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Compensation Saga Continues For Suffolk's 18B Plan

Budget problems for courts, lawyers and public striving to aid the indigent

By John L. Buonora

Please note that the following article went to press on Nov. 25, 2011. Any updates to the issue of 18B will be forthcoming in future issues of The Suffolk Lawyer.

John L. Buonora

Currently there are 325 lawyers registered with Suffolk County's 18B Plan, (the Plan). There is no shortage of qualified and capable attorneys willing to represent indigent defendants.

According to Plan Administrator David Besso, "the Plan was doing reasonably well until six or seven years ago." That's when the rates of compensation changed in 2004 to be exact, in what you might call a case of "good news and bad news." These rates were raised from $40 per hour for court appearances and $25 per hour for work out of court on all cases, to the present rates of $60 per hour for misdemeanor representation and $75 per hour for felony representation respectively for both in court and out of court work. For all other representations (e.g. Family Court), the rate was raised to its current rate of $75 per hour. The bad news part of this equation is that the higher rates have increased the cost of the program by as much as 75 to 80 percent according to Plan Administrator Besso.

Please see page 5 for the history of Pro Bono and the 18B Assignment

While the county has been increasing its budget for payment of 18B representation it hasn't kept pace with the rising costs of the Plan. The result has been the decision that payment for outstanding payment vouchers from this past year will to be paid out of the current year's budget. (I think in government it's called "deficit spending.") As an example, 1151 vouchers submitted in 2010 were paid from the 2011 budget. The result of the increasing financial shortfall is that the Plan ran out of money to pay lawyers by September of this year. According to County Attorney Christine Malafi, as of October 4 of this year there was almost $600,000 in unpaid vouchers pending with almost three months yet to go in calendar year 2011. Plan Administrator Besso said the 18B Plan has had a cumulative shortfall of approximately $1,500,000 for the years 2010, 2011and projected for 2012.

Where does the money go? The voucher breakdown

With respect to the numbers of vouchers filed by the end of August of this year, the Office of the Plan Administrator had received 5,215 vouchers for payment. Out of that number 1,529 were for misdemeanors, 1064 for felonies, 2,383 for Family Court and 239 for appeals and experts. By the end of August there were yet 589 vouchers unpaid. The Plan Administrator projects that for the remaining four months of this year, September through December, there will be an estimated 1800 additional vouchers to process for payment.

Robbing Peter to pay Paul

In the 2010 Budget the County Executive had originally budgeted $4,000,000 for the 18B Plan (exclusive of the Legal Aid Society). The County Legislature cut $500,000 from that budget and gave that amount to Legal Aid. The final budget for the 2011 year after adjustments was approximately 3.67 million dollars.

Legal Aid Society & NYS Office of Indigent Legal

(Continued on Page 5)

This is a sample page of the new SCBA website which has been officially launched. See details on page 5 and additional photos of the website on pages 14-15.

INSIDE-DECEMBER 2011

FOCUS ON DISTRICT COURT

PRESIDENT'S MESSAGE

SCBA Continues to Serve Needs of Members

Matthew Pachman

By Matthew E. Pachman

I am proud to report that the last month has been a success for the Suffolk County Bar Association's goal to continue its mission to serve the needs of our members. For example, on Wednesday Nov. 9 the Suffolk County Legislature voted to override the County Executive's veto of the $500,000 18-B supplemental appropriations. Prior to this, I was able to secure a commitment from Suffolk County Comptroller Joseph Sawicki's office (a) that the auditing of the 18-B vouchers would commence in anticipation of the override, and (b) to dedicate a resource to handling the influx of vouchers in an effort to reduce the lag between the availability of the funds and check issuance.

The SCBA was in frequent contact with the Presiding Officer of the County Legislature's office, Ways and Means Committee Chairman Richard Montano, and other key legislative leaders during the last few weeks advocating for the override. A great deal of thanks is owed to William Ferris, Steve Fondulis, Harry Tilis and Lynn Poster-Zimmerman for serving as a special ad hoc committee that has been invaluable in assisting the Executive Committee in these efforts.

Furthermore, the new SCBA website has gone live. It has been drastically updated and enhanced with new tools for our members' everyday use. Some features are an online membership directory that also serves as a business to business tool, and the ability for you to add information about your practice. Coming soon will be a legal forms bank. Congratulations to our Director of Technology Barry Smolowitz for his efforts. (His article detailing the new website can be found on page 3 of this month's issue.)

In addition, Diane Carroll traveled to Albany to testify on behalf of the SCBA before the New York State Law Revision Commission with respect to its study of the pendente lite maintenance awards in matrimonial actions. Diane was the lead-off speaker, and the Commission made special mention about how impressed they were with her thorough and thoughtful presentation. The Board of Directors thank Diane for undertaking this important (albeit consuming) task with such enthusiasm.

Finally, please remember to help us brighten the holiday season for needy children by bringing an unwrapped toy to the SCBA Holiday Party on Friday December 9 for the 2011 Toy Drive.

BAR EVENTS

SCBA Annual Holiday Party

Friday, Dec, 9, 4:00–7:00 p.m.
SCBA Center

Annual Judicial Swearing-In & Robing Ceremony

Monday, Jan. 9, at 9 a.m.
Touro Law Center
District Administrative Judge C. Randall Hinrichs presiding. Reception to follow.

The Peter Sweisgood Dinner originally scheduled for Thursday, Nov. 17 will be rescheduled for the spring. Further details will follow when available.

FOCUS ON
DISTRICT COURT
SPECIAL EDITION

Suffolk County Bar Association

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SCBA Calendar

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

OF ASSOCIATION MEETINGS AND EVENTS

NOVEMBER 2011

30 Wednesday Professional Ethics & Civility Committee, 5:30 p.m., Board Room.

DECEMBER 2011

1 Thursday Worker's Compensation & & Social Security Disability Committee, 6:30 p.m., Board Room.

5 Monday Executive Committee, 5:30 p.m., Board Room.
Insurance & Negligence - Defense Counsel Committee, 5:30 p.m., E.B.T. Room.

6 Tuesday Joint Surrogate's Court/Appellate Practice Committees, 5:30 p.m., Board Room.

8 Thursday Joint New Members/Membership Services Committee, 6:00 p.m., Board Room.

9 Friday SCBA's Annual Holiday Party, 4:00 p.m. - 7:00 p.m., Great Hall.

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

13 Tuesday Labor & Employment Law Committee, 8:00 a.m., Board Room
Insurance & Negligence - Plaintiff's Counsel Committee, 6:00 p.m., Board Room.

14 Wednesday Elder Law Committee, 12:15 p.m., Great Hall.
Education Law Committee, 12:30 p.m., Board Room.

15 Thursday Taxation Law Committee, 6:00 p.m., Board Room.

JANUARY 2012

5 Thursday Workers' Compensation & Social Security Disability Committee, 6:30 p.m., Board Room

9 Monday SCBA's Annual Judicial Swearing-In & Robing Ceremony, 9:00 a.m. to 12:00 noon, Touro Law Center. Members and their families are invited.
Labor & Employment Law Committee, 8:00 a.m., Board Room.
Executive Committee, 5:30 p.m., Board Room.
Insurance & Negligence - Defense Counsel Committee, 5:30 p.m., Board Room.

10 Tuesday Labor & Employment Law Committee, 8:00 a.m., Board Room.

11 Wednesday Education Law Committee, 12:30 p.m., Board Room.

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

24 Tuesday Solo & Small Firm Practitioners Committee, 4:30 p.m., Board Room.

25 Wednesday Professional Ethics & Civility Committee, 5:30 p.m., Board Room.

Our Mission

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

Join Our Leadership

The Nominating Committee of the SCBA is soliciting recommendations and expressions of interest from members interested in holding the following positions: President Elect, First Vice President, Second Vice President, Secretary, Treasurer, four (4) Directors (terms expiring 2015) and three (3) members of the Nominating Committee (terms expiring 2015).

The Nominating Committee is accepting résumés from those interested in these leadership positions. Résumés may be sent to the Executive Director at the SCBA, marked for the Nominating Committee.

The members of the Nominating Committee are: Derrick J. Roberson, Rosemarie Tully, James R. Winkler, Ilene S. Cooper, Hon. John M. Czygier, Jr., Scott M. Karson, Sheryl L. Randazzo, Ted Rosenberg, and Hon. Peter H. Mayer. - LaCova

Support One of Our Own Serving in Afghanistan

Please show your support for SCBA member Assistant District Attorney Bethany Green who is serving in Afghanistan, by dropping her a line or two. Being away from family and friends is particularly difficult during the holiday season. It would be great if SCBA members took a few moments to thank Bethany for her service and wished her well.

Please send your cards and letters to Bethany at:
US Mail
Bethany Green
HHC82nd CAB, Task Force Poseidon
Bagram Airfield
APO, AE 09354

Bethany Green worked in the domestic violence bureau.

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

THOMAS MORE GROUP TWELVE-STEP MEETING

Every Wednesday at 6 p.m.,
Parish Outreach House, Kings Road - Hauppauge
All who are associated with the legal profession welcome.
LAWYERS COMMITTEE HELP-LINE: 631-697-2499

THE SUFFOLK LAWYER

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Hometown Girl Makes Good…Again

Justice Prudenti new Chief Administrative Judge

By Laura Lane

Suffolk County's own A. Gail Prudenti was recently appointed to serve as the state's chief administrative judge, yet another stellar accomplishment for someone who has already led a very distinguished career. Justice Prudenti, the current Presiding Justice of the Appellate Division, Second Department will take on her new position on Dec. 1.

Most people think of Justice Prudenti as a personable, hardworking judge, admired not only for her expertise, but also her dedication to the legal field. But what they may not know is the love she feels for Suffolk County and her commitment to a place she has called home since her early childhood.

Justice Prudenti was born in Long Island City but moved to Blue Point when she was only four. Her memories of growing up in Suffolk County are idyllic, surrounded by a loving family who encouraged her always.

"I lived right next door to my cousins who were all girls," she said, adding that she had only brothers who she also adored. "We were best friends and walked to school together. Bayport was like a rural community at the time and we played at the beach and rode our bicycles there. It was a very happy time in my life."

Although she was a good student, Justice Prudenti doesn't remember being a leader in elementary school. She did say that she always enjoyed school and learning. At Bayport-Blue Point High School she was active in student government and a member of the National Honor Society.

Justice Prudenti has been a State Supreme Court Justice, a Surrogate Court Judge, the District Administrative Judge for Suffolk County, and the Presiding Justice of the Appellate Division. A successful leader, one can't help but wonder how and when she acquired this skill.

"I obtained my leadership skills from both of my parents," she explained. "My mother (Annelies Miller Prudenti) was from Bavaria, immigrating at 24 years old. With Mom, I knew I better be at the top of my class. She always had great confidence in me and wanted me to be a doctor. I think she was disappointed when I decided to become a lawyer!"

Her father, Anthony Prudenti, who during his retirement became the Suffolk County Republican Chairman, was a successful building contractor who worked seven days a week. Young Gail would accompany him to work on the weekends in order to see him.

"I remember when I was five I went to a closing with him and he was the only one at the table not represented by a lawyer," she said. "I remember saying to him that someday I'm going to be a lawyer. He said, 'You know Sis that would be great.'"

Justice Prudenti said she always received a great deal of encouragement and support from both of her parents. Her father believed that someday women would be leaders, a belief not too common at the time.

"He was forward thinking believing that a woman would be president someday," she said. "He didn't live to see me become a judge."

Perhaps her father's views on what women could do were in the back of her mind as she moved forward in her legal career. She is the first woman to achieve several legal accolades. Justice Prudenti is the first woman to hold the position of Presiding Justice of the Appellate Division for the Second Judicial Department in New York State (2002). Before that she was the first woman from Suffolk County to serve as an Associate Justice of the Appellate Division for the Second Judicial Department (2001-02). Earlier still in 1995, Justice Prudenti was the first woman elected Surrogate of Suffolk County.

"Dad had absolute confidence in me that I could do anything I wanted to do," she said. "I chose the paths where I thought I could help the most people inside and outside the system, where I could achieve my own personal and professional goals. Every job I've had I put my heart and soul in."

It was not an easy decision to make for Justice Prudenti when Chief Judge Jonathan Lippman approached her with the new job offer.

"I leave my present post with mixed emotions," she said. "The system that I worked in has shown me some of the hardest working dedicated people there are. For me this (Chief Administrative Judge) isn't about a title or promotion. It's about helping the most people I can and Judge Lippman has been a mentor of mine for a very long time."

Hon. A. Gail Prudenti

Justice Prudenti believes her own past legal experiences will be of great value in her new position. She's been in private practice, in trial court and an appellate court judge. The girl from Suffolk County, who is still very much in love with where she lives, will no doubt bring as much passion and commitment to her new position as she has done with everything she's ever done in her life.

"I have a unique perspective of growing up in the legal community," she said. "I know the system very well outside and inside and have been a judge for 20 years. I feel like I've grown up in the court system. I'm not afraid to try things and if they don't work will change them. I'm the first person to admit that I'm far from perfect. I believe we do a lot of things well but there's a lot we can do better."

Note: Laura Lane is the Editor-in-Chief of The Suffolk Lawyer. She is an award-winning journalist having written for The New York Law Journal, Newsday and for the Herald newspapers among others. She can be reached at (516) 376-2108.

Meet Your SCBA Colleague

Lynn Poster-Zimmerman, **a solo practitioner, is always searching for ways to make a difference. She believes membership in the SCBA grants her many opportunities to fulfill this desire.**

By Laura Lane

You didn't always plan on being an attorney, right? I got a Bachelor of Science in journalism and photography from Binghamton. But after working a year or so in journalism after college, decided that journalism would not be challenging enough for me.

How did you end up in the legal field? Well my father always said I liked to argue but seriously, being an attorney was always in the back of my mind. When I was in law school I knew the legal profession was the right fit for me.

You went to Hofstra University School of Law and had ties to Nassau County for many years. Yes. I lived in Nassau County most of my life and worked at Schiffmacher, Cullen, Farrell & Limmer in Great Neck as an associate for approximately seven years. I moved to Suffolk County when I got married 24 years ago. Right before I had my first child I was about to become a partner. The firm was very generous and gave me a year off but I decided not to go back.

Why didn't you return? I was out every single night at that job which was very difficult with a young child. I couldn't go back. I knew that I had had a great job so I decided that I didn't want to work for anyone else. I started my own practice out of my house. But I have to tell you when I came to Suffolk County I didn't even know where the courthouse was.

Being so unfamiliar with the legal profession in Suffolk must have been difficult. How did you get yourself acclimated? I joined the Suffolk County Women's Bar Association and the Huntington Lawyer's Club. My goal was to meet people and network. I did whatever volunteering that was needed and moved up the ladder. I eventually became the president of both organizations.

When did you join the SCBA? I joined approximately 20 years ago. I got involved at the bar after my Presidency at the Women's Bar when I was asked to join SCBA's Judicial Screening Committee. I thereafter became a director at the SCBA Academy of Law and later a director at the SCBA.

Why did you join? To network and be involved in an organization with my colleagues - to see what was out there that I could help in. The SCBA is a great organization and I've loved being involved. When you are there you feel like you can make a difference.

You are the managing director of SCBA's Charitable Foundation, were a member of the SCBA's Task Force on Mandated Indigent Defense Services, and currently serve as a member of SCBA's Task Force on 18B Reform. Would you say you are the type of person that is committed to helping the underserved? I do this work because it is important and needed and it is something that is a part of my life. I do like helping people far less fortunate than I am. In some ways I've chosen to be involved, like my work on 18B Panel, and my work as a law guardian.

How did you get involved in the 18B issue? The 18B work came out of my work as an SCBA Director. President Pachman is dedicated to reforming the system and asked me to be involved in the 18B issue. We are hoping to make changes that will make it better for the litigants and our attorneys. I'm actually hopeful about 18B. The funding has been restored and some of the problems on the administrative end can be changed for the better. The program needs to be computerized and there are a lot of different issues with the vouchers. We're trying to streamline the process so 18B will operate more efficiently.

What are you doing with the Charitable Foundation? I really enjoy being a part of it. We are currently collecting teddy bears, hats and coats for the children that come to court. A lot of these kids that come into the day care center are so poor they don't have a hat. We are planning fundraising events too. I'm looking into holding one at the new Paramount in Huntington and would love to get Billy Joel. We'll see. The goal is to raise a substantial amount of money for the foundation.

Lynn Poster-Zimmerman

Why would you encourage an attorney to join the SCBA? There are many reasons. It's really important to be a part of the Bar Association, to network, to know your colleagues and learn from them. There is a wealth of knowledge to be gleaned from our members who are always more than willing to offer guidance and support. I advise anyone looking to be more involved to simply join a committee. The bar has tremendous resources for attorneys. whether newly admitted or practicing many years. Being a member is beneficial for your own personal growth and for your practice. As SCBA Past President Sheryl Randazzo said, "The SCBA is our home."

Enjoy the Party, Don't be the Party!

Prepare employees for holiday parties

By Nathan Jamail

Nathan Jamail

It is that time year for company parties and year-end sales events, events that leaders spend lots of money and time planning and putting together to show their employees how much they appreciate their hard work and recognize their top performers. But you can bet many of them will have the hangover of that famous question the next morning, "Hey did you see that guy or girl last night at the company event?" That question can elicit many answers and some may sound like, "Oh yeah, everybody did when he got on the microphone and slurred profanity for everybody to hear. Or, "Did you see that girl? She was so drunk; she was saying all kinds of inappropriate things to her boss."

I can guarantee his or her boss remembers it and their boss remembers it and they are for sure talking about it, but not as a funny story at the coffee pot. No, they are talking to HR or legal on how they are going to handle the situation. Many great careers have been ended at company events by someone being that guy or that girl.

I fortunately have not been that guy or girl as far as I know, but unfortunately, I have been the boss of a few in my career.

In 2000, our area had our annual planning session and awards event. This event was hosted by my boss, the Area Vice President and all of my fellow directors and all of our managers and sales reps were in attendance with an estimated 300 employees. It was the first night and until then we'd made it through the first day without any major incidences, but it was still early. Later in the evening after dinner, many of the employees went to the bar in the hotel to continue celebrating and having fun with their peers from across the country. A few of us managers were in a room with my boss having a discussion on how the event was going and reviewing the next day's activities when another manager walked in and said, "one of the employees is throwing up in the middle of the bar." With confidence I said, "I know it's not one of my people." I was confident because I had a talk with my team prior to this event on how everybody

(Continued on Page 21)

BENCH BRIEFS

By Elaine Colavito

Elaine Colavito

HONORABLE JOSEPH FARNETI

Motion to compel granted; failure of the plaintiff to move for a protective order, within twenty days after service of the demands foreclosed all inquiry concerning the propriety of the demands except as to demands seeking privileged matter, or demands that were palpably improper.

In *Beverly D. Baird v. Jeffrey Fox, D.D.S., Allen Motola, D.M.D. and Total Dental Care of Middle Island, P.C.,* Index No. 2719/10, decided on April 6, 2011, the court granted the defendants' motion to compel compliance with discovery demands. In this dental malpractice action, the defendants' requested HIPAA compliant authorizations for her primary care physician, her treating gastroenterologist, for her mental health care providers, and for Port Jefferson Dental Laboratory. For the first time, plaintiff objected to providing the authorizations.

The court found that although plaintiff now objected to certain discovery demands by the defendant, plaintiff had not moved for a protective order with respect to these demands. The failure of the plaintiff to move for a protective order pursuant to CPLR § 3122, within 20 days after service of the demands foreclosed all inquiry concerning the propriety of the demands except as to demands seeking privileged matter under CPLR § 3101, or demands that were palpably improper pursuant to CPLR § 3122.

The court noted that a disclosure request is palpably improper if it seeks information of a confidential or private nature that did not appear to be relevant to the issues on the case. Here plaintiff, had not asserted a privilege, and under the circumstances presented, the court did not find the defendants' demands to be palpably improper.

HONORABLE ARTHUR G. PITTS

Cross-motion to extend time to answer the complaint granted; affidavit of merit as a precondition in obtaining relief not required when the delay in failing to answer has been of a reasonably short duration.

In *Board of Directors of the Villas at West Hills Home Owners Association, Inc. V. JPD Properties, LLC, Robert Reitman, The People of the State of New York and "John Doe One" to and including "Jon Doe Ten," said names being fictitious and unknown to the plaintiff, the persons intended being the tenants, occupants, persons or corporations, if any, having or claiming an interest in or lien upon the premises described in or lien upon the premises described in the complaint,* Index No.: 49575/09, decided on August 17, 2010, the court denied the plaintiff's motion for a default judgment and granted the cross-motion by the defendants for additional time to serve answers to the complaint. In rendering its decision, the court deemed the affirmation in opposition

(Continued on Page 29)

Problems facing the courts, lawyers and public *(Continued from page 1)*

Services

The private attorneys on the 18B list are not the only ones affected by the financial downturn. The Legal Aid Society with an annual budget of approximately $12,000,000 will be handling in excess of 30,000 cases this year. Legal Aid has been experiencing a gradual but steady upward trend in cases handled from an approximate 25,000 cases in the year 2003 to the present day of over 30,000 for calendar year 2011. While caseloads have increased, staffing levels have remained the same. Current budgeted funds for Legal Aid remain the same irrespective of any increase in the year's caseload.

