appropriate changes in staffing the matter. Good practice dictates that any such changes be communicated to the client immediately and that the client does not incur additional fees as a result of a staffing change made by the firm.

This may also be the place in the agreement to discuss the client's right to their file and the firm's file retention policies and time limitations.

Arbitration and mediation

Lawyers may be required to include a clause in the engagement agreement that advises the client of the right to arbitration or mediation of fee disputes. Some jurisdictions

even have mandatory arbitration or mediation of fee disputes, or may permit a lawyer to mandate through their engagement agreement that the client must go through arbitration or mediation prior to filing a suit over the legal fee.

Grounds for withdrawal or other consequences for breach of the agreement

The agreement should advise the client of the lawyer's right to withdraw, subject to court approval where applicable, as well as the grounds and procedure for any such withdrawal. The client should also be advised of their right to discharge the lawyer and the method for doing so.

A time limitation/when the agreement takes effect

When clients fail to return an engagement agreement, it can lead to potential problems. The agreement should state specifically that the provisions contained within it (including the fee) are only valid if the agreement is signed within a specific period of time (i.e. 2 weeks, one month, etc.) It should be clear that if the agreement (and retainer fee) is not received within that period of time, the lawyer is not obligated to represent the client. It may be prudent to follow up with a non-engagement letter once the time period has expired.

No guarantees

Finally, it may be prudent to advise the client right in the engagement agreement that the firm cannot guarantee the client any specific outcome to their matter.

Note: Allison C. Shields, Esq. is the Executive Director of the Suffolk Academy of Law and the President of Legal Ease Consulting, Inc., which

provides productivity, practice management, marketing, business development and social media training, coaching and consulting services for

lawyers and law firms nationwide. A version of this article originally appeared in the Simple Steps column of Law Practice Magazine.

Failure to Adapt to Climate Change (Continued from page 17)

the law, some Long Island municipalities have proactively begun to plan for and implement hazard mitigation measures. Steps that coastal municipalities can and are taking include: reviewing waterfront development plans and related regulations to assess whether development and rebuilding is being allowed or even encouraged in areas that are currently vulnerable or will become vulnerable within the lifespan of the development, and whether the development is increasing the vulnerability of adjacent areas; amending structure elevation requirements to reduce the vulnerability of the structure throughout its entire useful life, not just for the next five, ten or twenty years; assessing zoning and building codes to determine whether they impose requirements on the construction of elevated structures that increase local flood risk by, for example, increasing impermeable surface areas; and educating residents on scientific projections regarding future flood and other related risks so that they can make prudent building and buying decisions.

Because we can anticipate the addition of substantial new building stock and infrastructure over the next few decades, local governments that regulate the placement and, in some respects, design aspects of building stock have an opportunity — if not a duty — to avoid locking in infrastructure that increases flood and other related risks.

To learn more about disaster resilience and land use, join planners,

municipal board members and staff, lawyers, law students and others at Touro Law Center's October 2015 Bagels with the Boards CLE and March 2016 Second Annual Long Island Coastal Resilience Summit. Visit www.tourolaw.edu/landuseinstitute/ for more information and to register.

Note: Sarah J. Adams-Schoen is an Assistant Professor of Law at Touro Law Center and Director of Touro Law's Land Use & Sustainable Development Law Institute. She is the author of the blog Touro Law Land Use (<http://touro-lawlanduse.wordpress.com>), which aims to foster greater understanding of local land use law, environmental law, and public policy. At Touro Law Center, she teaches Property Law, Land Use Law, Environmental Law and related courses.

² Patricia Salkin, *Sustainability at the Edge: The Opportunity and Responsibility of Local Governments to Most Effectively Plan for Natural Disaster Mitigation*, 38 ENV'T L. R. 10158, 10159 (2008).

³ See, e.g., Maxine Burkett, *Duty and Breach in an Era of Uncertainty: Local Government Liability for Failure to Adapt to Climate Change*, 20 GEO. MASON L. REV. 775, 780–81 (2013).

⁴ See, e.g., *Vermef v. City of Boulder City*, 80 P.3d 445, 445 (Nev. 2003), *abrogated by ASAP Storage, Inc. v. City of Sparks*, 173 P.3d 734 (Nev. 2007); *Walter Legge Co. v. City of Peekskill*, 619 N.Y.S.2d 771, 771–72 (N.Y. App. Div. 1994).

⁵ See *Cootey v. Sun Inv., Inc.*, 718 P.2d 1086, 1088–89 (Haw. 1986).

⁶ No. 05-1119L, 2015 WL 2058969 (Fed. Cl. May 1, 2015).

⁷ 133 S. Ct. 511, 515 (2012).

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