Also contributing to the financial crunch has been the establishment by the State Legislature of the New York State Office of Indigent Services which was created to monitor, study and improve the quality of indigent legal services around the state (Sections 832 and 833 of the Executive Law).This new office is having an immediate financial effect on the 18B Plan. It will require funding to function and there is only so much money to be had. In recent years Suffolk County has been receiving $2,000.000 annually from the state as reimbursement for indigent legal services. This grant will be reduced by10 percent each year until such time that it is totally dissipated.

What is being done to improve the situation?

As former Clinton presidential advisor James Carville famously said, "It's the economy stupid."- Something that we have been hearing a lot about lately. The poor economy has in part caused an increase in the number of defendants and litigants giving rise to more 18B as well as Legal Aid assignments. The poor economy has also been a factor in many lawyers becoming increasingly dependent on 18B assignments to cover their overhead. I leave to others to debate whether lawyer dependence on 18B assignments conflicts with the pro bono aspect of the Plan. The fact is that this dependence by some attorneys is a present day reality.

There are two financial aspects of great concern to attorneys. The first is the specter of the Plan running out of money, which has already happened. The second is the speed in which claims (vouchers) are processed and checks issued.

Plan Administrator Dave Besso and County Attorney Christine Malafi have met with Suffolk County Administrative Judge C. Randall Hinrichs to seek ways to cut costs.

Judge Hinrichs is exploring whether attorneys who take 18B assignments can have part of the fee paid for by the client to the extent that the client is able. Nassau County has had a similar program. Other areas being explored both to save money and to expedite payment include direct deposit of county payments to lawyers, electronic filing of vouchers and greater scrutiny of vouchers.

SCBA President Matt Pachman reported that he appointed a task force to assist in lobbying for a supplemental appropriation to fund the 18B Program through the end of the year in his November column of *The Suffolk Lawyer*.

Current legislative action

Mr. Pachman also reported in his column that the Suffolk County Legislature passed a resolution sponsored by Legislative Ways and Means Chairman Ricardo Montano on Oct. 13 that amended the county's 2011 Budget authorizing $500,000 to supplement the $3,600,000 previously budgeted. On Oct. 27 the County Executive vetoed this legislation. On November 9 the County Legislature overrode the County Executive's veto. When *The Suffolk Lawyer* went to press, the County Budget Office was waiting for receipt of a copy of the resolution from the legislature. Once this occurs there will be a transfer of $500,000 to the 18B budget line. It is expected that this transfer will occur in mid-November. Updates will follow in future issues of *The Suffolk Lawyer*.

This legislation authorizing the transfer of the $500,000 to pay outstanding vouchers will be a great help in alleviating some of the short term financial pressures on the Plan. But these financial difficulties will not be going away any time soon. The additional $500,000 authorized by the legislature won't even cover the almost $600,000 in outstanding vouchers as of Oct. 4. Legislator Montano has also sponsored a bill that would require the County to pay 18B attorney vouchers within 60 days of receipt by the county. This bill is pending legislative action.

According to the Aug. 2 testimony of attorneys Kerry Bassett and Steven Fondulis before the County Legislature regarding Legislator Montano's bills, there are 18B attorneys who claim that vouchers "sit in the Administrator's Office for about five months." When a voucher goes to the Comptroller's Office "it doesn't take two or three weeks, it can take now four months; normally it's two or three months."

It would appear logical that if there are no funds currently available that outstanding vouchers will not be paid. As to attorney complaints about the slowness of payment when there is funding available, it is difficult to judge whether the problem is systemic or anecdotal without documentation or an audit. At the moment no one seems to have an easy answer as to whether or how administrative layers can be eliminated to speed up the process.

A county legislative subcommittee consisting of Legislators Montano, Kennedy and Stern has been formed to look into 18B issues generally.

Conclusion

Pro bono publico, as well as the related 18B issues, continue to be of serious and increasing concern for the bench, bar and public. Developments should be followed closely in the months ahead.

Note: John L. Buonora is a past president of the Suffolk County Bar Association and the Suffolk County Criminal Bar Association. He recently retired as Suffolk County Chief Assistant District Attorney and is an Adjunct Professor of Law at Touro Law Center.

SCBA Newly Launched Website Receiving Kudos From Around the State

By Barry M. Smolowitz

On October 24, 2011, the Suffolk County Bar Association unveiled a completely redesigned website. Two years in the making, the site represents the collaborative efforts of Barry M. Smolowitz, Ilene S. Cooper, Allison Shields, the SCBA Executive Committee, the Suffolk Academy of Law, and Exobit Networks (now Sidera). The website was designed in three phases, with phases one and two now live. Phase one is the public side of the site. Phase two is the new "members only" area of the site, and phase three, which is currently being designed focuses on the Suffolk Academy of Law.

The new site represents a complete redesign. The site has been graphically enhanced, and is now fully database driven. The new site speaks to who we are, what we do, and is artistically connected to our home, Suffolk County. When you go to the site at www.scba.org you will be pleasantly surprised. Gone is the bland site with the busy background, replaced by the colors and theme of our association. The menus have been redeveloped to be more user friendly. It allows anyone to quickly find areas that are of importance to them.

Here is a quick tour of the website. The site's web page has four areas of interest: the left side menu, the top menu, the center of the page, and the right side "News & Events."

The menu on the top will never change. It consists of: Home, About Us, Contact Us, FAQ's, Site Map (currently under construction), and Logout. The menu on the left side will adjust depending on whom is logged into the site, as will the center page and the News and Events area. The default left side menu consists of the Members Log in, the association's Main Calendar, MCLE, Public Services, Community Outreach Calendar, Charity Foundation, and Scholarship Fund. The MCLE and Public Services area have mouse-over submenus as well. Everyone entering www.scba.org will be greeted with this menu unless or until they log in as a SCBA member.

When a member logs into the site, the left side menu will now include additional access to the following categories: Member Services,

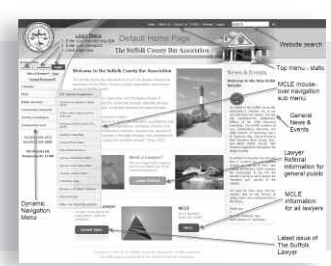
Barry M. Smolowitz

Committee Information, On the Move/Looking to Move, Attorney Pro Bono, Research, Legislation, Attorney/Client Relationship, Legal Links. Many of these categories contain additional mouse-over sub topics that are of interest to our members. While most areas are operational, some are not. For instance, the Forms and Decisions bank under Research is still under development.

The information requested will be displayed in the center of the page. Initially, this area acts as the site's default home page. The information in this area will vary depending on the log in status of the user. For instance, the home page of the general site is different from the home page of the members' area portion of the site.

The News and Events area contain information of current or upcoming events or other areas of interest. The News and

(Continued on Page 23)



See photos of SCBA's redesigned website on pages 14 and 15.

A History of Pro Bono and the 18B Assignment

By John L. Buonora

In 1963 the United States Supreme Court *in Gideon v. Wainright, 372 U.S. 335*, held that an indigent criminal defendant charged with a felony in a state court must be provided with counsel by the state. This landmark decision was expanded by subsequent courts to apply not just to felonies but to all crimes. *Gideon* did not say how the state was to provide counsel or for that matter, whether and how counsel should be paid.

While the decision in *Gideon* was considered a watershed moment in the areas of criminal law and the right to counsel, in the State of New York,

"even while the territory now embraced by the State of New York was a colony of Great Britain, it was a part of the common law that counsel should be assigned by the court for the defense of poor persons and that before there was any applicable statute it was the practice and duty of the courts to make such assignments." (People v. Witensky, 15 N.Y.2d 392 and authorities cited therein, 1965)

Even before *Gideon*, in 1961 New York State enacted Article 18A of the County Law. It permitted the counties to establish Public Defender offices or to contract with Legal Aid Societies to provide representation to indigent defendants. In response to the passage of this law some counties provided for compensation for assigned counsel. *Most, however, continued to rely on the then long standing tradition of court assignments of voluntary counsel to represent indigent criminal defendants, primarily in criminal cases* (*People v. Brisman, 173 Misc.2d 573 (Supreme Court, New York County, Justice Budd G. Goodman, 1996)*

In 1965 following the lead of *Gideon*, the New York State Court of Appeals decided *Witensky*, holding that all criminal defendants, not only those charged with felonies had a right to the appointment of counsel if they were unable to afford private counsel. Also in 1965 the New York State Legislature enacted Article 18B which provided the framework for carrying out the mandate of *Gideon* (as well as *Witensky* and other cases of that genre`).

The history and court interpretation of Article 18B

Article 18B of the County Law, Sections 722 -722(f), sets forth the framework for the counties to establish a "Plan" for representation of the indigent as well as compensation for assigned attorneys - more about that later. In *Brisman*, Justice Goodman, noted that:

"The practice of law carries with it the noble burden of defending the poor. With the enactment of Article 18B came recognition by the State of New York of the duty of the public to share this burden."

While Article 18B provided for

(Continued on Page 28)

Confrontation in DWI Cases!

Coming to a court near you

By Members and Volunteers of the District Court Committee of the SCBA

FOCUS ON DISTRICT COURT SPECIAL EDITION

In June, 2011, the United States Supreme Court in *Bullcoming v. New Mexico*[1] held that the Confrontation Clause requires in-court testimony from an analyst who conducted or observed the testing on the defendant's blood sample in a DWI case.

Although most Suffolk County DWI cases are based on breath, not blood tests, little or no meaningful or principled distinction exists between the *Bullcoming* holding about gas chromatograph blood tests and breath test machines[2] used in Suffolk County,[3] so a live witness who conducted the test should be required (and usually testifies at the request of the DA's office.)

Bullcoming, though, is significant because live testimony from the person who calibrates the machines and conducts weekly maintenance and test is sometimes absent from Suffolk County DWI trials. Frequently, if not always absent, is testimony from the person at the State Police Forensic Investigation Center who tests the simulator solution reference standard that must be used as part of the series of steps in each driver's breath test.[4] *Bullcoming* raises the strong possibility that the Confrontation Clause requires such live testimony which would require live testimony from an Albany-based witness for every DWI trial across the state although no reported decision (as of November 8, 2011) in New York addresses the issue.

Now, calibration, maintenance, weekly testing and simulator solution records generally come into evidence in Suffolk County as business records. In general, reliance is placed on *People v. Lent*[5] to admit the documents without confrontation.

Lent, analyzed the impact of *Melendez-Diaz* on *People v. Lebrecht*,[6] which had, post-*Crawford* and pre-*Melendez-Diaz* relied on a theory that simulator certificates and calibration records were not testimonial because they were not tied to a specific defendant and were prepared as part of an official mandate. *Melendez-Diaz* put the *Lebrecht* fiction to rest.[7]

With *Melendez-Diaz* having effectively reversed *Lebrecht*, *Lent* held that the simulator solution certificates and calibration and maintenance certificates for the breath test machines were non-testimonial based *People v. Brown*,[8] which, post-dated *Melendez-Diaz* and held that a four-prong test of testimonial documents should be applied.[9] *Lent* applies the same four-prong test to the admissibility without confrontation analysis for the simulator solution certificates and calibration and maintenance records.

One prong is independence of law enforcement which, obviously, is absent in the simulator solution certificates and the calibration and maintenance records.

Next, *Brown* and *Lent* examine whether a document reflects objective facts at the time of recording.[10] In *Brown*, a private laboratory conducted a DNA test on a rape kit and submitted the results to a DNA database. *Brown* held that no confrontation rights existed as to the private laboratory's report because "it consisted merely of machine-generated graphs, charts and numerical data. There were no conclusions, interpretations or comparisons apparent in the report…."[11] Essentially, *Brown* and *Lent* believe that so long as a scientific machine is giving the conclusion, confrontation may be dispensed with.

Bullcoming squarely rejects this "objective facts" fiction. The *Bullcoming* opinion notes that the operator followed a specific protocol and had room to record remarks, which, in *Bullcoming*, was left blank, leading to the conclusion that nothing affected the validity or propriety of the test. A breath test operator likewise adheres to protocol[12] "These representations, relating to past events and human actions not revealed in raw, machine produced data, are meet (sic) for cross-examination."[13] *Bullcoming* alerted that the New Mexico reasoning about objective facts raises red flags[14] of having note-taking police recite a declarant's testimony.[15]

Third, *Brown* and *Lent* look at whether a report is biased toward law enforcement, reasoning that science is, essentially, impenetrable by cross-examination. Not only should suspension of operations of the Nassau County crime lab put this fiction to rest, but also *Bullcoming* says that the "comparative reliability of an analyst's testimonial report drawn from machine-produced data does not overcome the Sixth Amendment bar."[16] *Bullcoming*, like *Melendez-Diaz*, refused to find hidden in the Confrontation Clause a forensic science exception.[17]

Fourth, *Brown* and *Lent* look at whether a report or document accuses a

(Continued on Page 21)

The Suffolk Lawyer wishes to thank District Court Special Section Editor Harry Tilis for contributing his time, effort and expertise to our December issue. Mr. Tilis, is a co-chair of the District Court Committee, with Judge William Ford, and serves as an officer of the Suffolk Academy of Law, a member of District Administrative Judge's Hinrich's Task Force on Court Operations and a member of the Executive Committee's Ad Hoc Committee on Indigent Defense.

SIDNEY SIBEN'S AMONG US

On the Move…

Steven P. Block, JD, CPA, TEP has become a partner at Futterman & Lanza, LLP, which will now be known as Futterman, Lanza & Block, LLP.

Elaine M. Colavito has become associated with the law firm of Sahn Ward Coschignano & Baker. She concentrates her practice in matrimonial and family law, civil litigation and immigration matters. Ms. Colavito is a frequent contributor to *The Suffolk Lawyer*.

Lawrence M. Kenney has joined Tsunis, Gasparis, Lustig & Ring as of counsel. He will work primarily with partner Christopher Ring who directs the municipal law and not-for-profit division.

Goldberg Segalla LLP is relocating its Long Island office from Mineola to Garden City, New York, in order to provide the firm with increased space to accommodate growth. Effective November 14, 2011, Goldberg Segalla's Long Island office address is: 100 Garden City Plaza, Suite 225, Garden City, NY 11530-3203. All phone and fax numbers will remain the same. The main office phone number is (516) 281-9800, and the main fax number is (516) 281-9801.

Eva Klein has joined Ruskin Moscou Faltischek, P.C. as counsel in the Real Estate Department.

Forchelli, Curto, Deegan, Schwartz, Mineo, Cohn & Terrana, LLP announces the arrival of Partner **Jeffrey G. Stark**, Head of the Litigation. In his law practice, he represents individuals, businesses, educational institutions, unions and healthcare institutions. Mr. Stark has served as a Justice of the New York Supreme Court, sitting in Nassau County, and was nominated by President Clinton to be a Judge of the United States Court of Inter-national Trade.

Lawrence M. Kenney has joined the Islandia, NY based law firm Tsunis, Gasparis, Lustig & Ring as Counsel Attorney. Mr. Kenney will work primarily with Partner Christopher Ring who directs the firm's Municipal Law and Not-for-Profit Division, along with John C. Tsunis, representing numerous fire districts, not for profit entities, and municipalities.

Jacqueline M. Siben

Forchelli, Curto, Deegan, Schwartz, Mineo, Cohn & Terrana, LLP has expanded its Employment & Labor practice with the arrival of Partner **Gregory S. Lisi**, new head of the Employment & Labor practice, and associates **Susan J. Deith** and **Lauren E. Kantor**.

Jeffrey Lhuiller has joined Kushnick Pallaci, PLLC as an associate. He will focus on the firm's construction litigation practice.

Rosen & Rosenblum PLLC have moved their offices to 445 Broadhollow Road, Suite 110, Melville, NY . Their email and phone number remains the same. The firm's concentration is in Matrimonial and Family Law.

Congratulations…

To **Touro College Jacob D. Fuchsberg Law Center** on a successful "With Liberty & Justice for All" 2011 dinner celebration on Sept. 9. The evening featured an awards presentation to the Builders Society, paying tribute to **Barry M. Smolowitz** '84 (Barry, first Touro law grad to lead a major bar association (SCBA 2007-2008); Dean Emeritus **Howard A. Glickstein** and NYS State Senator **Kenneth P. LaValle** were among the 18 honorees.

To **Richard A. Weinblatt**, Haley, Weinblatt & Calcagni partner, who was nominated by the Board of Directors for the New York State Bar Association Attorney Professionalism Award for 2012. A teacher of colleagues and the general public, his dedication to service to his clients and a commitment to promoting respect for the legal field, his support of the Academy and the SCBA.

Congratulations and best wishes to **Rosemarie Bruno** and **Christopher Repetti** on their wedding taking place on 11-11-11.

The New York State Bar Association ("NYSBA") Committee on Animals and the Law has presented **Jim Gesualdi** with a special Award of Recognition "with love and appreciation for exemplary service and commitment to making a difference for animals and people." Mr. Gesualdi, one of only two lawyers to serve on the committee since its founding in 2002, has served two years as vice chair and three as chair. He was also co-founding Chair of the SCBA Animal Law Committee.

Congratulations to SCBA Past President **Lynne Adaire Kramer** and **Howard Baker** who were recently appointed President and Vice President respectively of the Suffolk Y Jewish Community Center of Commack.

Mary Anne Sadowski, Managing Partner in the law firm Ingerman Smith LLP, has been named to *Who's Who in Women in Professional Services* in a special section of *Long Island Business News*.

Jeffrey M. Schlossberg from Ruskin Moscou Faltischek, P.C. received *Long Island Business News'* 2011 "Fifty or So Around 50" Award. This award recognizes and honors individuals for their leadership in business, support of professional and not-for-profit organizations and a commitment to the needs of the local community.

Congratulations to SCBA staff member **Mary Shannon** who became a great grandmother to baby boy Donald Joseph Browne, III on Veterans Day 11-11-11. The baby's parents Donald & Kylie Browne was born at 10:11 a.m. and weighed in at 11 lbs., 15 oz. The baby's father, Donald, is in the army stationed in Watertown, N.Y., scheduled to go to Afghanistan in July. He already served a tour in Iraq.

Congratulations to **Joseph LaCova,** grandson of SCBA Executive Director **Jane LaCova**, who won the Bohemia Fire Department Poster Contest for his Kindergarten Class. He will receive his award at a ceremony on November 30.

Announcements, Achievements &Accolades…

The law firm of **Futterman, Lanza & Block, LLP** will present a free two-hour seminar addressing elder law and estate planning. The topics, "Medicaid Planning & Asset Protection" will be presented on Nov. 30 at the law office located at 222 East Main Street, Suite 314, in Smithtown. The morning seminar runs from 10 a.m. to 12 p.m., and the evening seminar is from 6 p.m. to 8 p.m.

Arthur "Jerry" Kremer, a partner at Ruskin Moscou Faltischek, P.C**.** served as a political analyst for News12 Long Island's

(Continued on Page 21)

Court Attorney Referee Jurisdiction Defined

Calls Into Question Some Orders of Protection

By Members and Volunteers of the District Court Committee of the SCBA

In September, a unanimous Second Department panel threw into doubt the validity of orders of protection, especially ex parte temporary orders, issued by Family Court Court Attorney Referees. In *Gale v. Gale*,[1] the Second Department held that consistent with CPLR article 43 [2] governing references, a referee, court attorney or otherwise, has no jurisdiction to hear a case or issue orders unless, among other things, all parties[3] agree[4] to a reference and certain other procedural formalities occur.

The common practice in the Suffolk County Family Court has been to assign ex parte order of protection requests based on a rotation system. Thus, depending on the "wheel" or system in place when the petitioner sought the ex parte TOP, a Family Court Judge or a Court Attorney Referee might hear the initial (and ex parte) application.

Serious implications arise in criminal cases because some felony and misdemeanor criminal contempt}[5] cases are based alleged violations of a referee's TOP or OP. To sustain a conviction for any criminal contempt charge arising out of an order of protection violation, "There must be a specific *valid* order...."}[6] When an order of protection is not valid, no contempt conviction can occur.[7] When a referee issues an order *ex parte* at the case's outset, the parties' written stipulation for reference is absent by definition because one of the parties is unaware of the action. Thus, under *Gale*, the temporary order of protection cannot be valid or binding. Those temporary orders of protection should not serve as the basis for an arrest or prosecution.

FOCUS ON DISTRICT COURT SPECIAL EDITION

The issue *Gale* highlights differs substantively from orders a judge or properly appointed referee issues for good cause shown only to be dismissed later, but after an alleged violation. These "failure to sustain" cases are jurisdictionally valid orders of protection that were issued in accordance with Family Court Act Article 8. The referee orders arising out of a proceeding that did not comply with CPLR Article 43 are not jurisdictionally valid.

Because of the prosecutor's responsibility to check the actual order alleged to have been violated and defense counsel's like duty although growing from a different authority, both sides should carefully examine the accusatory instrument and/or in grand jury testimony. The best practice is to have the allegedly violated order as part of the accusatory instrument,[8] and the jurisdictional defect of having an invalid order would likely be apparent immediately, eliminating a needless prosecution not to mention the complicating dangers of a criminal court temporary order of protection being then issued based on a jurisdictionally invalid prosecution that a modicum of due diligence would have avoided.[9]

Gale applies also to Family Court orders of protection that referees issued even if both parties are present in court. *Gale* makes an obvious point—adherence to CPLR Article 43 is required. Thus, in *Gale*, the litigants', both of whom apparently had counsel as did the subject child or children, participation in a full hearing before a court attorney referee neither substituted for nor waived the statutory formalities of a written stipulation agreeing to a reference with a subsequent order of reference. Moreover, the parties' prior case involving their same children and same referee neither substituted for nor waived the Article 43 requirements.

Thus, both defense counsel and the prosecution have an investigatory duty to insure that a referee's order of protection, even if not issued ex parte, arose from a properly made stipulation and order of reference.

1. 87 AD3d 1011 [2d Dep't 2011]. See also, *Walker v. Bowman*, 70 AD3d 1323 [4th Dep't 2010].

2. See, especially, CPLR 4311 and 4317. See also, Family Court Act § 165[a] incorporating the CPLR for Family Court proceedings.

3. See, e.g., *Batista v. Delbaum, Inc.*, 234 AD2d 45 [1st Dep't 1996]; *Litman, Asche, Lupkin & Gioella v. Arashi*, 192 AD2d 403 [1st Dep't 1993][plaintiff and one of the two defendants consented to reference, and the other defendant did not. The referee, thus, lacked jurisdiction.]

4. If the parties' do not consent to a reference, the Family Court may not nonetheless refer the case to a referee solely to hear and report. See, CPLR 4317 which does not provide for compulsory reference in family offense cases.

5. Penal L. §§ 215.50 and 215.51.

6. *In re: Holtsman v. Beatty*, 97 AD2d 79, 82 [2d Dep't 1983] .

7. *People v. Smith*, 4 Misc.3d 909 [NYC Crim. Ct., NY Co., 2004].

8. *People v. Casey*, 95 NY2d 354, 359 [2000].

9. See, 22 NYCRR Pt. 1200.0 Rule 3.8.

Criminal Defendants Need Lawyers to Avoid Judges Being Reversed

By Members and Volunteers of the District Court Committee of the SCBA

In October, 2011, the Court of Appeals, in *People v. Crampe*,[1] reviewed a Justice Court of Riverhead case and a Queens County Supreme Court felony case. Both defendants proceeded without a lawyer. The Court of Appeals reversed both convictions because neither court engaged in a sufficient "searching inquiry" before allowing the defendant to waive the right to counsel. That searching inquiry and the record as a whole must enable an appellate court to conclude that the waiver of the right to counsel was made knowingly, intelligently, competently and voluntarily. [2]

In *Crampe*, a jury convicted the *pro se* Riverhead defendant, of criminal possession of a controlled substance in the seventh degree.[3] When the defendant appeared to want to proceed *pro se*, the court gave the defendant a form order that reminded the defendant of his right to counsel, stressed the risk of being convicted and jailed and pointed out various other matters regarding trials, the right to counsel, the right to be present and the complexity of criminal trial work. The defendant signed the order, and, at the end of that court appearance, the court told the defendant, "Be here with a lawyer or without a lawyer, as you choose. I advise you to get a lawyer, sir."

FOCUS ON DISTRICT COURT SPECIAL EDITION

The Court of Appeals held that the Riverhead court did not undertake a "searching inquiry," before allowing the defendant to waive the right to counsel. The only actual risk of which the Riverhead defendant was advised was the risk of conviction, a risk that also existed if the defendant had representation. The Court of Appeals went on to hold that in the companion Queens Felony case,[4] the suppression court made the same error because it did not "direct the defendant's attention to the dangers and disadvantages of self-representation beyond the risk of a… conviction." Thus, the *Crampe* holding clearly stands for the proposition that the court has the duty to insure through a searching inquiry that the potentially *pro se* defendant understands the specific risks of *self-representation* as op-posed to just the ordinary risks of criminal trials.

Risks of self-representation include less access to plea bargaining, unawareness of the typical plea offer in a particular jurisdiction (or court) for the charged offense, unawareness of other consequences,[5] inability to seek help from an established network of professional colleagues [which is part of the Queens trial judge's[6] warning about unawareness of how to prepare for trial], unawareness of case law and doctrine, unawareness of the rules of evidence [which the Queens trial judge noted might lead to conviction based on incomplete or inadmissible evidence], accidentally admitting or conceding points during conference or colloquy or cross-examination, unintentional waiver of important rights and lack of a remedy if legal representation is ineffective.

Crampe appears to be the first case where the Court of Appeals clarifies that the "searching inquiry" must alert a defendant to the danger of self-representation which has two components: first, self-representation has risks that make self-representation different from proceeding with an attorney such as those set forth above, and, second, self-representation has the general risks inherent in the adversary system that having a capable attorney mitigates.[7]

Crampe appears to continue the rule that whatever else the judge does in the "searching inquiry," the judge must insure that the record includes defendant's pedigree information such as age, education, occupation, previous exposure to the legal system and criminal justice system[8] and, most likely, fluency in English [which the Queens trial judge explored with the potentially *pro se* defendant there].

Crampe seems to anticipate that high volume local criminal courts could grind to a halt were the Constitution to require the sort of 20 page inquiry the Queens trial judge made. *Crampe* suggests that the level of searching inquiry required should depend on the pragmatic question of "what purposes can a lawyer serve at the particular stage of a proceedings in question, and what assistance [the lawyer] could provide to the accused at that stage."[9] Thus, the "searching inquiry" at arraignment might be less than the "searching inquiry" at trial, yet, the searching inquiry is required; what neither *Crampe* nor the federal and state cases it relied on say is that the nature of the charge is a valid consideration, so the "searching inquiry" is as required in an aggravated unlicensed operation of a motor vehicle case[10] as it is in a driving while intoxicated case[11] as it is in Mr. Crampe's criminal possession of a controlled substance case.

1. —- NY3d—-, 2011 NY Slip. Op. 07148 [2011].

2. See, *People v. Slaughter*, 78 NY2d 485 [1991] cited in *Crampe.* See also, *People v. Allen*, 39 NY2d 916 [1976].

3. Penal L. § 220.03

4. In the Queens case, the defendant chose to precede *pro se* at a suppression hearing, which the defendant lost. The defendant also chose to proceed *pro se* at trial, where the trial judge conducted an inquiry consuming over 20 pages in the record before permitting the defendant to waive counsel.

5. New York has moved away from the "direct" versus "collateral" consequences categorization, at least in ineffective assistance of counsel jurisprudence. See, e.g., *People v. Peque*, —-AD3d—-, 930 NYS2d 492 [3d Dep't 2011].

6. The *Crampe* Court said that the Queens trial judge's searching inquiry was "exemplary," but not a "template."

7. *People v. Arroyo*, 98 NY2d 101, 104 [2002]["The court's record exploration of the issue must … appris[e] a defendant of the singular importance of a lawyer in the adversarial system of adjudication."].

8. *People v. Providence*, 2 NY3d 579 [2004].

9. *Patterson v. Illinois*, 487 US 285 [1988]. See also, *Iowa v. Tovar*, 541 US 77 [2004].

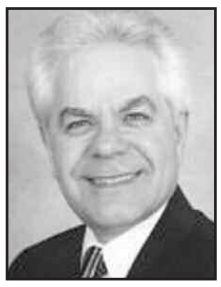
10. Veh & Traf. L. § 511.

11. Veh. & Traf. L. § 1192.

TAX LAW

Preparer Tax ID Number-"PTIN" Revisited and Up for Renewal

By Alan E. Weiner


Alan E. Weiner

Happy Birthday PTIN; it's hard to believe this baby is just about one year old. If you were there at the birthing in late 2010, you'll need to renew, by December 31, 2011,[1] for the 2012 filing season. The IRS announ-ced that 738,000 tax preparers had received a PTIN as of October 20, 2011[2]. If you don't have a PTIN but you think that you need one, this update is not for you. See the comprehensive article in the November/December issue of *The Suffolk Lawyer* [3].

This update is limited to PTIN renewal (for you and your licensed employees) and "Supervised Preparers" (unlicensed tax preparers working for you) with some important bonus information thrown in at the end. Don't cheat by skipping ahead.

The 'How To' (Renew)

Easy! You received or refreshed your PTIN in late 2010 [4] and paid the $64.25 fee. If you set up a PTIN account electronically last year, you should have received a reminder email[5], with renewal instructions, from the IRS by the time you read this article. But even if you did not receive a reminder (or you haven't opened it yet), you can renew by going to www.irs.gov/ptin . Most everything that is in this update can be found on the opening page and by drilling down (i.e., clicking on links) from there. In 2010, the website focus was on obtaining or refreshing an old PTIN. This year you will note that the focus is on renewal (although information also is available at that link for those who need a PTIN for the first time).

Here are the renewal steps that you'll see on the aforementioned IRS site:

• "Access Your Account" – You'll need your email address and your password.
• "Renew Your PTIN" – The IRS provides a link to its "PTIN Renewal Checklist" which tells you what to have available before you start. The IRS has pre-populated your information (including your credit card data) from last year, so, if nothing has changed, on many pages you just will be reviewing your 2010 entries. Nevertheless, be ready with:

a. Personal information (name, mailing address, date of birth)
b. Business information (name, mailing address, telephone number)
c. Explanations for felony convictions (if any)
d. Explanations for problems with your U.S. individual or business tax obligations (if any)
e. Credit or debit card for the $63.00 PTIN user fee - Here's good news. The renewal fee is only $63 (down from the first time PTIN fee of $64.25).
f. If applicable, your supervisor's PTIN (more on that later in this article)
g. Any U.S.-based professional certification information (CPA, attorney, enrolled professional) *including certification number, jurisdiction of issuance, and expiration date.* This is

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REAL ESTATE

Survey Says... Record Owner Pays Punitive Damages

By Lance R. Pomerantz


Lance R. Pomerantz

The Fourth Department recently handed down a (3-2) decision that appears to be the first New York appellate case to hold that a trespass to land held by adverse possession can trigger an award of punitive damages.[1]

The facts

In the memorandum opinion, the court gave an abbreviated version of a complicated set of facts. Plaintiffs owned Lot 8,[2] which was improved with a camp that was originally built around 1971. They are successors to their parents, who had purchased the camp in 1983. Lot 7 abuts Lot 8 immediately to the east. Defendant purchased Lot 7 in 2004 and then commissioned a survey based upon his deed description. Defendant's survey indicated that the camp improvements overlapped the boundary between the lots by approximately 2 ½ feet. Plaintiffs commissioned their own survey, which indicated that the boundary was approximately 10-12 feet east of the location shown on the defendant's survey. The court referred to this 10'-12' wide strip as the "disputed area." It is unclear from the opinion how far the camp improvements extended into the disputed area on the plaintiffs' survey.

The holding

The court rapidly concludes that the title to the disputed area ripened in the plaintiffs (or their predecessors) through adverse possession decades before the defendant neighbor moved in and commenced his trespass. ***Note that this result emphasizes that the defendant's survey was accurate.*** [3] The defendant's conduct included desecrating a memorial erected to the father of one of the plaintiffs, plugging plaintiffs' vent pipe, entering their cellar and "rendering their toilet unusable." The majority believed that this conduct continued despite the fact that the defendant was aware of the claim of title through adverse possession. (The dissent differs on this point. See *The Dissent*, *infra.*)

Relying on precedent where punitive damages have been awarded for trespass to land acquired by deed, the court concludes that the neighbor's conduct, "amounted to a wanton, willful or reckless disregard of plaintiffs' rights," [4] despite his possession of a survey that appeared to support his own claim of record title. Defendant's conduct was intentional, "evince[d] a high degree of moral turpitude and demonstrate[d] such wanton dishonesty as to imply a criminal indifference to [his] civil obligations.'"[5]

The damage award

The trial court, sitting without a jury, had originally awarded $200,000 in punitive damages. The Appellate Division concluded that that amount was "so grossly excessive as to show by its very exorbitancy that it was actuated by passion (*Nardelli v Stamberg*, 44 NY2d

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HEALTH AND HOSPITAL LAW

Role of Legal Advisor in Facilitating Hospital Discharges

By James G. Fouassier

This is the first of a two part series.

Seldom can a client's relationship with a trusted legal advisor be of greater value than when the client or a family member is hospitalized. Fear, anxiety, uncertainty and instability, both emotional and financial, are the sentiments and emotions most often associated with a hospital encounter, even a brief one. The family attorney often is in a good position to address in advance the many issues that may befall a client and his or her family when serious illness or injury strikes. When the real estate transaction is completed, a casual inquiry into whether the client has a health care proxy or other advance directive, not just a will, clearly is in the client's best interests. Attorneys specializing in elder law and estate planning are well positioned to inquire into the existence and adequacy of health insurance and any potential healthcare concerns. Has anyone considered whether a guardian is or soon will be needed? A consultation regarding recovery for a personal injury should never neglect the possible consequences of large unpaid hospital and doctors' bills and how they may be ameliorated.

Some of you may have seen an article in the *Sunday New York Times Metropolitan* section of October 2, 2011, entitled "The Prisoner of Room 516," the sad story of how a hospital's inability to transfer a stable patient to a subacute, rehabilitation or long term care facility, or even back home with adequate support, was frustrated for lack of funds. The 19 month encounter cost the hospital some $1.4 million dollars. (The article may be accessed on line at http://www.nytimes.com/2011/10/02/nyregion/stuck-in-bed-for-19-months-at-hospitals-expense.html?_r=1&hp)


James G. Fouassier

An indigent undocumented alien with no income and no assets may be unable to answer for any part of such a large debt. Your client, on the other hand, well may have the ability to pay a significant portion of such large hospital and doctors' bills. Rest assured that in this day and age of diminishing hospital reimbursement from all sources (including past and future cuts in Medicare and Medicaid), health providers no longer are walking away from big bills.

It's more than just the money, though.

Acute care general hospitals are intended to serve acutely ill patients. People who are not acutely ill should not and, more importantly, *cannot* be maintained in facilities designed to provide acute levels of care. State licensure for such facilities expressly contemplates the medical care and treatment of the acutely ill. Furthermore, hospitals have a legal and moral obligation to keep themselves accessible to the most acutely and severely ill patients, and they cannot do so if they are required to manage patients with chronic long term conditions. This is precisely why the law imposes separate licensure and operational requirements on subacute, rehabilitation, and long term care facilities different from those for acute care hospitals. [1] Chronically ill patients no longer requiring inpatient care should be transferred to facilities which are specifically designed and licensed for long term care and are best able to provide for their extended medical needs. Most acute care hospitals simply are not able to extend optimal long term chronic care.

It is tempting for critics to attribute all discharge planning to a hospital's financial motives, as if the need to remain solvent were some kind of evil. This is especially so for those with social or financial interests in avoiding the patient's discharge for as long as possible, for reasons which either are already obvious or which will become clear as we move along. What should also be self evident is that when the relevant parties – providers and the patients and families - consider the needs of the patient his or her finances almost always will be a factor. When medical care is unreimbursed by an insurer or other third party payer the cost of the care becomes the patient's personal financial responsibility. Unreimbursed acute hospital care costs may well exceed hundreds or thousands of dollars a day. Such an expense rapidly builds up, and will have to be satisfied from the assets of the patient if there is no insurance coverage or if commercial insurance or benefit programs such as Medicare or Medicaid do not pay all of the costs of the care or service. Only when the patient is unable or unwilling to pay such costs is the financial loss legally borne by the provider. [2]

A common and growing problem as the economy worsens is the lack of a means of payment, or inadequate insurance or health plan coverage, for care required upon hospital discharge, such a s rehabilitation, subacute or long term care and, in particular, care in a skilled nursing facility. An acute care hospital is compelled by the federal "EMTALA" [3] laws to accept an acutely ill patient presenting through the emergency department. There is no similar obligation imposed by law on a subacute, rehabilitation or chronic long term care facility such as a skilled nursing facility. If the patient (or the family) cannot pay or cannot guarantee personal financial responsibility for services not covered or paid "short" [4] by a health plan, the patient is not accepted. This issue is relevant not only in the context of institutional placement. Many patients,

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LANDLORD TENANT LAW

Liability for Second-hand Smoke Intrusion

By Patrick McCormick

Patrick McCormick

Two recent cases address issues that arose when a tenant's smoking and the resulting intrusion of second-hand smoke into a neighboring tenant's apartment created objectionable living conditions.

In *Upper East Lease Associates, LLC v. Cannon*[1], the court held that landlords of "high-rise apartment" buildings have a "duty to prevent one tenant's habits from materially interfering with another tenant's right to quiet enjoyment. When a tenant's smoking results in an intrusion of second-hand smoke into another tenant's apartment, and that tenant complains repeatedly, the landlord runs a financial risk if it fails to take appropriate action."

In this case, the landlord commenced an action against the tenant seeking monetary damages for breach of a residential apartment lease. Tenant served an answer which included counterclaims alleging that: landlord violated the warranty of habitability owed to defendant; landlord failed to address unsafe and intolerable conditions; and, the tenant was deprived of the beneficial use and enjoyment of the premises forcing it to abandon the premises resulting in a constructive eviction. The tenant also alleged that the claimed breach of warranty of habitability entitled her to a refund of the rent previously paid and damages for breach of the lease.

The tenant's lease contained a provision specifically addressing the subject of second-hand smoke under which the tenant specifically acknowledged that the infiltration of second-hand smoke into the common areas of the building or into other apartments may constitute a nuisance and health hazard and agreed to prevent the infiltration of second-hand smoke into the common areas of the building or into other apartments. The lease clause provided that the prevention of such second-hand smoke infiltration was "OF THE ESSENCE" to the lease.

This action was commenced after the apartment immediately beneath the defendant-tenant's apartment became occupied by a new tenant in September, 2008. The new tenant's lease contained the identical lease language regarding second-hand smoke. The next month, the tenant began to complain to the landlord about second-hand smoke infiltrating into the tenant's apartment. The landlord attempted to caulk and seal around vents that may have been conductors of cigarette smoke from the neighbor's apartment but these measures were ultimately ineffective. The tenant requested to be relocated to a different apartment; the landlord initially agreed but sought an agreement to a new one year lease by the tenant which the tenant refused. The second-hand smoke problem continued unabated. Tenant did not pay January 2009 rent and vacated the apartment February 4, 2009.

Emphasizing that the rights and obligations of the parties are governed by the provisions of the lease, together with the statutory implied warranty of habitability found in Real Property Law §235-b, the court held that the key question revolved around "whether or not the second-hand smoke was so pervasive as to actually breach the implied warranty of habitability and/or cause a constructive eviction." Recognizing that the answer was fact-sensitive, the court found the second-hand smoke was "enough of a nuisance to warrant action by the landlord. Without a doubt, the landlord, at least initially, took general appropriate actions to abate the nuisance. However, when those initial actions proved ineffective, the landlord was obligated to take further steps to alleviate the condition, or to accommodate the defendant in a different apartment." Thus, the court found that under the "totality of circumstances" the landlord failed to meet its obligations to the tenant and precluded the landlord from pursuing its claim for rent that accrued after the tenant vacated the apartment. The court also found that for the period of time the tenant occupied the apartment while "enduring the neighbor's second-hand smoke" an abatement of rent was warranted. The court granted 10 percent rent abatement for October 2008, 20-percent rent abatement for November 2008, 30 percent rent abatement for December 2008, and 40 percent rent abatement for January 2009. Because tenant vacated the apartment February 4, 2009, no abatement was granted for that month.

It is important to note that the court's decision was dependent not only on the specific facts related to tenant's complaints and landlord's response, but also on the specific lease clause regarding second-hand smoke. While the court may have reached the same conclusion if the lease was silent regarding second-hand smoke, that is not a certainty. Tenants who are concerned about second-hand smoke should attempt to obtain appropriate protections in their leases and landlords should endeavor to take appropriate and documented remedial measures upon receipt of tenant complaints, especially if a lease contains terms recognizing the potential nuisance of second-hand smoke.

In *Ewen v. Maccherone*[2], condominium unit owners sued their neighbors (not the condominium), for negligence and private nuisance alleging that the defendants' excessive smoking resulted in second-hand smoke seeping into their unit. The Supreme Court, Appellate Term, held that the individual defendant's smoking was not so unreasonable as to constitute a private nuisance and, because there was no specific statute, by-law or house rule addressing second-hand smoke, the defendants owed no duty to plaintiffs to refrain from smoking in their unit.

In addition to the second-hand smoke intrusion from the neighbor's smoking, plaintiffs alleged the effect of the second-hand smoke was exasperated by a building-wide ventilation or "odor migration construction design problem." Plaintiffs alleged that the second-hand smoke filled their kitchen, bedroom and living room causing them to vacate the unit and resulting in personal injury. The defendants moved to dismiss the complaint because the condominium's declaration and by-laws

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HOLIDAY TOY DRIVE

Help the SCBA brighten the holiday season for needy children in our greater community. Please bring an unwrapped toy for "Holiday Magic," run each year by colleague Charlie Russo, to the SCBA Holiday Party on Friday, Dec. 9, 4 to 8 p.m. in the Great Hall. Toys may also be brought to any Academy lecture or committee meeting.

The Origin of Shorthand

By Marcus Tillius Tiro

Note: Dominick Tursi, OCR and Director of the Gallery of Shorthand, is Tiro's "ghost writer." See: http://www.galleryofshorthand.org. Joseph W. Ryan, Jr. Chair of the Federal Courts Committee contributed to the article.

For 37 years I was privileged to serve Marcus Tillius Cicero, first as his household slave and later as his confidential secretary— when Cicero served in the Roman Senate of Julius Caesar. Cicero became known as the Orator who could "Conquer Rome" with nothing more than his voice:

But if the moment has come when this noble House no longer has ears for the pleas of an innocent man, then all those courageous deeds are worthless, and our soldiers bleed in vain. This morning there came into my house just such an innocent man, whose treatment by one of our number has been so shameful, so monstrous, and so cruel that the gods, themselves, must weep to hear of it.

[Cicero pleading the case of Sthenius of Thermae before the Roman Senate.]

Cicero's eloquent plea was captured by me using a shorthand system developed by Cicero, himself. Beginning in 74 BC, I accompanied Cicero to Athens where we witnessed efforts to develop shorthand. While the Greeks were able to reduce words to symbolic letters, Cicero was able to develop a speedier way of writing by eliminating letters, such as vowels, that could be spared, and by rarely removing the hand from the tablet.

By 64 BC, Cicero developed a complete series of symbols that captured the sounds of words spoken. The system became known as "Tironian Notes" I am very proud to state. With stylus in hand, the symbols were written onto tablets of wax, and thereafter transcribed onto parchment by premier scribes for preservation. By 59 BC, Julius Caesar ordered that Senate deliberations be recorded. His successor, Augustus, continued the practice but prohibited publication. The shorthand profession was well underway.

The evolution of shorthand traces the literacy of civilizations, for the importance of preserving thought led to the very creation of written language in 3500 BC – implemented by the Ancient Scribes of Sumer and Egypt. They are the ancestors of today's shorthand artisans, who embrace modern technology to instantly produce text from speech and can immediately convey it as captions during live televised broadcasts.

My story can be found in the Gallery of Shorthand—the only one of its kind—at the Central Islip Federal Courthouse where a replica of my stylus and wax tablet are on display among the Ten Epochs which describes the history of shorthand. Cicero and I are humbled to be part of this exhibit which so aptly demonstrates the value of the shorthand profession in the preservation of history. I invite you to attend.

Liability for Smoke Intrusion *(Continued from Page 11)*

did not prohibit smoking in the residential units and because the plaintiffs failed to join the condominium as a necessary party. The Appellate Term concluded that the plaintiffs failed to state a cause of action for private nuisance because the neighbor's "conduct in smoking in the privacy of their own apartment was not so unreasonable in the circumstances presented as to justify the imposition of tort liability against them…Critically, defendants were not prohibited from smoking inside their apartment by any existing statute, condominium rule or by-law. Nor was there any statute, rule or bylaw imposing upon defendants an obligation to ensure that their cigarette smoke did not drift into other residences." The court continued that "to the extent odors emanating from a smoker's apartment may generally be considered annoying and uncomfortable to reasonable or ordinary persons, they are but one of the annoyances one must endure in a multiple dwelling building, especially one which does not prohibit smoking building-wide." The court determined that "in the absence of a controlling statute, bylaw or rule imposing a duty, public policy issues militate against a private cause of action under these factual circumstances for second-hand smoke infiltration" and dismissed the nuisance claim. The court, having found that the defendants did not have a duty to refrain from smoking inside their apartment, also dismissed plaintiffs' negligence claim.

The courts in both these cases looked to the relevant controlling documents to support their respective conclusions. The court in *Upper East Lease Associates, LLC* relied upon the relevant lease provision recognizing the potential "nuisance" of second-hand smoke to support its conclusion that the landlord owed a duty to protect its tenants, in certain factual circumstances, from second-hand smoke. Likewise, the court in *Ewen* relied upon the absence of a controlling statute, condominium bylaw or rule imposing a duty on the unit owners in determining that, under the factual circumstances presented, no private claim existed.

Thus, landlords, tenants and condominium unit owners and boards should take care in drafting and reviewing the relevant controlling documents, whether a lease, bylaws or house rules, to delineate the rights and obligations of landlords, tenants, condominium boards and unit owners in connection with second-hand smoke.

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

1 *Upper East Lease Associates, LLC v. Cannon* , 30 Misc.3d 1213(A), 924 N.Y.S.2d 312 (2011, Dist. Ct., Nassau Co.; Ciaffa, J.)

2 *Ewen v. Maccherone* —- N.Y.S.2d—- (App. Term 1st Dep't 2011) 2011 WL 2088967

TRUSTS AND ESTATES

By Ilene Shewryn Cooper

Ilene Sherwyn Cooper

Burial

The surviving spouse of the decedent commenced a proceeding in the Supreme Court to disinter the body of her late husband alleging that it was the decedent's wish to be buried alongside her, and the cemetery in which he was buried, would not, for religious reasons, allow her to be buried there. The application was opposed by the mother and sister of the decedent. The Supreme Court granted the application and the mother and sister appealed.

In affirming the order of the Supreme Court, the Appellate Division held that in the absence of consent, the court may order disinterment of a body for good cause shown and substantial reasons for the relief. The court found that the testimony at the hearing before the Supreme Court supported the conclusion that the decedent's concern was to be buried alongside the petitioner, which was not possible given the rules of the cemetery and the lack of available space.

***Matter* of Eirand-Herskowitz v. Mt. Carmel Cemetery Assn., 82 A.D.3d 1231 (2d Dept.2011).**

Summary Judgment

In a contested probate proceeding, the objectant, daughter of the decedent, moved for summary judgment dismissing the probate petition that had been filed by her sister, another daughter of the decedent. The propounded instrument disposed of the decedent's entire estate to the petitioner. Objections to probate were based on allegations that the will was not duly executed, that the decedent lacked testamentary capacity on the date of its execution, and that it had been procured by undue influence and fraud. The motion for summary relief was limited solely to the issue of due execution.

The propounded instrument was prepared by an attorney, and contained an attestation clause followed by the signature of two witnesses, one of whom was the attorney-draftsperson.

The court initially noted that the objectant failed to annex a copy of the pleadings to the motion, which could prove fatal to the relief sought. Nevertheless, because dismissal of the motion on this ground was subject to renewal, the court in the interests of judicial economy addressed the merits of the motion.

To that extent, the court observed that when an attorney supervises the execution of a will, there is a presumption of due execution. Nonetheless, the objectant argued that the presumption was inapplicable because the attorney-draftsman and attesting witnesses failed to establish a consistent procedure for the execution of wills in compliance with the provisions of EPTL 3-2.1. More specifically, the objectant claimed that the petitioner had not demonstrated that the testator had signed in front of both attesting witnesses and whether the witnesses had signed in front of the testator and each other. In this regard, the objectant relied upon the fact that one of the witnesses had no specific recollection of the will execution ceremony. Further, the objectant alleged that at the time of the will's execution, the attorney-draftsperson had no knowledge that the decedent had a spouse and four children.

In opposition to the motion, the petitioner argued that a presumption of due execution attached to the instrument because its execution was supervised by an attorney, who testified that he followed a consistent procedure when executing wills. The petitioner further argued that this procedure was confirmed by the deposition of the witness to the will, who testified that it was the usual practice of the draftsman to first discuss and read the will to the testator and then to call her into the room to witness its execution. The petitioner also relied on the fact that the instrument contained an attestation clause and attesting witness affidavits.

The court opined that the existence of an attestation clause creates a presumption of due execution of a testamentary instrument, although it is nevertheless incumbent upon the court to insure its validity. To this extent, the court noted that the mere fact that an attesting witness cannot recall the circumstances surrounding the execution of a will is not fatal to its admission to probate, although it intensifies the scrutiny given by the court to the document.

Accordingly, under the circumstances, the court found a triable issue of fact on the issue of due execution, and denied the objectant's motion.

***In re Pannone,* NYLJ, July 13, 2011, at p. 30 (Sur. Ct. Kings County).**

Security for Costs

In a contested probate proceeding, the proponent, a nephew of the decedent, moved for an order directing the non-domiciliary objectant to post security for costs pursuant to SCPA 2303. The decedent died survived by seven nieces and nephews. The propounded will instrument nominated one of the decedent's nephews as executor, bequeathed her diamond ring to one of her nieces, and further bequeathed $50,000 equally among her remaining nieces and nephews. Two of the decedent's nephews, one of whom was a non-domiciliary, filed objections to probate, and the proponent moved for an order directing that he post security for costs.

The court opined that an application pursuant to SCPA 2303 is discretionary based upon considerations of whether (1) the non-domiciliary has an interest in the estate that can be resorted to if unsuccessful in the proceeding; and (2) there is substantial merit to the objections.

In support of his application, the proponent argued that the objectant was a non-domiciliary who stood to lose his bequest under the will, if unsuccessful, by virtue of the *in terrorem* clause in the instrument. The proponent further argued that the objectant had limited income and insufficient assets to cover any costs that might be imposed.

In opposition to the motion, the objectant maintained that he had a good faith basis for the objections; that the decedent was suffering from breast cancer, and was rushed to the hospital on the date she executed the propounded instrument, and then died eight days later. Moreover, the objectant alleged that the decedent's poor physical and mental condition prevented her from executing the instrument on her own, and submitted in support of this claim, an affidavit from the decedent's niece/beneficiary of her diamond ring, averring that she had assisted the decedent in executing the instrument.

Based upon the foregoing, the court denied the motion. In reaching this result, the court opined that when there are resident and non-resident objectants, the court will not compel the non-resident member of the class to post security for costs. The court further noted that costs will not be required unless the moving party demonstrates that the non-resident objectant is using non-residency as a precaution against the consequences of a vexatious claim.

***In re Ruoti,* NYLJ, May 10, 2011, at 38 (Sur. Ct. Kings County).**

Note: Ilene Shewryn 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 a past president of the Suffolk County Bar Association and a member of the Advisory Committee of the Suffolk Academy of Law.

SECOND CIRCUIT BRIEFS

"Sham on You"

By Eugene D. Berman

This month we discuss a decision that the United States Court of Appeals for the Second Circuit issued concerning a sham submission opposing summary judgment. In *Rojas v. Roman Catholic Diocese of Rochester*, Docket No. 10-4132-cv, 2011 U.S. App. LEXIS 20125 (2d Cir., Oct. 4, 2011), the Second Circuit departed from the usual rule that a court reviewing a summary judgment motion must deem the opposing party's evidence as true, and draw all justifiable inferences in his or her favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). Instead, the court affirmed summary judgment where the district court concluded that the plaintiff had offered "sham" evidence to defeat the motion.

Summary judgment is appropriate when the moving party shows that there is no genuine dispute as to any material fact and that he or she is entitled to judgment as a matter of law. Fed. R. Civ. P. Rule 56(a). A fact is "material" if it can affect the outcome under the law governing the issue in dispute. *Anderson*, 477 U.S. at 248.

A party opposing summary judgment must submit more than "a scintilla of evidence" casting doubt concerning the material facts. *Id.*, at 252; *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Thus, a material fact is "genuine" only "if that evidence can allow a reasonable jury to return a verdict for the nonmoving party." *Anderson,* 477 U.S. at 248.

In her complaint, Rojas asserted that the Roman Catholic Diocese of Rochester (the "Diocese") fired her in retaliation for her sexual harassment complaints. While employed at the Diocese, Rojas's office was located on the Church of the Nativity of the Blessed Virgin Mary's ("Church of the Nativity") campus. The Diocese and the Church of the Nativity, however, were separate corporate entities. Although the Church of the Nativity's Pastor was a Church employee, and not a diocese employee, Rojas alleged that he was her co-worker and that she was a victim of his sexual harassment, which created a hostile work environment.


Eugene D. Berman

The district court *sua sponte* inquired whether an alleged co-worker's acts that caused a hostile environment could subject the Diocese to vicarious liability. Nevertheless, Rojas continued to allege that the pastor was her co-worker when she thereafter amended her complaint. Rojas then reiterated that characterization in her sworn responses to the defendants' interrogatories.

Separately, Rojas filed a criminal complaint against the pastor. At the pastor's criminal trial, in which he was acquitted, Rojas continued to characterize him as her co-worker.

Rojas, however, contended that the pastor was her supervisor in her papers opposing summary judgment. She supported her new contention with her own affidavit and portions of her deposition testimony. Rojas's summary judgment opposition did not dispute that she was a diocese employee or that the Church of the Nativity and the Diocese were separate corporate entities.

In addition to her characterizations concerning the Pastor, Rojas made conflicting statements concerning the Diocese's knowledge of the alleged harassment. In this regard, Rojas's deposition testimony about her alleged complaints to the Diocese concerning the pastor's conduct differed from the versions set forth in her Equal Employment Opportunities Commission complaint, as well as in her original and amended complaints at the district court.

The district court, in its analysis of Rojas's summary judgment opposition, found that "upon the entire record, [Rojas] has changed key aspects of her prior version of events, set forth in pleadings, trial testimony, and sworn discovery responses, in an attempt to defeat [the Diocese's] summary judgment motion." *Rojas v. Roman Catholic Diocese of Rochester*, 2010 U.S. Dist. LEXIS 106735*62 (W.D.N.Y., Oct. 1, 2010). Based on its evidentiary determination, the district court, relying on *Jeffreys v. City of New York*, 426 F.3d 549 (2d Cir. 2005), discounted Rojas's summary judgment opposition. In *Jeffreys,* the Second Circuit found that:

> [w]hile it is undoubtedly the duty of district courts not to weigh the credibility of the parties at the summary judgment stage, in the rare circumstance where the plaintiff relies almost exclusively on his own testimony, much of which is contradictory and incomplete, it will be impossible for a district court to determine whether the jury could reasonably find for the plaintiff, and thus whether there are any genuine issues of material fact, without making some assessment of the plaintiff's account.

Id., at 555 (internal citation and quotation marks omitted).

The Second Circuit viewed that Rojas's "inconsistent and contradictory statements transcend credibility concerns and go to the heart of whether [she] has raised genuine issues of material fact to be decided by a jury. *Rojas,* 2011 U.S. App. LEXIS 20125*21. Thus, following *Jeffreys,* the Second Circuit held that "in order to determine whether there were any genuine issues of material fact to be tried by a jury, the District Court was entitled to assess Rojas's factual averments." *Id*., at *17.

The Second Circuit cautioned that its decision is not a suggestion that district courts should skeptically analyze summary judgment opposition papers. Indeed, courts should not disregard a party's conflicting evidence where he or she submits a plausible explanation for the discrepancies.

> [I]f there is a plausible explanation for discrepancies in a party's testimony, the court considering a summary judgment motion should not disregard the later testimony because an earlier account was ambiguous, confusing, or simply incomplete.

Id., at *19-20 (citation and quotation marks omitted). In this regard, the Second Circuit pointed out that "Rojas and her counsel were given ample opportunity to explain or reconcile Rojas's inconsistent and contradictory statements, but no such explanation was provided." *Id.*, at *20.

Note: Eugene D. Berman is Of Counsel to DePinto, Nornes & Associates, LLP in Melville.

ETHICS AND PROFESSIONAL MANAGEMENT

Ethical Propriety of Referral Fees

By Alison Arden Besunder

The idea of receiving referral fees for referring a client to another attorney can be increasingly tempting in times of economic turmoil. Phrases like, "Do you give referral fees?," "We give referral fees," and "I have a potential referral for you … but first, how do you deal with referral fees?" are overheard more and more frequently. This article explores the ethical rules impacting the propriety of giving and accepting fees in exchange for a referral.[1]

Under the prior Code of Professional Responsibility (the "Code"), it was proper to share a fee with another lawyer provided (1) the client knows and consents; (2) the division is in proportion to the work performed and responsibility assumed by each lawyer; and (3) the total fee is reasonable and not excessive. NYSBA Op. 134 (4/9/70), *citing* DR § 2-107(A). The same remains true under the New York Rules of Professional Conduct (the "Rules") (effective April 1, 2009). A lawyer still may not compensate or give anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client, unless those same elements are met. Rule 7.2.

Rule 1.5(g) governs the standards for referral fees under the rules and provides that "A lawyer shall not divide a fee for legal services with another lawyer who is not associated in the same law firm unless: (i) the division is in proportion to the services performed by each lawyer or, by a writing given to the client, each lawyer assumes joint responsibility for the representation; (ii) the client agrees to employment of the other lawyer after a full disclosure that a division of fees will be made, including the share each lawyer will receive, and the client's agreement is confirmed in writing; and (iii) the total fee is not excessive".[1]


Alison Arden Besunder

A lawyer who receives referrals must not pay anything solely for the referral (except as provided in Rule 1.5(e)), but can agree to reciprocally refer clients to the referring attorney or organization if the reciprocal referral agreement is (i) non-exclusive; (ii) the client is informed of the referral agreement; and (iii) the agreement is not indefinite and is reviewed periodically. Rule 7.2.

In addition to these requirements, then, as now, the attorney must continue to exercise independent professional judgment on behalf of the client. NYSBA Op. 667 (6/3/94). While a lawyer may apparently accept fee from mortgage broker for referring client to broker (NYSBA Op. 667 (6/3/94), an attorney cannot accept referrals from an accounting firm in return for an agreement to share contingent fees on personal injury matters. NYSBA Op. 727 (2/4/00), *citing* DR § 2-103(B), (D); 2-107, 3-102(A). Nor can an estate planning attorney accept a referral fee from an insurance company for recommending a client who ultimately purchased life insurance from the company, or a financial or investment advisor, because it constitutes a conflict of interest and impacts the independent professional judgment of the lawyer, and disclosure and consent would not cure the conflict. NYSBA Op. 671 (11/4/94); NYSBA Op. 682 (6/7/96). Moreover, a lawyer may not profit from legal work which he or she would be disqualified from accepting. NYSBA Op. 338 (4/25/74). And, even if the fee is permissible, the attorney must apparently remit the fee to the client if the client desires. NYSBA Op. 667, *citing* NYSBA Op. 595 (1988).

A referral fee usually passes muster **if** the lawyer performs "some work, labor or services which contributed toward the earning of the fee … there being no requirement that compensation be in proportion to the amount of work actually performed." *Nicholson v. Nason and Cohen*, 192 A.D.2d 473, 597 N.Y.S.2d 23 (1993). Although the fee need not be proportionate to the work performed, more is required of the forwarding attorney than the mere recommendation

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Sousa Celebration Salute to Vets

On Friday, 11-11-11, my husband Joe and I had dinner with SCBA member Victor Villacara and his lovely wife Anita at a fine Patchogue, Long Island restaurant. Following dinner, we attended a stirring concert at the Patchogue Theatre for the Performing Art's featuring the Sousa Symphonic Band who, continuing in the Sousa tradition, performed encores from the John Philip Sousa March Book as well as music from other composers including the Star Spangled Banner, God Bless America and America the Beautiful, to name, but a few. The Sousa Symphonic Band played to a packed house and their annual performance once again was dedicated to service men and women who have chosen to protect and honor our country.

Victor Yanacone, Jr., an honorary member of our association and Chair Emeritus on the Board of Directors of the Patchogue Village Center for the Performing Arts, played Alto Saxophone in the 60-piece band which has become an annual tradition and a wonderful theatre experience for this band playing in the fully restored 1920's music hall. John Philip Sousa, who is known for his military and patriotic marches, played at the Patchogue Theatre on July 23, 1923. The Sousa Symphonic Band was conducted by Peter Loel Boonshaft and in the John Philip Sousa tradition, performed many encores in response to audience demand. John Philip Sousa's great granddaughter honored the Sousa Symphonic Band with her presence on this wonderful moving occasion.

America would not be the country it is today without the fine men and women in uniform fighting in the name of freedom and we should celebrate our veterans every day of the week and not just on their one special day thanking them for their service and sacrifice.

The performance by this extraordinary band was outstanding and we hope you all will be able to attend next year to hear the wonderful sounds of the Sousa Symphonic Band. *-LaCova*

PRACTICE MANAGEMENT

Law Firm Business Plan Basics

By Allison C. Shields

Whether you're a solo practitioner or you work for a firm, a business plan can be an exceptionally helpful tool. The business plan functions not only as a road map for your firm's future, but also as a means to evaluate past performance, identify gaps and take action to improve.

Having a business plan can help you prioritize, focus your efforts and manage your resources. By taking the time to identify your main goals, you can more easily determine which activities and clients to undertake and which to pass by - at least for now. The business plan can help keep you on track and avoid what some call the "Bright Shiny Object (BSO) Syndrome:" rather than being distracted by every new idea or opportunity that comes your way, you can decide quickly and easily what deserves your attention.

"The only thing that's certain is that nothing stays the same."

Elements of the business plan

At its most basic, a business plan consists of the following elements: the current assessment and evaluation, the vision and goals you intend to achieve, the strategy and action plan that needs to be in place to achieve them, and a periodic review.

Current assessment: Who am I/Where am I?

The current assessment consists of two parts. The first part, Who am I (or Who Are We?) takes a look at who you are as a lawyer - a brief history of your firm or your legal career and the reasons why you decided to practice law and to help these particular clients. It includes your core values and the guiding principles by which you do business and defines what differentiates you and your firm from others in the market.

Allison C. Shields

The second part of the assessment answers the question, "Where Am I?" It addresses the marketplace and your competition. It also considers your biggest challenges. You should also rate how you're doing in several different areas including:

- Client service
- Administration and management
- Cash flow and finances
- Personnel and staffing and
- Professional development

Vision and goals: where am I going?

Once you have established where you are, it's time to look at where you want to be. What is the future vision for your firm? What kind of practice do you want to create? What do you want to be for your clients? What will your firm look like? What services will you provide?

In addition to creating an overall vision, you'll want to set specific goals in your business plan. These goals must be tied to a time frame. You can create 6 month goals, one year goals and three to five year goals. The pace of the marketplace and technology makes creating goals longer than five years in the future largely an exercise in futility.

When creating your goals, review both your vision and your current assessment. If you scored low in one or more areas on the assessment, you may want to create goals to address those issues.

Strategy and action plans: how will I get there?

Part 3 of the basic business plan is the 'meat' of the plan. You've taken stock of where you are and identified where you want to be in the future. You've set goals that will get you to that vision. Now the gaps between where you are and where you want to be should be apparent. This section of the plan addresses the means by which you will close those gaps to move closer to your vision.

Your strategy lays out the overall plan for how you'll reach your goals. For example, if one of your goals is to increase your client base by 20 percent over the next year, your strategy might include targeting a new industry and/or increasing your online marketing efforts.

Your action plan backs up and supports the strategy. The action plan contains the individual steps that must be taken to further the strategy. An action plan that supports the strategy of targeting a new industry might include action steps such as: identifying industry trade groups, attending trade group meetings, writing an article for the trade publication, or asking for introductions to potential clients within that industry. Each action plan should also include an accountability component.

To develop your action plan, ask questions such as:

- What are you going to do?
- Who will be responsible for doing it?
- How will it be done?
- Who will supervise each action?
- When will the action be completed?
- Who will be responsible for following up?
- What mechanisms will be put in place to determine compliance?

If you're a solo or small firm lawyer, accountability is especially crucial - you may need to go outside of your firm to identify others who can help keep you accountable. Coaches, colleagues, friends, spouses and even clients can help keep you accountable for reaching your goals.

Periodic review: how did I do?

Business plans are only helpful if they're periodically reviewed and, if necessary, revised. The pace of business is increasing. In order to keep up, you've got to ensure that your business plan is current.

The only thing that's certain is that nothing stays the same. Who knows what new technology lies on the horizon? Will clients change the way they view legal services? Review your business plan to ensure that your vision is still valid. Look at the goals you set: how many of those goals did you reach? Have your priorities changed over the last year? Do you need to set new goals?

Even if your goals are still valid, you may need to change your strategy or create new action plans. Personnel and staffing changes may mean shifting responsibilities or new accountability measures. A higher value client base may signal new services that should be explored.

Note: Allison C. Shields, Esq., President of Legal Ease Consulting, Inc. is a former practicing attorney and law firm manager who helps law firms create more productive, profitable and enjoyable law practices by providing practice management and business development coaching and consulting. Contact her at Allison@LegalEaseConsulting.com, visit her website at www.LawyerMeltdown.com or view her blog, www.LegalEaseConsulting.com.

COMMERCIAL LITIGATION

Slamming the Door on Defenses to Disbursement of Counterfeit Funds

By: Leo K. Barnes Jr.

In February 2011 we reviewed *JP Morgan Chase Bank, N.A. v. Pinzler*, 28 Misc.3d 1214(A) pertaining to an attorney's liability for disbursement of counterfeit funds. In *Pinzler*, the defendant attorney was found liable to the plaintiff bank for disbursing funds to a client that was drawn on a counterfeit check. The court concluded that under UCC § 3-414(1) the attorney, as an indoser, was secondarily liable, even though the attorney had no knowledge that the check was counterfeit. The court, however, left open the issue as to whether the law firm could succeed on its counterclaim, notwithstanding the finding that the attorney was responsible for the dishonored deposit. Specifically, the court agreed to hold summary judgment in abeyance pending the attorney's pursuit of his counterclaim premised upon the bank's alleged negligence in advising that the funds had cleared into his account.

Recently, in a very similar fact pattern, the New York Court of Appeals addressed the exact issue left open in *Pinzler*, and expressly rejected the law firm's claims that the bank was negligent in advising that the counterfeit funds had cleared the account. Specifically, in *Greenberg, Trager & Herbst, LLP v. HSBC Bank*, 2011 N.Y. Slip Op. 07144, 2011 WL 4834474 (2011), summary judgment was granted in favor of two defendant banks, HSBC and Citibank N.A., when the Court of Appeals ruled, inter alia, that it was unreasonable as a matter of law for the law firm to rely upon an oral statement by a bank employee that the funds had cleared.

According to the court's decision, the plaintiff law firm, Greenberg, Trager & Herbst, LLP ("GTH"), received an email from Northlink Industrial Limited ("Northlink"), a company based in Hong Kong, who was looking for assistance in the collection of debts owed by its North American customers. In exchange for representation, GTH required a $10,000 retainer. GTH was then informed by Northlink that it had recently received a check from one of its customers for $197,500. GTH was instructed that it could take its retainer from the check and wire the remaining funds ($187,500) back to Northlink.

Leo K. Barnes. Jr.

The check was deposited into the firm's trust account at HSBC Bank and on the next business day HSBC processed the check and provisionally credited the law firm's account for the full amount of the check pursuant to applicable laws. That same day, the check was returned to HSBC, the depository bank, due to a routing number error that needed "repairing." A return for reasons other than a dishonor, such as a routing number error, is referred to as an "administrative return" in the banking industry.

GTH was never notified of the "administrative return" and four business days later, one of the partners at GTH called a representative of HSBC and inquired as to whether the check had "cleared." In response, GTH alleged that the representative told it that "the funds were available for disbursement." Relying on the statement, GTH wired the amount of the check less the $10,000 retainer to Northlink.

Thereafter, HSBC received a dishonor notice from Citibank, the payor bank, because the check was suspected to be counterfeit. HSBC then charged back GTH's account for the amount of the check. Immediately following the chargeback, GTH brought suit against both HSBC and Citibank for negligent misrepresentation and equitable estoppel. Both banks moved for summary judgment dismissing the causes of action asserted against them.

In granting summary judgment in favor of HSBC and Citibank, the court first referenced UCC § 4-302(a) which pertains to Citibank's (the payor bank) duty to a non-customer and stated:

> UCC 4–302(a) provides that a payor bank is liable for an item received by the payor bank if it "does not pay or *return the item* or send notice of dishonor until after its midnight deadline" (emphasis added). In this case, it is uncontroverted that Citibank returned the check…within its midnight deadline.

The Court of Appeals then distinguished a line of cases pertaining to a customer's claims against a payor bank "for that payor's bank failure to use ordinary care with regards to forged checks drawn on the customer's account" under UCC § 4-406(3). The court noted that GTH was not a customer of Citibank, the payor bank, and instead was only the customer of HSBC Bank, the depository bank. Thus, the court found that UCC § 4-406(3) was inapplicable.

Next, the court addressed GTH's claim against HSBC for negligent misrepresentation, premised upon the theory that HSBC was an agent for GTH pursuant to UCC 4-201 and, as agent, HSBC owed GTH a fiduciary duty. Although the Court of Appeals acknowledged the agency relationship, it characterized the same much more narrowly, and confirmed that the purpose of UCC 4-201 is not to impose a fiduciary obligation upon HSBC, but to permit the bank the process the check, all the while maintaining risk of loss on the customer. The Court of Appeals ruled that the relationship between HSBC and GTH was not one in which imposes a fiduciary duty on the depositing bank, and held that:

> GTH's claim is based on the alleged oral statement by the HSBC representative that the check had "cleared" — an ambiguous remark that may have been intended to mean only that the amount of the check was available (as indeed it was) in GTH's account. **Reliance on this statement as assurance that final settlement had occurred was, under the circumstances here, unreasonable as a matter of law** [emphasis added].

GTH's final claim was for equitable estoppel. The Court of Appeals sided with the opinion of the Appellate Division and affirmed dismissal of the estoppel claim stating that:

> we agree, that **"[GTH] was in the best position to guard against the risk of a counterfeit check by knowing its 'client'"** and that until there is a final settlement of the check, the risk of loss lies with the depositor.

The Court of Appeals characterization of a law firm's reliance upon a bank's oral advice that a check had cleared as unreasonable as a matter of law, coupled with the court's confirmation that the law firm maintained the best position to avoid by the fraud by "knowing its client," proved to be a very expensive lesson.

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

RESTAURANT REVIEW

Long Island Tuscan Fare Can Be The Light Of Life

Luce in East Norwich has possibilities

By Dennis R. Chase

Dennis R. Chase

Luce (pronounced LOO-chay) translated means light of life. With a name like this, you come to the restaurant with incredibly high expectations... most will be delivered. This self described beautiful and casual upscale restaurant is not located in New York City. The potential is there. The menu is varied and the food better than most, but the service needs some tweaking.

Please also stock the bar *appropriately* for a self described *upscale* restaurant. Hendrick's Gin (which is described as the Wall Street Journal as the best gin in the world) should now be easily obtainable . . . Bombay Sapphire is merely second best, and yesterday's second best at most. Ciroc Vodka (the only vodka distilled exclusively from Mauzac Blanc and Gaillac Grapes) should be the first choice and not just leading to an extremely disappointing Grey Goose Martini . . . as Sean Diddy Combs says, drinking anything else is like just drinking [insert disparaging noun here]. The wine list is passable (consisting of mostly Italian and American labels), but please, upgrade the basic bar fare before calling yourself upscale. While many upscale restaurants have taken to providing not only a single malt scotch menu, but a menu that provides all of their upscale choices for gin, vodka, microbrews, as well as single malts.

Let's address the balance of the negatives up front; the bread was cold, slightly stale and served with what was supposed to be a seasoned butter. There is, unfortunately, a vast difference between seasoned butter and that which can best be described as butter left a little too long in the fridge and a little too close to leftover (fresh?) herbs. If providing the diner with mediocre bread with funky tasting butter, at least allow the diner the opportunity to finish such mediocre fare. The wait staff quickly removed everyone's bread plate (empty or not) upon serving the first course to the diners.

Interestingly enough, although two diners ordered the same Mozzarella DiBuffalo described as fresh buffalo mozzarella, proscutto di parma, roasted peppers, marinated grape tomatoes, grilled asparagus, roasted artichoke hearts, each received a completely different appetizer. While each seemingly enjoyed their first course, one wonders about an upscale restaurant's presumed consistency.

Insalata Di Rucola, arugula, grilled artichoke hearts, shaved aged parmesan cheese, dressed with white balsamic vinaigrette struck the perfect balance between this bitter green and this sharp, dry, aged Italian cheese. All of the risotto and paste can be ordered as an appetizer, and highly recommended is the Risotto ai Funghi with wild mushroom which is simultaneously creamy and al dente served with real wild mushrooms and not the white ubiquitous white button mushrooms crowding most menus and Penne Al Capesante, which are scallops served piping hot with slightly crunchy and fresh asparagus, shitake mushrooms, chardonnay, and cream.

The pesce (fish) selections all appeared interesting; however, the proving ground for the preparation of fish begins and ends with the halibut. The Luccio Venetiana can best be described as halibut served with a potato wrapping, carmelized onions, balsamic reduction, and crisp-tender stems of broccoletti. This dish is all of the following: white, light flaky luminous pan-seared fish brilliantly prepared and perfectly garnished. Also delightful is the Salmone Provenzale, a pan seared salmon, plump juicy sea scallops, shitake mushrooms, sautéed leaf spinach, lightly topped with white wine and lemon sauce.

But carnivores should not despair . . . there's plenty from which to choose. Whether it's the Costoletta Di Maiale Allan Napolitana (the Flintstone thick double cut pork chop, roasted butternut squash, french beans, and carmelized cippolini onions); the Arrosto Di Bue (well marbled, fully flavored boneless rib eye steak, authentic (as opposed to the black market bootleg stuff to which we have become accustomed) creamed spinach, roasted fingerling potatoes, and crispy onions; or the Carre' D'Agnello, an extremely tender baby rack of lamb well adorned with sautéed wild mushrooms, mashed potatoes, and an herb demi-glace, the carnivores will be well satisfied. Any of these dishes easily rival that served down the street at the well established and popular steakhouse, Rothmann's.

Luce
1053 Oyster Bay Road(Route 106) East Norwich
(516) 624-8330
www.luce-ristorante.com

The only dish that makes the dessert menu special is Luce's panna cotta. Panna cotta (from Italian *cooked cream*) is an Italian dessert made by simmering together cream, milk and sugar, mixing this with gelatin, and letting it cool until set. While the dish originates from the Northern Italian region of Piemonte, it is consumed all over Italy, where it is served with wild berries, caramel, chocolate sauce, or fruit coulis. It is not known exactly how or when this dessert came to be, but some theories suggest that cream, for which mountainous Northern Italy is famous, was historically eaten plain or sweetened with fruit or hazelnuts. At Luce, the panna cotta is served with a seasonal sauce that is always sure to please.

This is a Long Island restaurant, with New York City prices, interesting food (the food is never boring, that is for sure), with *just fair* service. Luce could be magnificent... it just needs to try a little harder.

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

PRO BONO

Partners in Pro Bono

By Maria Dosso

Necessity is often the mother of invention, and with a growing demand for pro bono services, new innovations and collaborations are in the works to address the problem of serving people in need who cannot afford an attorney. Specifically, without funded services on Long Island for free representation in divorces, many people are caught in marriages that cannot be dissolved due to a lack of income or resources.

Nassau Suffolk Law Services' Pro Bono Project has been working closely with the Suffolk County Bar Association and the Suffolk Bar's Pro Bono Foundation arm for many years, joining resources and common efforts towards the goal of providing free legal assistance to Suffolk County residents who are dealing with economic hardship. Law Services is a non profit civil legal services agency funded primarily by the Legal Services Corporation to provide free legal assistance to Long Islanders, primarily in the areas of benefits advocacy, homelessness prevention, access to health care, and services to special populations such as domestic violence victims, disabled, and adult home residents. Services are necessarily prioritized based on financial eligibility and funding is woefully inadequate in these areas. Furthermore, there is no funding for the general provision of matrimonial or bankruptcy representation. These are also two of the most commonly requested services in our community.

At a recent meeting of the Suffolk County Bar Association's Pro Bono Foundation, Maria Dosso, Director of Communications and Volunteer Services for Nassau Suffolk Law Services, brought the dilemma to the Foundation's attention: How to serve the hundreds of people on the pro bono waiting list who cannot afford representation in a divorce. Donna England, a member of the foundation immediately stepped up to the plate. With a no-nonsense commitment to providing access to legal services in a way that would build and improve on the current Pro Bono Project model, Donna England, joined by her friend and colleague, Cathy Kash, have embarked on a new effort. They rolled up their sleeves and went to work.

The new and improved pro bono matrimonial effort involves careful screening of applicants for free divorce representation with an eye towards further prioritizing cases. Utilizing their years of expertise and experience, England and Kash are meeting applicants for free legal services at the offices of Nassau Suffolk Law Services in Islandia to evaluate their financial situation and the complexity of the matrimonial case. Based on their evaluations, the attorneys are either a) handling the cases themselves, b) referring cases to pro bono attorneys, c) referring to the modest means panel (the Bar's panel of attorneys who will take cases on a reduced fee basis) or d) referral to the Bar Referral service in the event that the applicant has resources or there is a potential for counsel fees from the opposing party. The goal is to deal with the cases in the most expeditious way, hopefully avoiding prolonged proceedings. This is accomplished with the attorneys' initial and careful screening of the cases along with the education of applicants on the merits of their case and what they can realistically expect.

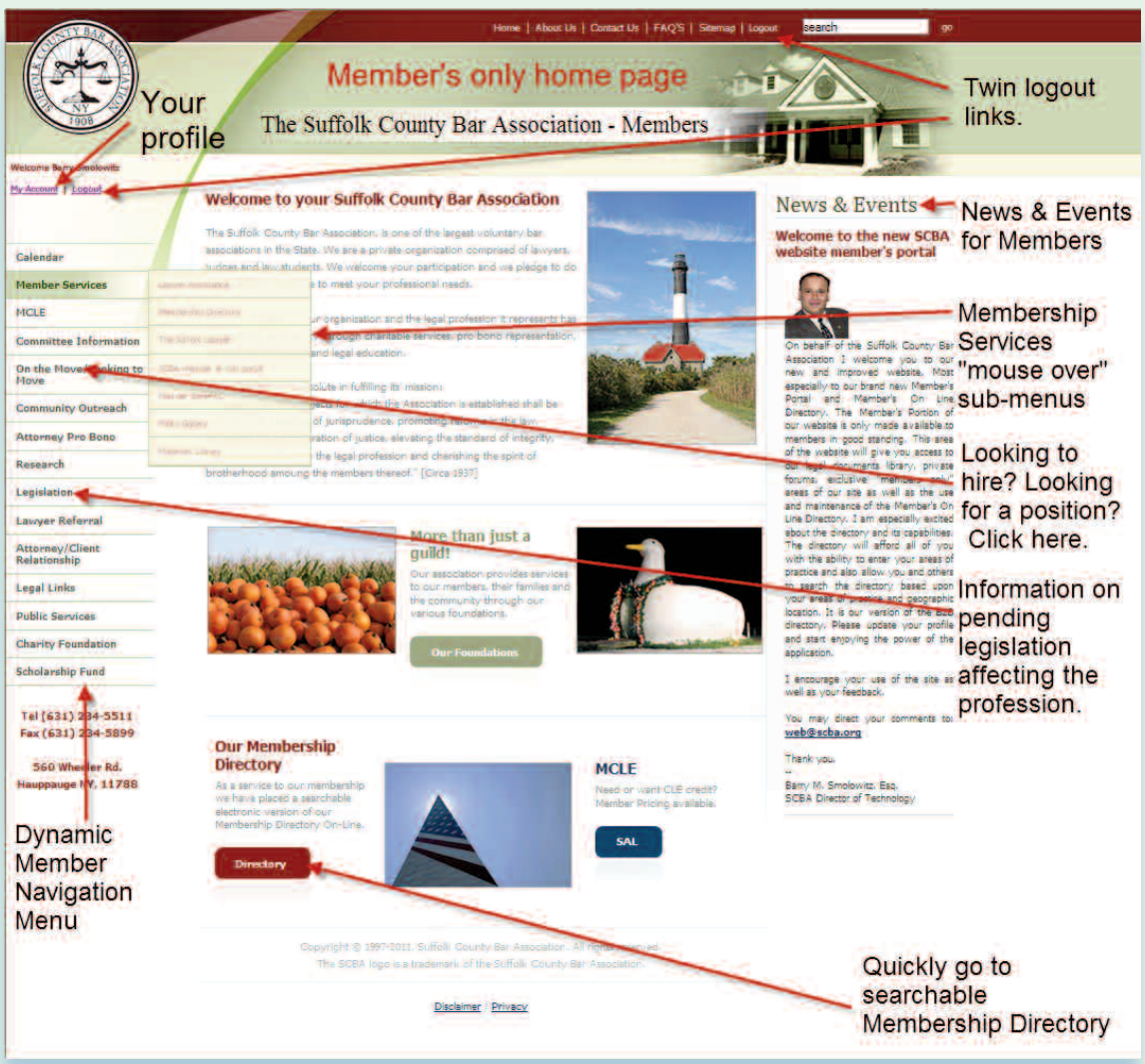
The project is still in its early stages, but the results are promising. Law Services is truly grateful for the interest and commitment shown by our partners at the Suffolk Bar Association as they work together to fulfill the pro bono mission.

Attorneys who are interested in serving on the matrimonial or bankruptcy pro bono panels, or who would like more information on the modest means fee panel can call Maria Dosso at 232-2400 x 3369 for more information. Attorneys who are interested but do not have experience in these areas will be provided with a mentor.

Note: Maria Dosso, Esq. is the Director of Communications and Volunteer Services for Nassau Suffolk Law Services.

SCBA's New Website

www.SCBA.org



FUTURE LAWYERS FORUM

No Decision Yet on Indian Point

By Sarah D. Ragusa

Sarah D. Ragusa

Built in 1962[1] and put into commercial operation in 1973,[2] Indian Point Energy Center, a facility comprised of two operating nuclear reactors and located just 24 miles north of New York City in Buchanan, New York,[3] is now the oldest working nuclear power plant in the country.[4] Since its inception, this nuclear power plant has encountered a litany of accidents which have not only resulted in numerous lawsuits,[5] but have also landed the facility on the federal list of the nation's worst nuclear power plants.[6] Despite its infamy, public dependency on the plant is undeniable; presently, this facility provides approximately 25 percent of the energy powering the "Capital of the World," New York City.

With the operating licenses for the plant's reactors due to soon expire in 2013 and 2015, politicians and environmental groups have raced to conduct studies and present their positions in hopes of either shutting the plant down, or renewing its licenses. Following the nuclear tragedy brought on by an earthquake and tsunami in Fukushima, Japan this past March, New Yorkers turned their attention to the possibilities of a similar tragedy in their own backyards. U.S. studies designating Indian Point 3 as the nuclear power site with the highest risk of an earthquake causing core damage sparked increased governmental involvement to review the safety of the plant.[7]

Amongst the first to take action were Governor Andrew Cuomo, who pushed for the permanent closing of the Indian Point facility even during his tenure as Attorney General for New York State; and current attorney general Eric T. Schneiderman,[8] who sued the Nuclear Regulatory Commission for approving a plan which would allow the long-term storage of nuclear waste at Indian Point and other nuclear power facilities across the nation for at least 60 years after their closure, without completing the federally required review of the public health, safety, and environmental hazards such storage would pose.[9]

As of this moment, other than the publication of conflicting reports from sources such as the Bloomberg administration (pro-licensing renewal),[10] and The Natural Resources Defense Council and Riverkeeper (anti-licensing renewal),[11] and court petitions in support of and in opposition to the plant's continuance of operation, no substantial developments in the determination of the plant's license renewals have taken place.

All there is left to do now is wait and see, but we can only hope that when the decision is made, it is kept in mind that "[t]o make no mistakes is not in the power of man; but from their errors and mistakes the wise and good learn wisdom for the future."[12]

Note: Sarah Ragusa is a fourth year part time evening student at Touro Law Center with a Bachelors Degree in elementary education from St. John's University. Mrs. Ragusa's career interests lie in the fields of education and employment law. She is active in environmental law and is the secretary of Touro's Environmental Law Society.

1 John Farley, *There is Life – and Energy – After Indian Point, Report Says*, Thirteen: Metro Focus, Oct. 18, 2011, http://www.thirteen.org/metrofocus/news/2011/10/there-is-life-and-energy-after-indian-point-report-says/.

2 Entergy Nuclear, Indian Point Energy Center, http://www.entergynuclear.com/plant_information/indian_point.aspx

3 *Id*. at Note 1.

4 *Id.*

5 See, *Brodsky v. U.S. Nuclear Regulatory Comm'n*, 578 F.3d 175 (2d Cir. 2009); *Perrino v. Entergy Nuclear Indian Point 3, LLC*, 48 A.D.3d 229, 850 N.Y.S.2d 428 (2008); *Entergy Nuclear Indian Point 2, LLC v. New York State Dept. of Envtl. Conservation*, 23 A.D.3d 811, 805 N.Y.S.2d 429 (2005); *Brodsky v. New York State Dept. of Envtl. Conservation,* 1 Misc. 3d 690, 766 N.Y.S.2d 277 (Sup. Ct. 2003); *Cont'l Cas. Co. v. Employers Ins. Co. of Wausau,* 22 Misc. 3d 729, 865 N.Y.S.2d 855 (Sup. Ct. 2008) *rev'd,* 85 A.D.3d 403, 923 N.Y.S.2d 538 (2011); *Consol. Edison Co. of New York, Inc. v. Westinghouse Elec. Corp.*, 567 F. Supp. 358 (S.D.N.Y. 1983); *Rockland County v. U.S. Nuclear Regulatory Comm'n,* 709 F.2d 766 (2d Cir. 1983); *Consol. Edison Co. of New York, Inc. v. Hoffman,* 43 N.Y.2d 598, 374 N.E.2d 105 (1978); *People v. Consol. Edison Co. of New York*, 71 Misc. 2d 587, 336 N.Y.S.2d 708 (Sup. Ct. 1972) *rev'd sub nom. People v. Consol. Edison Co. of New York, Inc.,* 41 A.D.2d 809, 342 N.Y.S.2d 313 (1973) *modified,* 34 N.Y.2d 646, 311 N.E.2d 511 (1974).

6 *Indian Point Nuclear Power Plant (NY),* July 14, 2011, http://topics.nytimes.com/top/ reference/timestopics/subjects/i/indian_point_nuclear_power_plant_ny/index.html.

7 Bill Dedman, *Gov. Cuomo orders review of N.Y. reactor after report on quake data*, March 17, 2011, http://openchannel.msnbc.msn.com/_news/2011/03/17/6285997-gov-cuomo-orders-review-of-ny-reactor-after-report-on-quake-data.

8 *Id.*

9 LoHud.com, *N.Y. Sues Fed Over Nuke-Waste Storage*, February 16, 2011, http://www.clearwater.org/ea/power-plants-energy/indian-point-campaign/.

10 Charles River Associates for NYC Dept. of Environmental Protection, *Indian Point Retirement Economic Analysis*, July 5, 2011, http://media40.wnyc.net/media/resources/2011/Jul/07/IPEC_Report_circ_draft_7-5-11.pdf.

11 Synapse Energy Economics, Inc., *Indian Point Energy Center Nuclear Plant Retirement Analysis: Replacement Options, Reliability Issues and Economic Effects*, Oct. 17, 2011, *available at* http://www.nrdc.org/nuclear/indianpoint/files/Synapse_Report_Indian_Point-2011-10-14_final.pdf.

12 Plutarch.

New Discount Dental Membership Plan for you and your employees! EDP Dental Plan

In today's economic climate, dental insurance tops the list of benefits employers are looking to eliminate. In fact, it's rare to find dental insurance in the personal healthcare plans. What is alarming is that according to statistics, 1 in 4 Americans under the age of 65 lacks dental insurance.

EDP Dental Plan developed its discount dental membership platform over 10 years ago in order to bridge the gap between consumers and dentists by providing a cost effective alternative that gives its members instant relief from the burden of high cost dental care. Members can select from over 2000 dentists on Long Island and New York and can save as much as 70 percent off of a variety of dental procedures. Also, since EDP's plans are not insurance, there are no waiting periods or age limitations. Once you enroll, you can begin saving money immediately.

In order to better serve potential and existing clients, EDP developed a customized "dentist locator" database on its website in order to allow consumers instant access to the dentists within the EDP provider network. Total client satisfaction has been a key element to EDP's success thanks to its friendly and professional Client Services Department located at the company's call-center operations center in Ronkonkoma, New York.

As a member of The Suffolk County Bar Association, you will receive special discount pricing of $89/year for an individual, $169/year for couples, and $189/year for families.

The enrollment process is simple so if you are interested in learning more about our plans, please contact Kurt Meyer, Director of Business Development, at 631-272-5230, ext. 704 or visit us on the web at www.edp-dental.com.

CONSUMER BANKRUPTCY

The Business Debt Exception to the Means Test

By Craig D. Robins

Craig D. Robins

The means test that turned six-years old last month, was intended by Congress to create an objective standard for permitting only those consumers who are not "abusing" the privileges of bankruptcy to get Chapter 7 relief.

In general terms, if a consumer debtor has an income that is relatively high in relation to his or her expenses, the consumer will not pass the means test and will not be eligible to file Chapter 7.

The business debt exception

The means test only applies to individuals whose debts are "primarily" "consumer debts," as opposed to business debts, as set forth in Bankruptcy Code §707(b). A debtor can check a box on the first page of the means test to declare that his or her debts are primarily non-consumer debts, and then avoid the rest of the means test, also known as Form B22A.

Congress could have told us what exactly "primarily" means, but they didn't bother to, so we have to analyze this word. *Webster's* dictionary defines "primarily" as "for the most part." Most courts have focused on this definition to mean more than half. Thus, if more than 50 percent of the debtor's debts are non-consumer debts, the debtor is automatically eligible for filing a Chapter 7 case without having to bother with the means test. There is no presumption of abuse for such cases.

Consumer debts

So what exactly is a consumer debt? The Bankruptcy Code defines "consumer debt" as "debt incurred by an individual primarily for a personal, family, or household purpose."

In analyzing whether a debt is a consumer debt or not, bankruptcy courts have developed a "profit motive" test: if the debt was incurred with an eye towards making a profit, then the debt should be classified as a business debt. Thus, the mortgage on an individual's home would clearly be a consumer debt, and the mortgage on a vacation home would also be a consumer debt. However, if that vacation home was also purchased as an investment and rented out, then the mortgage would qualify as a business debt.

One bankruptcy court permitted a debtor to deem one of the three mortgages on his home to be a non-consumer debt because the proceeds were used to fund a business venture.

Most credit card debts are obviously consumer debts. However, if an individual used a credit card for business purposes, then it could be reasonably argued that the resulting liability is a business debt.

Other examples of business debts include personal guaranties on business obligations, investment losses, and motor vehicle accident liabilities. Domestic support obligations such as child support and maintenance are generally considered consumer debts. There are some varieties of debt that courts have held to be neither a business debt nor a consumer debt.

Although some courts have held that student loans are not consumer debts, the Second Circuit has held that they are.

Any liability as a responsible person for taxes on a business is clearly business debt. However, there is no clear-cut answer in this jurisdiction as to whether personal income tax obligations are consumer debts or not. Courts outside of New York and the Second Circuit have reached different conclusions on income tax debt.

In one case in the Sixth Circuit, the court rejected the application of the profit motive test concluding that income taxes can be distinguished from consumer debts for several reasons. Tax debts are not incurred like consumer debts as they are not incurred voluntarily. Tax debt is assessed for the benefit of the general public whereas consumer debt is incurred for personal and household purposes. Finally, tax debt arises from income and earning money whereas consumer debt results from consumption and spending money. *In re Westberry*, 215 F.3d 589 (6th Cir. 2000).

Most of the debtors that I have represented who were able to make a means test business debt declaration were victims of a failed business who owed substantial sums, either directly, or through personal guaranties, to various trade creditors, taxing authorities or business partners.

Most individuals with a failed mom and pop business will not be able to take this shortcut as their mortgage debt alone will likely exceed their business debt.

Business debt exception has limitations

Just because a debtor can by-pass the means test does not mean that a debtor can use it as a loophole to escape other good faith requirements.

In a Michigan decision from earlier this year, the bankruptcy court addressed a situation involving husband and wife debtors whose debts were genuinely primarily business debts. They had over six million dollars of unsecured debts from failed real estate investments. However, both debtors were doctors whose budget showed that they were living on $42,000 of monthly expenses – what the court described as a very lavish and extravagant lifestyle. They each drove a Mercedes Benz and had a BMW in the garage.

The court commented that even though the debtors did not fail the means test, they nevertheless lacked good faith because they could have easily adjusted their budget while still maintaining a nice lifestyle, and paid their creditors a significant dividend through a Chapter 11 plan. *In re Rahim and Abdulhussain*, No.l 10-57557 (Bankr.E.D.Mich 12/16/10).

Practical tips

If the characterization of a particular debt that is not clear-cut in this jurisdiction, such as tax debt, enables your client to pass the means test, how should you tackle the situation?

That really depends on how aggressive you want to be. My recommendation is to take an aggressive position as long as it is reasonable and you have a good basis for taking your position. You should be prepared for presenting your arguments to the U.S. Trustee as they have the initial burden of proof to support a dismissal motion under § 707(b).

You would also want to review the matter with your client before filing the petition and prepare a letter that the client signs, acknowledging the aggressive position and the potential risk of defending a dreaded §707(b) motion that the U.S. Trustee brings. Defending §707(b) motions will certainly be a topic for a future column.

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 20 years. He has offices in Coram, Mastic, West Babylon, Patchogue, Commack, Woodbury and Valley Stream. (516) 496-0800. He can be reached at CraigR@CraigRobinsLaw.com. *Visit his Bankruptcy Website: www.Bankruptcy-CanHelp.com and his Bankruptcy Blog: www.LongIslandBankruptcyBlog.com.*

ELDER LAW

New Medicaid Regulations Expand Estate Recovery

By Lawrence Eric Davidow


Lawrence Eric Davidow

I reported earlier this year that New York passed a new Medicaid law expanding estate recovery. I am now supplementing my report with news of the new regulation implementing the new law, effective September 8, 2011. The new regulation amends 18 NYCRR Section 360-7.11 and now permits "estate" recovery against the following new definition of "estate:"

"Estate means: (i) all of a decedent's real and personal property and other assets passing under the terms of a valid will or by intestacy; and (ii) any other real and personal property and other assets in which the decedent had any legal title or interest at the time of death, including such assets conveyed to a survivor, heir, or assign of the decedent through joint tenancy, tenancy in common, survivorship, life estate, living trust or other arrangement, to the extent of the decedent's interest in the property immediately prior to death."[1]

This new law is so significant because, in the past, estate recovery was disallowed against assets that avoided probate. Today, the issue of probate is irrelevant and the new focus is on whether the decedent has any *legal title or interest in property immediately prior to death.* This is further defined in the regulations to include (i) the person's proportionate share of real property held in joint tenancy, tenancy in common or similar arrangement[2]; (ii) a retained life estate, based on the actuarial life expectancy of the life tenant[3]; (iii) funds in a jointly owned bank account, except to the extent the surviving joint owner documents his or her interest in the account through verifiable deposits and withdrawals[4]; (iv) the person's per capita share of jointly owned securities[5]; (v) the principal and accumulated interest of a revocable trust[6]; (vi) the principal and accumulated interest of an irrevocable trust funded in whole or in part with the assets of the person or the person's spouse to the extent that the person was entitled to the distribution of such principal and interest pursuant to the terms of the trust, and if the person was entitled to receive trust income, any income that, as of the date of the person's death, was required to be but had not been distributed[7]; and lastly, (vii) remaining payments from an annuity purchased by or with the assets of the person or the person's spouse.[8]

This article is not exhaustive of the issue of the new regulations, but rather focuses in on a few practical points to help us in the future. Frankly, there is nothing too surprising or disturbing about this new law and most of it is self explanatory. Many would agree that Medicaid's right to recovery should not be defeated based upon whether or not an asset goes through probate. This is a welfare system after all, and if the Medicaid applicant has assets upon their death, they should certainly reimburse Medicaid for care provided, to the extent of their interest therein. In practice, however, a Medicaid recipient would have very limited assets upon death, so the reach of this new regulation, as it pertains to the recipient, should be limited, except as to the following issues that this paper will address in no particular order.

Can Medicaid Recover Against IRAS and Other Retirement Plans?

The answer to this is that we do not yet know the full ability of Medicaid to recover against IRAs and other retirement plans. At the time of application, as long as these plans are in pay status, the principal amount in such plans is not considered an available asset for Medicaid eligibility. The flip side of this is that the plans must be in pay status and the minimum distributions (according to Medicaid tables, not IRS tables) are considered countable income for Medicaid purposes. Nevertheless, since these plans have designated beneficiaries, they avoided probate and escaped recovery in the past. Now with expanded estate recovery, these plans MAY be subject to estate recovery, unless some other law preempts this result. While I do not hold myself out as an expert in the ERISA laws, I have heard that the federal ERISA laws may stand in the way of New York Medicaid recovering from "qualified plans" such as 401ks, 403Bs and the like. However, IRAs, are not subject to ERISA and instead have enjoyed state creditor protection. Therefore, until further clarification, IRAs may be subject to estate recovery.

Can Medicaid Really Recover Against all Life Estates?

It appears that Medicaid is going to at least try to recover against a life estate when created by the Medicaid recipient as the regulations speak in terms of a "retained life estate" rather than one created by a third party. The regulations define a retained life estate as:

(i) a life estate created by a person or the person's spouse in property in which the person or spouse held any interest at the time the life estate was created; or (ii) a life estate created for the benefit of a person or the person's spouse in property in which the person or spouse held any interest within five years prior to the creation of the life estate.[9]

The first situation is the most common; Mr. A transfers his home to his kids and retains a life estate. The second situation is actually the same thing but accomplished through a slight of hand, although Medicaid sees right through it. In this latter case, Mr. A transfers his home outright to his children and then the children create the life estate for Mr. A within five years of the transfer. This prevents what is called a "step transaction;" you cannot do in two steps what you cannot do in one. However, life estates legitimately created by third parties are not subject to estate recovery, clearing up this open issue stemming from the new law as first enacted.

Another issue addressed in the regulations was the question of whether a life estate has any value at the time of death. The federal law allowing estate recovery stated that Medicaid could recover from the value of a life estate "At the Time of Death." This "at the time of death" language was also found in the New York state legislation. One might ask, "What is the value of a life estate at the time of death?" Perhaps at the time of death the value is zero. In spite of this incongruity, the regulation shifts gears and says that the life estate shall be valued at the moment *immediately prior to death*. While this makes more sense, one principle of Medicaid law is that the state law cannot be more restrictive than the federal law. This change potentially is more restrictive and therefore may be one element in upcoming litigation against the new regulation. Note that the New York chapter of the National Academy of Elder Law Attorneys (NAELA) has hired counsel to challenge aspects of the new law and its regulations.

Another element of the new law and its regulations to be litigated is the potentially unconstitutional taking of property. The issue is that the property remaindermen have a vested legal interest in property which this new legislation alters retroactively. Key to this issue is that life estate interests created prior to the September 8, 2011 effective date are not grandfathered, perhaps leading to a governmental taking without notice and due process.

The new regulations also contained a surprise by changing how Medicaid will forthwith value a life estate. Prior to the new law, Medicaid provided a fixed table of values, contained in 96 ADM [8]. The table simply gave a percentage next to each age. For example, the value of a life estate in the old tables for a 75 year old was about 50 percent. The new regulations dispose of this table for *all* life estate valuation purposes, not just recovery. This is good news for recovery purposes at this time in history, but bad news for transfer penalty purposes. Why?

The reason is that henceforth, life estates will be valued by using the Section 7520 tables of the IRS. The tables link an interest rate to a person's life expectancy to arrive at a value. Two variables are in play now; of course, the older the person, the less the value of the life estate. In addition, the lower the monthly interest rate, the lower the value of the life estate. The interest rate is published monthly and equals 120 percent of the Federal Midterm Rate, compounded annually and rounded down to the nearest 2/10 of one percent. For example, the interest rate for October 2011 was 1.4 percent. Using this interest rate for a 75 year old translates into a life estate value of 13.961 percent; for an 80 year old of 10.792 percent and for an 85 year old of 8.105 percent. Since the life estate is valued so low, this means that the remainder interest is valued high. As such, transfers of remainder interests will be bigger and recoveries will be smaller. On the other hand, if interest rates soar, we may have big transfers now and then big recoveries later. It will all depend on interest rates, which are currently at historic lows.

Can Medicaid Recover Against Trusts?

The answer is clearly that they can recover against all assets in revocable trusts[10], but the regulation stopped well short of allowing full recovery from irrevocable trusts. The New York legislation stated that Medicaid could recover from any trust in which the Medicaid recipient retained any legal title or interest, to the extent of that interest at the time of death. We did not know at the time of the legislation how much the regulations would allow Medicaid to recover from irrevocable trusts if the Medicaid applicant retained an interest in an irrevocable trust because we had no interpretation of the word "interest." I am happy to report that the regulations took a limited and somewhat reasonable approach. The new regulations state that Medicaid can recover from:

> "the principal and accumulated interest of an irrevocable trust funded in whole or in part with the assets of the person or the person's spouse to the extent that the person was entitled to the distribution of such principal and interest pursuant to the terms of the trust, and if the person was entitled to receive trust income, any income that, as of the date of the person's death, was required to be but had not been distributed. "[11]

A properly worded irrevocable trust created for the purpose of protecting assets would certainly never allow the grantor access to the principal. However, some trusts are created to be "income only" trusts, that is, trusts which instruct or allow income to be paid to or for the benefit of the grantor. If the grantor is on Medicaid, all such income will be budgeted to be available for the cost of long term care, with Medicaid perhaps paying for costs above such income. However, if income is permitted to be paid to or for the benefit of grantor but is held instead and accumulated within the trust, the new regulation provides that such accumulated income is subject to recovery. This seems fair to me. This is as far as the regulation seems to go on its face. The fact that income may be retained, or that the grantor has retained certain rights and privileges, does not call for recovery against the assets subject to such rights and privileges. This is good news!

Nevertheless, one major open question remains regarding irrevocable trusts which hold real estate. Some commentators are arguing that if the trust holds real estate and further provides that the grantor retains the right to the "use and occupancy" of that real estate, then the grantor will have inadvertently retained a "life estate" which in turn will be subject to estate recovery. Let's explore this concept.

It is very common to have language in irrevocable trusts which retain for the grantor the right to occupy the home held in trust. This by itself is of little concern because the case law is filled with decisions that hold that the mere right to occupancy of real property does not rise to the level of a "life estate." If this is correct, then why don't we just limit the retained rights to occupancy, rather than "use and occupancy." We could but this could lead to another result unacceptable to many of the clients we counsel. Unfortunately, the term "use" connotes the right to the income from the property, even if the property produces no income. At first blush most of us would say, "Who cares?" "We don't need the right to this fictitious income." However, the property tax exemption laws state that in order to retain the right to the Veterans, Star, Enhanced Star and Senior property tax exemptions, the grantor of the trust must have retained a life estate in the property. The property tax laws and the decisions thereon clearly explain that the right to the income from property is an essential element of a life estate. The bottom line is that in order to retain the property tax exemptions, we need to retain the "use" or "income" from the property together with the right to occupy it. Consequently, this trust language may be creating a beneficial or equitable "life estate" subject to recovery. Note that this is one possible interpretation, and other commentators disagree. For example, these other commentators argue that one element of a legal life estate is the right for the life tenant to partition the property and be paid their proportional share in cash, or at least subject to a life income right in the proceeds. However, if the trust sells the property, the trust gets the money. Distinctions like these are coupled with the fact that the legislature and the drafters of the regulations did not cover this possibility in the case of a home held in trust. Stay tuned as this issue progresses.

My experience so far in counseling the many older clients we see in our office is that our clients are not surprised or bothered by this law or either interpretation as to whether a life estate exists or not in a trust, but for the fact that there is an element of unfairness if the law is enforced retroactively. The reason for this is that most clients are not concerned with paying for their long term care. They are willing to contribute their hard earned money to achieve the best health care our country can provide. What they are unwilling to do is go broke in the process. If they can still save at least 80 percent of their home for their children, their estate planning and asset protection goals will have been met. In other words, many clients see this new law as fair, at least prospectively. As such, most are willing to give up a small amount of estate recovery to keep their full property tax exemptions.

Note: Lawrence Eric Davidow is the managing partner of the Elder Law, Special Needs and Estate Planning firm of Davidow, Davidow, Siegel and Stern located in Islandia, Garden City and Mattituck. Mr. Davidow is an accomplished speaker and published author on the subjects of elder law and estate planning. In addition to his full time legal practice, he is an active member of the Legal Advisory Board for the Alzheimer's Association, a member of the Foundation Board of Suffolk AHRC and a past Vice President of the New York State Bar Elder Law Section as well as a Past Editor of its newsletter.

"PTIN" Revisited (Continued from Page 10)

new. You'll need to click on the 'edit' button for each license and enter the information for each license[6]. If your attorney or CPA license expires in 2011 and you are renewing your PTIN before the license expiration date, it is unknown whether that will delay your renewal.

- **"Pay Your Fee"** - Another new question that you will answer is whether you are a "Form 1040 Series Preparer" for compensation. If you have nothing to do with individual tax returns, you'll answer 'no;' however, if you have a questions about what the 1040 series is, dig deeper[7].

You'll see on the link that the IRS estimates that it will take you only about 15 minutes to complete the renewal. This is the same IRS that tells you that the average time to complete your 2010 Form 1040 should have been 4 hours plus 2 hours for tax planning. Renewal is not difficult but leave more than 15 minutes for the process, especially when you get to what essentially says that 'these questions aren't applicable to you but due to system limitations, you need to answer them anyway.' That having been said, the site, and renewal, is very easy to navigate.

Paper PTIN Filing

If you applied for your PTIN on paper Form W-12 last year, this is what the IRS says[8] about your current renewal.

"Preparers who used paper applications to receive their 2011 PTINs will receive an activation code in the mail from the IRS which they can use to create an online account and convert to an electronic renewal for 2012. Individuals can also renew using a paper Form W-12, IRS Paid Preparer Tax Identification Number Application, but renewing electronically avoids a four to six week wait for processing the renewal request."

By this time, you already should have received your 'activation code' correspondence.

Supervised Preparers

This designation has been welcome relief for the attorney/CPA community who employ unlicensed professionals to prepare tax returns. Qualification as a supervised preparer exempts the individual from having to take an IRS test and from taking continuing education required by the IRS for tax preparers not already in an exempt category (i.e., attorneys and CPAs).

The IRS has defined[9] 'Supervised Preparers' as individuals who do not sign, and are not required to sign, tax returns as a paid return preparer but are employed by attorney or CPA firms OR employed by other recognized firms that are at least 80 percent owned by attorneys, CPAs, or enrolled agents

AND

Who are supervised by an attorney or CPA (and certain other designated tax preparers) who signs the tax returns prepared by the supervised preparer as the paid tax return preparer.

When applying for or renewing a PTIN, supervised preparers must provide the PTIN of their supervisor. The supervisor's PTIN must be a valid and active PTIN. Question: Does the supervisor have to have renewed his/her PTIN for 2012 before the supervised preparer can renew for 2012?

The New York State Society of CPAs (and Big 4 accounting firms) is working to allow non-CPAs to own a piece of the CPA firm's 'rainbow'. This is not an investment opportunity for pure investors. If the NYSSCPA et al are successful, there are consequences. On the one hand, it's desirable because so many key people working for accounting firms hold designations other than CPA. They are valuation specialists, forensic accountants, attorneys, retirement planners, financial planners, et al. On the other hand, since, to be a supervised preparer, the individual tax preparer must be employed by a firm that is at least 80 percent owned by attorneys, CPAs, or enrolled agents, the employer will need to monitor the firm's percentage ownership on an ongoing basis and, perhaps, need to inform its supervised preparers when the percentage falls below 80 percent because the supervised preparers then will, in order to retain their own PTIN, need to sit for the IRS competency examination from which they have been exempt. It can get messy.

Further, in a plain vanilla calculation, determining 80 percent is simple; however, 80 percent has not been defined. Therefore, it could be interpreted as 80 percent of capital; 80 percent of profits; or both.

It appears that the 80 percent test is an annual one. Firms that hover around 80 percent would need to be alert to the calculation each year.

Lest the attorney (you) think that this potential ownership change is limited to CPAs, consider a recent article in the *New York Times*, *Selling Pieces of Law Firms to Investors*[10].

Still have questions?

See if Frequently Asked Questions[11] will help you.

What this article didn't cover

- **Fingerprinting** - For the time being attorneys, CPAs and supervised preparers are exempt[12].
- **Competency Testing** - Attorneys and CPAs are exempt and, for the time being, so are supervised preparers.
- **Provisional PTINs** - These are issued by the IRS to individuals who are not attorneys, CPAs, or enrolled professionals. They are expected to pass the competency examination by December 31, 2013.

Bonus information

- You cannot call yourself a "Registered Tax Return Preparer" unless you take the IRS competency examination and fulfill the IRS continuing education requirement. "Registered Tax Return Preparer" is a term of art[13]. No matter how many years you went to school to become an attorney or CPA, you'll never be able to put "Registered Tax Return Preparer" on your letterhead (unless you take and pass the IRS competency test).
- More important than the above is that much of the information that you submitted to obtain or renew your PTIN is available[14] under the Freedom of Information Act (and has been disclosed for $35 on a CD pursuant to FOIA requests). This includes your mailing address, which may be your home address, email address, telephone number, et al. You can change the information that you don't want to be available (such as home address to your business address). The American Institute of CPAs is in discussions with the IRS about this topic. Somewhat related to the above, as announced at the beginning of the IRS PTIN drive in 2010, the IRS is constructing a database of tax preparers that is expected to be available in 2013. It is expected that the database will contain the names, addresses, professional qualifications and publicly disclosed professional disciplinary actions of tax preparers.

Watch this space

If there is salient news to report for 2013, we'll be back in the November 2012 issue of *The Suffolk Lawyer*.

THIS WRITTEN CORRESPONDENCE (INCLUDING ANY ATTACHMENTS) DOES NOT CONSTITUTE AN OPINION AND IS NOT INTENDED OR WRITTEN TO BE USED, AND IT CANNOT BE USED, BY ANY TAXPAYER FOR THE PURPOSE OF AVOIDING PENALTIES THAT MAY BE IMPOSED ON THE TAXPAYER.

Note: Alan E. Weiner, CPA, JD, LL.M. is Partner Emeritus of the CPA firm of Holtz Rubenstein Reminick LLP, with offices in New York City and Melville, Long Island. He founded the firm's tax department in 1975 and headed it through 2006. He is active on the tax committees of the Bar Associations of Suffolk County and Nassau County, and the New York State Society of CPAs ("NYSSCPA"), for which he served as the 1999-2000 President and also as a Chairman of its Tax Division Executive Committee. Alan served on the Executive Committee of DFK International, a worldwide association of independent accounting firms and formerly was the chairman of its international tax committee. He is a past chairman of the Partnership/LLC Tax Committee of the NYSSCPA and he was a member of the 1992 NYSSCPA Limited Liability Company Task Force that worked with government officials towards enacting the New York State LLC law (which was accomplished in 1994). He is the author of "All About Limited Liability Companies and Partnerships" and DFK International's "Worldwide Tax Overview."

1. When you obtained your PTIN last year, you were told that you would need to renew on the anniversary date (1 year from when the IRS issued your PTIN to you). Like your spousal anniversary date, it was NOT a date to be forgotten. However, in June 2011, the IRS announced that all PTINs would be good until December 31st of each year.

2. *IRS Begins PTIN Renewals for 2012 Filing Season*, IR-2011-105, October 20, 2011, http://www.irs.gov/newsroom/article/0,,id=248572,00.html

3. *Preparer Tax Id Number ("PTIN")-Another Number That You May Need* by Alan E. Weiner, *The Suffolk Lawyer,* November/December 2010, Pages 4, 26-27. It can be accessed in the Members' Area of the SCBA website. After logging into the portal, click on Member Services; then *The Suffolk Lawyer.* http://www.scba.org/eva/displayFile.php?id=47

4. Even if you received your PTIN in 2011, it would have been for the 2011 filing season and you need to renew for the 2012 filing season.

5. I received my reminder on October 24, 2011; I entered my PTIN account; and I renewed on the same day. I received my "PTIN Welcome Renewal Letter" (electronically, of course) on October 26th. I "Expire On" December 31, 2012.

6. If you don't have the paperwork with your attorney and/or CPA license information (number and expiration date) readily available, you can access it from the Attorney Search page of the New York State Unified Court System http://iapps.courts.state.ny.us/attorney/AttorneySearch and, for CPAs, the New York State Education Department online verification page http://www.op.nysed.gov/opsearches.htm .

7. Notice 2011-6: Supervised Preparers and Non-1040 Preparers, http://www.irs.gov/taxpros/article/0,,id=243337,00.html

8. See footnote 2, supra.

9. See footnote 7, supra.

10. October 29, 2011, page B-1.

11. http://www.irs.gov/taxpros/article/0,,id=239678,00.html; http://www.irs.gov/taxpros/article/0,,id=239679,00.html

12. Frequently Asked Questions: Fingerprinting Requirements- http://www.irs.gov/taxpros/article/0,,id=239682,00.html

13. Notice 2011-45, June 20, 2011, *Restrictions on Use of the Term Registered Tax Return Preparer* - http://www.irs.gov/irb/2011-25_IRB/ar11.html

14. Frequently Asked Questions: PTIN Application and Renewal Assistance, General Guidance, a.4. - http://www.irs.gov/ taxpros/article/0,,id=239679,00.html

Record Owner Pays Damages (Continued from Page 10)

500, 504, 377 N.E.2d 975, 406 N.Y.S.2d 443)" (internal quotations omitted). Based on awards in other land trespass cases,[6] the panel concluded that $15,000 is the amount that "bears a reasonable relation to the harm done and the flagrancy of the conduct causing it.'" It vacated the award and granted a new trial on the amount of punitive damages "unless plaintiffs … stipulate to reduce that award to $15,000, in which event the order and judgment is modified accordingly."

It is noteworthy that the "actuated by passion" test enunciated in *Nardelli* was intended to guide trial judges in their discretion to limit punitive damages awarded by juries. In this case, it was invoked to support the reduction of an award made by the trial judge, who is presumably best situated to assess the level of moral turpitude and wanton dishonesty demonstrated by the trial testimony.

The dissent

The majority opinion states that the "defendant was aware that there was a dispute over the property line, and he granted plaintiffs permission to continue to use [the disputed area]" *before* he commenced his trespass.

The dissent, however, points out that the plaintiffs waited for two years following the defendant's assertion of ownership before bringing suit. In the interim, the dissenters believe that "the survey that defendants commissioned gave defendant a reasonable and factual basis to believe that he owned the disputed area." Furthermore, "once plaintiffs commenced this action and placed defendants on notice that they were asserting title to the disputed area by adverse possession, there were no further incidents of trespass by defendant." As a result, the dissent finds no basis for a punitive damages award.

The bottom line

Landowners frequently believe that a deed and/or a survey give them the authority to remove or destroy any encroachment on "their land." As this case so vividly demonstrates, taking such action before understanding all the facts involved in a boundary dispute can lead to liability far in excess of the value of the "offending" encroachments. Clients should be encouraged to contact counsel or their title insurer instead of resorting to self-help in this situation.

Note: Lance R. Pomerantz is a sole practitioner who provides expert testimony, consultation and litigation support in land title disputes. He can be reached by email at lance@LandTitleLaw.com. Or visit www.LandTitleLaw.com.

1. West, et al. vs. Hogan, et al., 2011 NY Slip Op 07086 (Oct. 7, 2011) (http://www.nycourts.gov/reporter/3dseries/2011/20110708 6.htm).

2. The opinion does not mention the map to which the recited lot numbers refer.

3. Were plaintiffs' survey accurate, they would have had record title to the disputed area without having to prove adverse possession.

4. Citing *Ligo v. Gerould*, 244 AD2d 852, at 853 (4th Dept. 1997).

5. Citing *Ross v Louise Wise Servs., Inc., 8 NY3d 478,* at 489 (2007).

6. *Western N.Y. Land Conservancy, Inc., v. Cullen, et al.,* 66 AD3d 1461, at 1464 (4th Dept. 2009); *Vacca v. Valerino*, 16 AD3d 1159, at 1160 (4th Dept. 2005); *Ligo v. Gerould*, 244 AD2d 852, at 853 (4th Dept. 1997);

Sidney Siben's Among Us (Continued from Page 7)

election night coverage on November 8 marking his 17th year in this role.

Forchelli, Curto, Deegan, Schwartz, Mineo, Cohn & Terrana LLP Partner **Judy L. Simoncic** has been appointed to the Options for Community Living, Inc. Board of Directors. Options for Community Living, Inc. is a not-for-profit committed to assisting individuals and families with special needs to develop their fullest potential for independent living.

Lawrence Kushnick and **Vincent Pallaci** of Kushnick Pallaci, PLLC recently presented a lecture to architects, engineers, general contractors, owners, developers and attorneys entitled "Mitigation of damage to structures adjacent to construction sites in urban environments."

Herman Katz Cangemi & Clyne, LLP (HKCC) and Ruskin Moscou & Faltischek, P.C. (RMF) announced today in a joint statement by Mark S. Mulholland, RMF's managing partner, and Jay M. Herman, HKCC's senior partner, that HKCC partners – **Jay M. Herman, Robert S. Katz, Andrew G. Cangemi and Kevin M. Clyne** – will serve as special counsel to RMF's tax certiorari practice group.

Condolences….

To SCBA First Vice President **Arthur Shulman** whose mother-in-law Elizabeth Weigler, 97, passed away.

To the family of the Honorable **Sidney Mitchell** who passed away in Florida. Judge Mitchell is survived by his wife Audrey of Sarasota, Fl., children Alison and Andrew and grandson Gregory.

To **Robert A. Lifson** and his family upon the passing of his mother, Hannah, who was 99.

To **Eric and Carolyn Sackstein** on the passing of Eric's mother, Mildred Siegel.

To the family of **Paul Richard Federman** who passed away on October 12.

Condolences to **Jeffrey B. Hulse**, and the **Honorable Marion T. McNulty**, on the passing of Janis B. Hulse, Jeffrey's mother.

New Members…

The Suffolk County Bar Association extends a warm welcome to its newest members: **Raymond J. Averna, Stephen W. Basedow, Mary L. Brosdal, Lawrence H. Fine, James S. Gentile, Patricia T. Grant Flynn, Daniel S. Hallak, Toni J. Hoverkamp, Sally Kassim-Schaefer, Linda A. Lundgren, Kristen B. Mantyla, Matthew Minerva, Michael J. Snizek, Katherine Vasilopoulos and Robert E. Waters**.

The SCBA also welcomes its newest student members and wishes them success in their progress towards a career in the Law: **Dominick Cattrano, Timothy Riselvato, Nathan M. Shapiro.**

On the Move – Looking to Move

This month we feature two employment opportunities and three members seeking employment. If you have an interest in the postings, please contact Tina at the SCBA by calling (631) 234-5511 ext. 222 and refer to the reference number following the listing.

Firms Offering Employment

Small western Suffolk personal injury defense firm seeks associate with 8-10 years of experience. Extensive personal injury background necessary. Some trial and Labor Law experience helpful. Emphasis on high quality work. Must be organized and possess excellent deposition and writing skills.
Reference Law #22.

General practitioner, with Patchogue law office, seeking full-time attorney. **Reference Law #1.**

Members Seeking Employment

Experienced Family Law attorney, some Matrimonial Law experience, seeking full-time, part-time employment, per diem assignments, court appearances, drafting, etc. See resume for particulars.
Reference Att#40

Recent law school graduate awaiting admission to the New York State Bar with legal experience in corporate, litigation, real estate, personal injury, and immigration law, seeks an entry-level attorney position in any area of the law. Fluent in Greek and Albanian.
Reference Att#41

Recently admitted attorney seeking part-time or contract employment. Experienced in immigration law. Capable of learning new areas of the law quickly. Strong writing and communication skills. Self-motivated with ability to multi-task.
Reference Att#42

Keep on the alert for additional career opportunity listings on the SCBA Website and each month in *The Suffolk Lawyer*.

Confrontation in DWI Cases (Continued from Page 6)

specific individual. *Bullcoming* dispatches that position because New Mexico relied on it, claiming that the report was nothing more than observations of an independent scientist. *Bullcoming* reminds that *Davis v. Washington*[18]set forth the definition of testimonial as having a primary purpose of establishing or proving past events potentially relevant to later criminal prosecution.[19] A document created for an evidentiary purpose is testimonial, even if that document is scientific or a scientist's observations.[20] Here, the language of 10 NYCRR § 59.5 which says that certain protocols "shall be used by operators performing breath analysis for evidentiary purposes…." Among those protocols are using only those machines that meet other regulations requiring the keeping of the maintenance and calibration records and using simulator solutions with a known expected result.

Finally, *Melendez-Diaz* involved document in the form of an affidavit —documents with oaths. *Bullcoming*'s blood alcohol report is an unsworn document, just as are the simulator solution certificates, calibration and maintenance records. Thus, *Bullcoming* makes clear that an oath or jurat is not the lynchpin of determining whether a document is testimonial.

Just as *Melendez-Diaz* required a re-examination of *Lebrecht*, *Bullcoming* requires a re-examination of both *Brown* and *Lent* as applied to simulator solution certificates and calibration and maintenance records of breath test machines.

1. 564 US —-, 131 S. Ct. 2705 [2011].
2. Technically, a roadside test using an SD-2 or like device is a "breath test," while, in contrast, the use of an Intoxilyzer is a "chemical test." This article, though, refers to the latter as a "breath test" because breath is tested to obtain evidence about blood alcohol content.
3. Generally, the SCPD uses an Intoxilyzer brand device which appears on the Department of Health's approved list of breath testing devices.
4. 10 NYCRR § 59.5[d].
5. *People v. Lent*, 29 Misc. 3d 14 [App. Term 9th & 10th Jud. Dists. 2010].
6. 13 Misc. 3d 45 [App. Term 9th & 10th Jud. Dists. 2006]
7. *Melendez-Diaz v. Massachusetts*, 557 US —-, 129 S. Ct. at 2532-4 [Point III-A].
8. 13 NY3d 332 [2009].
9. *Brown*, 13 NY3d at 339-40, cited by *Lent*, 29 Misc. 3d at 20.
10. *Lent*, 29 Misc. 3d at 21.
11. *Brown*, 13 NY3d at 340.
12. 10 NYCRR § 59.5.
13. *Bullcoming*, 131 S. Ct. at 2714.
14. *Id.*
15. See, *Bullcoming*, 131 S. Ct. at 2546 quoting *Melendez-Diaz,* 129 S. Ct. at 2546 [Kennedy, J., dissenting].
16. *Bullcoming*, 131 S. Ct. at 2715.
17. *Bullcoming*, 131 S. Ct. at 2713, at n. 5.
18. 547 US 813 [2006].
19. *Bullcoming* at n. 6.
20. *Bullcoming*, 131 S. Ct. at 2717, quoting *Melendez-Diaz*, 129 S. Ct. at 2532.

Enjoy the Party (Continued from Page 4)

needs to act. We discussed dress code, good and bad topics to discuss in public and under no circumstance do you want to be the person that sees the bartender leave to go home. Since I just had this conversation about the do's and don'ts, I knew it could not have been one of my people.

Well, I have been wrong a lot in my life and tonight was no different. The manager then looked at me and said, "Actually, it is your employee." I instructed her immediate supervisor to have one of the other female employees to get her safely to her room immediately. Now, this was not a terminating offense, but it was a "that girl" event. Needless to say, she was embarrassed the remainder of the event. I bet she remembers the advice we gave her following corporate events. Here are a few simple company or business event rules:

- Use the 2 drink maximum rule or if you have low tolerance, then soda is probably what you should stick with.
- Remember no matter your surroundings, you are still at work.
- Don't be the last one at the bar, because you probably broke the 1st and 2nd rules.
- Have fun.
- Make sure someone else is "That guy or girl!"
- Take it from the boss of that guy or girl, the story never has good ending when you are that person.

What is a company to do? Many leaders are doing fewer events and some are eliminating them all together to help avoid the human resource and legal issues that happen so often during these events. This is a mistake that can and will cost the company good employees and good morale. Keep doing the events, and focus on educating the teams on the appropriate behavior ahead of time. Know at every event there will be that guy or that girl and you can deal with them, but the good news is there are those remaining hundreds of great employees talking about that person and how thankful they are to be working for a company that shows how much they appreciate them. Events can be expensive and a pain for many leaders, but they are cheap compared to unmotivated and unhappy employees and clients. Have a great end of the year and Merry Christmas to everybody!

Note: Nathan Jamail, president of the Jamail Development Group author of Best Selling Business Book "The Sales Leaders Playbook," as well as radio host on CNN 1190 delivering business talk radio with an edge, is a motivational speaker, entrepreneur and corporate coach. As a former Executive for Fortune 500 companies, and business owner of several small businesses, Nathan travels the country helping individuals and organizations achieve maximum success. To contact Nathan, visit www.NathanJamail.com or call (972) 377-0030.

Calling All Solo and Small Firm Practitioners

According to the American Bar Foundation Lawyer Statistical report in 2000, 48.3 percent of all lawyers are solos, and almost 70 percent are in firms with fewer than 10 lawyers. And that was over 10 years ago! With changes in the economy and the downfall of many large firms, the figures are likely to be even higher now.

The SCBA Solo and Small Firm Practitioners Committee is unlike any other committee at the SCBA. Rather than focusing on a practice area or substantive law, the Solo and Small Firm Practitioners Committee is a forum for brainstorming ideas and providing information and resources to aid attorneys in meeting the challenges encountered in the everyday running of a practice.

- This is the stuff they don't teach you in law school:
- Cash flow, profitability and financial management
- Dealing with difficult clients, avoiding fee disputes and handling a grievance
- How to market your practice affordably and effectively
- Websites and internet marketing
- What technology is available, affordable and easy to implement for solos and ssmall firms
- Closing, selling or succession of your practice
- Just how important networking is

Please join us at any one or all of our upcoming meetings:

- January 24, 2012
- February 28, 2012
- March 27, 2012
- April 24, 2012
- May 29, 2012

We meet in the board room at the SCBA at 4:30 p.m. Meet other solo and small firm lawyers and learn something that you can implement to improve your practice. For further information, contact Co-Chairs Allison Shields (Allison@LegalEase-Consulting.com) or Peter Walsh (PeterCWalshPC@PeterCWalsh.com).

DMV

2011 Developments in the Vehicle & Traffic Law

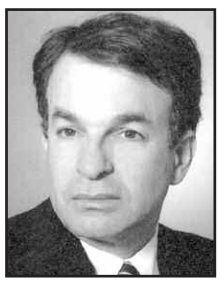
By David A. Mansfield

This article will discuss several developments in the Vehicle and Traffic Law occurring in 2011, which have the most direct impact upon defense counsel and their clients.

The move over law for stopped emergency vehicles under Vehicle & Traffic Law §1144-(a) went into effect on January 1, 2011. This law requires a motorist approaching a stopped emergency vehicle while exercising due care to move over to avoid colliding with an authorized emergency vehicle that is parked, stopped or standing on the shoulder or any portion of the highway. The stopped emergency vehicle must display emergency lights §375(41)(2) for the law to apply.

When approaching a stopped or parked emergency vehicle on parkways or controlled access highways you are required to move over from the lane next to the shoulder or where the emergency vehicle is stopped with its activated emergency lights to the adjacent lane while exercising due care in compliance with §1128(a). When changing lanes, a vehicle shall not be moved from the lane until the driver has first ascertained that such a movement can be made safety as per statutory language.

When defending these violations at the Suffolk Traffic Violations Bureau or elsewhere, it is important to determine whether it is properly written under §1144-(a) as a two-point offense under 15 NYCRR Part§131(3)(a). (You can re-view the ticket display page of TVB Ticket Management for Attorneys.)


David A Mansfield

The violation of §1144, a failure to yield right of way to emergency vehicles, occurs when a driver refuses to yield or pull over when pursued by an emergency vehicle with its emergency lights on while both vehicles are in motion. You could be charged under this section even if you are not the intended vehicle to be stopped. This offense is a three-point infraction 15 NYCRR Part §131.3 (6)(ii).

All violations of §1144 will be treated as required appearance cases at Suffolk Traffic Violations Bureau under 15 NYCRR Part 123.5(a)(2). This means that the charge will not be dismissed upon a first non appearance of the police officer.

The points assessed for improper cell phone use under §1225-c was increased to three points on or about October 5, 2011. Please see 15 NYCRR 131.3(6)((vii). The state has finally decided to get tough on distracted driving. The cell phone law was originally zero points and rose to two points on February 16, 2011.

The prohibition on the use of electronic devices while the vehicle is in motion is a three point offense under Vehicle and Traffic Law §1225(d) and 15 NYCRR Part §131.3 (6) (vii), which went into effect on or about October 5, 2011. The violation was assessed two points from July 12 to October 4, 2011. The portable electronic device shall mean any handheld mobile telephone or personal digital systems, handheld device with mobile data access, laptop computer, pager, broadband personal communication device, two-way messaging device and a portable computer device.

You are using the device within the meaning of the law when holding a portable electronic device while viewing, taking or transmitting images, playing games or composing, sending, reading, viewing, accessing, browsing, saving or receiving email text messages or other electronic data.

§1225(d) (3) provides for an emergency response operator exception in the official performance of their duties or emergency medical personnel, police department and fire department district. §1225(d)(4) sets forth the presumption that by holding an electronic device in a conspicuous manner while operating a motor vehicle, you are presumed to have been using such device within the meaning of the law.

This is also now a primary offense and can be charged independent of any other violation of the Vehicle & Traffic Law in order for you to be stopped. The law does not provide for a forfeiture of the device pursuant to §1225(d)(5). These changes will cause an increase in discretionary driver license suspensions for persistent violation of the Vehicle and Traffic Law §510(3)(d) and 15 NYCRR Part§134.4. There will be additional fees due under the Driver Responsibility Assessment §503(4).

Another significant development is the end of the compelling circumstances exception for §510(2)(b) mandatory driver license suspensions for felony and misdemeanor drug possession convictions.

This took effect on April 1, 2011. Defense counsel must now inform their clients that in the event that their client is convicted they will face a mandatory minimum six-month driver license suspension with their eligibility for a restricted-use license to be determined by §530 of the Vehicle & Traffic Law and 15 NYCRR Part §135.7.

Defense counsel should be familiar with these important changes and advise their clients accordingly.

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

AMERICAN PERSPECTIVES

Legislating Parity

By Justin Giordano


Justin Giordano

Occupy Wall Street Arrives

The Occupy Wall Street protests and the many others occupy imitator protests being held across the nation have now been in place for over two months. If reports are correct the protests are expanding nationally as well as internationally to a number of overseas locations. The demands appear to be varied and at times quite unfocused, ranging from demands for taxing the so-called rich at higher rates, the creation of good jobs, and even forgiving student loans. At the outset the occupy participants appeared to be mostly young people, students, some unemployed, anarchists, and an assortment of other sub-groups loosely brought together under the banner of protesting against the "system's injustices" and most prominently, the unequal distribution of wealth between the class. This from one can be gathered is the stated premise upon which those participating, encouraging and supporting the protesters predicate their discontent and raison d'etre.

The occupy movement, as its advocates have describe it, has seen its ranks expand since its inception to include labor unions, opportunistic Hollywood types such as Michael Moore et al, and a bevy of academics and pseudo intellectuals seeking to bolster their progressive/left wing credentials. In effect many of these later comers to the "movement" are either trying to usurp it to push their own demands or trying to ride the wave of what they perceive to the new populist uprising that they had been longing for as an answer to the "tea party" movement. The latter turned their dissatisfaction into impressive electoral victories on November 2010. It yet remains to be seen if the "occupy" movement can be organized, by whoever emerges as its leaders, into as effective a political force. Whether such leadership can emerge at all out of such a loose knit group is itself the key question. There is just as good a probability that the "movement" will slowly dissipate as a consequence of incoming winter and other inclement weather or just because its novelty wears out and is no longer the driving force it originally was to its followers.

99 percent vs. 1 percent credo

Although the "occupy" list of demands is extensive and expansive, one theme, or more descriptively a slogan, has risen to pre-eminence among the participants and supporters of the movement. Essentially it revolves around the premise that they represent the 99 percent standing against and pressing their demands against the 1 percent, and in New York where the movement originated, the 1 percent is embodied by Wall Street.

Their claim is that this group of individuals is unjustly enriching themselves at the expense of the rest of the population or the 99 percent. Consequently their demands seem to be, although this is not absolutely clear, that they should be forced to pay more, presumably through some sort of confiscatory new taxes. The question that inevitably ensues is how much more should this group pay in taxes? The protesters when the question is directly posed to them by the media and such, have a divergence of opinions and are basically unclear about at what rate they should be taxed and at which income level, say in terms of annual income, does one become a member of the dreaded 1 percent club? On this point the information under which the "occupy" protesters and many of their supporters operate under is substantially out of sync with the actual facts.

In fact according to the IRS Databook as reported by the National Taxpayers Union, in 2009 membership to the top 1 percent of all taxpayers meant an annual income of $343,927 while anyone earning $154,643 and $112, 124 per annum was a member of the top 5 and 10 percent clubs respectively. These numbers were down from the previous two years, namely 2008 and 2007 when 2008 incomes of $380,354, $159,619 and $113,799 and 2007 incomes of $410,096, $160.041 and $113,018 placed a taxpayer in the 1, 5 and 10 percent categories respectively. This 1 percent group accounted for 36.73 percent of all taxes in 2009, 38.02 percent in 2008, and 40.02 percent in 2007. These three top taxpayer groups combined paid in the same three years, 70.47 percent in 2009, 69.94 percent in 2008, and 71.22 percent in 2007 of all federal taxes paid by taxpayers. During the same three year period the share of taxes paid by the bottom 50 percent was 2.25 percent in 2009, 2.7 percent in 2008 and 2.89 percent in 2007.

The data listed above indicates that in actuality the threshold for gaining admission to three top brackets has decreased from its peak in 2007 prior to the 2008 financial meltdown. What is also quite apparent is that the aforementioned three top tax groups combined consistently account for approximately 70 percent or more of all taxpayers' contribution to the U.S. Treasury. The question thus still remains, what would constitute a "fair share" (which is a commonly used term among the ranks of Occupy Wall Street and its sympathizers and supporters including those in the media and in some in the political class) of the tax burden for the 1 percent group or the three groups combined?

The other target of the protesters is corporate America itself. Apparently according to this "occupy" their tax rates are also not high enough. Yet when compared to most if not all of our competitors and/or trading partners the United States' corporate tax rate is the second highest in the world at 38 percent, second only to Japan's 40.69 percent. Japan has indicated that they plan to lower their rate in the near future. It is also worth noting that Japan has been subjected to a stagnating economy throughout the 90's and this is persisting into the new century.

Others, just to cite but a few, include Canada, our largest trading partner. Its corporate rate is 15 percent overall but 11 percent for small businesses. Canada moved away from its overly burdensome tax system a number of years ago with the election of Prime Minister Steve Harper and as a consequence their employment rate has fallen below that of the United Sates even if traditionally Canada's unemployment rate exceeded that of the U.S. China, America's trading partner and the much touted new emerging economic power, has a corporate rate of 25 percent. Brazil's rate is 34 percent, Germany's is 29.8 percent, France's is 33.33 percent, and the U.K.'s top corporate rate of 26 percent is scheduled to drop to 23 percent by 2014 as per their newly enacted legislation.

Historic look & effects of legislating parity

The urge to seek parity is far from new. Taking from "those who have" to give to "those who want" is an easy impulse that has often been manipulated and fueled by opportunist as well as misguided individuals and/or groups that may otherwise have been well intentioned. In its extreme manifestation this has yielded many a bloody revolution waged under the "parity" banner. The governments that have typically come to power have ranged from outright dictatorships such as the former Soviet Union that followed the Bolshevik revolution in early 20th century Russia, to much milder forms such as modern European socio-democracies. The objective always being, though greatly varying in degree, to enable a powerful central government to confiscate from one group to give to another. Invariably in these systems the bureaucracy grows significantly and a ruling class emerges as was the case in socialist countries such as former Soviet Union, Cuba, etc. The same holds true for systems where big government and big business work in tandem as Japan has been experiencing or in Mussolini's pre-World War II Italy.

Recent moves by the U.S. government have shown a propensity to move in that direction as exemplified by the "too big to fail" approach, where selective industries and corporations are preferred. These have included the banking industry, automakers GM and Chrysler, as well as the failed green corporation Solyndra. To complete the circle it would seem that both the current government and the occupy protesters seek to choose winners and losers, good one-percenters versus bad ones. After all filmmaker Michael Moore and other Hollywood notables, celebrities and some opportunistic politicians who clearly are more than qualified members of the 1 percent club, are nonetheless welcome with open arms by this group that so vociferously touts its 99 percent credentials.

The irony is that the well-connected class always derives a great deal under big government-big business-parity for all triumvirates. Conversely the vast majority of the populace's income is leveled and most importantly the ability of the individual to elevate his/her status is practically obliterated - legislating parity inevitably legislating away ambition and creativity.

Then we can go by contribution to society. Why are the occupy protesters focused on some individuals within that 1 percent and not others, even those among them assuming their leadership. A prime example is Michael Moore who certainly is a longtime member of the 1 percent club since the threshold is $80,355 annual income.

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

No Legal Advice, But Important Information – with a Subtext of Hope and Reassurance – Dispensed by Foreclosure Project Volunteers

By Dorothy Paine Ceparano

"I feel like a squatter in my own home," complained one of the more than fifty attendees at the Bar Association's seminar for Suffolk County residents in danger of losing their homes to a foreclosure action. He did not know what to do or where to go, he said.

The resident was quickly reassured by the panel of Foreclosure Settlement Project volunteers who advised him to stay put in his home, to water the lawn, plant flowers, and wait for the impending action to play out – one way or the other.

Numerous residents posed similar queries as the 2 ½ hour program, held at the SCBA Center on the afternoon of October 27, ended with a Q&A session during which many, despite the difficult circumstances they faced, paused to thank the volunteer presenters for explaining matters and helping them to achieve some degree of clarity about their choices.

Entitled "Foreclosure Law for Homeowners in Distress," the program was a free informational seminar and clinic for the public. Attendees were required to own and live in a home in Suffolk County, be delinquent in their mortgage payments, and not already be a client of the SCBA's Foreclosure Project. The program was presented by the SCBA in conjunction with its Pro Bono Foundation, Foreclosure Settlement Project, and Academy of Law. Through the assistance and support of Manexa, the provider of Internet CLE services for the Academy, the seminar was also available as a free webcast.

Barry M. Smolowitz, coordinator of the SCBA's Foreclosure Project, opened the program with a disclaimer advising that the panelists would not dispense legal advice, but would provide information about the foreclosure process that would help the imperiled homeowners to make decisions. He stressed that the presenting lawyers were volunteers who gave countless hours to the Project and to helping residents through settlement conferences. He then introduced the panelists and their specific topics: **Rory Alarcon**, who would review the general way in which the foreclosure process works; **Eric Sackstein**, who would talk about possible foreclosure defenses; **Raymond Lang**, who would explain loan modifications and how to seek them; and **Barry Lites**, who would discuss the impacts of bankruptcy and divorce on foreclosure.

Eric Sackstein provides examples of fraudulent actions on the part of brokers or lenders.

Barry LiteS talks about the interplay of divorce or bankruptcy with foreclosure.

Panelists Barry Lites and Ray Lang listen as Rory Alarcon explains the general foreclosure process to the audience of Suffolk County residents.

The presenters spoke quickly, cramming as much information as possible into the time allotted them. Throughout, they stressed, as Mr. Alarcon articulated at the start of his presentation, that foreclosure is not "a single event in time." It is a process, the panelists explained, and the sheriff will not show up at residents' doors to evict them immediately after the first foreclosure notices are received.

Important prevailing laws – HAMP and mandatory settlement conferences, for example – were explained, and much practical information was disseminated. Mr. Smolowitz talked about how the SCBA's Foreclosure Project could provide help and about when residents might want to seek advice from housing counselors. Mr. Alarcon suggested that those facing foreclosure might want to look – realistically – at their financial circumstances and potential future income before deciding on whether to leave or try to salvage a home. He also advised that homeowners in trouble try to save money and not make unnecessary expenditures. Mr. Sackstein talked about circumstances that could call for actual defenses against a foreclosure action – when non-English speaking individuals did not understand what they were signing, for example, or when credit-application documents produced at closing were different from the originals. If true fraud is suspected, he advised, the homeowner might want to see an attorney. Mr. Lang advised that homeowners seeking a loan modification should be sure to comply with requirements, should not give lenders an excuse to deny the modification, should persevere when a lender claims to have lost their papers, and should, in general, be pro-active in their own behalf.

Beneath much of the information the presenters disseminated, there was an undercurrent of compassion and understanding. Mr. Lites, for example, said that the "inability to pay a mortgage is often caused by a life event" a person could not control. He described situations he had encountered, including one involving a wife whose divorcing husband moved out and just stopped playing the mortgage. As it turned out, only the husband was on the mortgage, and if a person is not on a mortgage, he said, in the bank's eyes that person does not exist. The wife wanted to seek a loan modification, but did not have a voice. Mr. Lites said he saw his job as "getting her a voice."

All of the speakers acknowledged that foreclosure papers sent from a lender could seem ominous, and in an effort to ease the fear-factor, they explained what the various documents meant and what responses were required. Again and again, the presenters emphasized that foreclosure was a process and that time could be on the side of the homeowner. Additionally, they said, new legislation might provide new options.

The educational seminar was purposefully scheduled during National Pro Bono Week. And the spirit of pro bono publico was almost tangible as the presenters provided empathetic information to the distressed homeowners and responded to their concerns during a question-and-answer period that went on far longer than originally scheduled. In return, the prevailing feeling emanating from the homeowners was that their frustrations and problems, though not gone, could at least be more effectively handled as a result of the information gained at the program.

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

Raymond Lang (podium) explains the loan modification process. Beneath the PowerPoint display are fellow panelists (left to right) Rory Alarcon, Eric Sackstein, and Barry Lites.

SCBA's Redesigned Website *(Continued from Page 5)*

Events content will vary based upon the user log in status.

The member only portion of the site represents many enhancements over our old site. There is a new area titled Legislation. This portion of the site lists a number of legislative bills that affect the practice of law. The bills are categorized by the area(s) of law they affect. Each bill also hot links to the actual legislation, so that the actual bill text may be reviewed. Another new item is Committee Information. Each SCBA committee or task force (and there are around 60!) has its own page or blog. Each committee chairperson has direct access to the page, and may add pertinent information at any time. The control is live, meaning it goes up on the website as soon as the chairperson submits the information. This is a great area to keep committee and association members up to date on committee activity.

I believe one of the most exciting new additions is the member account and directory. Every SCBA member will now have their own personal account on the website. The account includes user and password information as well as the member's general pedigree. The information includes the member's name, office address, office phone number, e-mail address, and up to three SCBA committees that the member serves on. In addition, each member may choose up to three areas of concentration, may enter a cell phone number, a website, and there is a free form area where the member may type anything else they deem applicable. This information can only be observed by other members after they log in. The membership directory is somewhat distinct in that it provides a member-to-member B2B directory. This is accomplished by allowing a member to search the directory by: member ID number, first name, last name, areas of concentration, zip code, or x amount of miles from a particular zip code.

All that is needed to use our new website is Internet Access, and any one of the following browsers: Internet Explorer version 7.0 or greater, or the current version of either Firefox or Chrome. For membership login access you will need a valid e-mail address on file with the SCBA. That's it! A member login is accomplished by entering your Member ID number (available on your membership card) and getting a password. Password generation is fully automated. Upon your first login attempt, you will be prompted. A temporary password will be sent to your e-mail address. Upon you next login, you will enter the temporary password and you will be prompted to choose and set a permanent password. Once you have logged in successfully, you will be greeted with your personal account page. Take a moment to update the content (certain areas are not editable for security reasons). Be sure to enter your practice areas, and insure that the information is accurate. Please direct changes that you cannot make yourself to me at web@scba.org.

Now you will have all of the association information available to you online. Future plans include a shopping cart, and making the site Smart Phone compatible. So start surfing the new site, and enjoy the new features. You may also send comments to web@scba.org.

Note: Barry M. Smolowitz is a sole practitioner in Kings Park, NY. His practice concentrates on Criminal, Education, and Cyber Law. He is an SCBA past president (2007-2008). He is also the SCBA Director of Technology.

EDUCATION LAW

Tax Cap & Ramifications for School Districts

By Randy Glasser and Kathryn J. Maier

Due to legislation signed into law by the Governor on June 24, 2011, most school districts will be subject to a limit on the amount of real property taxes that may be levied.[1]

School districts will now be required to compute the *tax levy limit* pursuant to a 7-step statutory formula delineated below.[2] In addition, on or before March 1 of each year, school districts subject to the cap must submit to the State Comptroller, the Commissioner of Education and the Commissioner of Taxation and Finance any information necessary for the calculation of the *tax levy limit*. The school district's determination of the *tax levy limit* will be subject to review by the Commissioner of Education and the Commissioner of Taxation and Finance.[3]

The 7-step formula[4] for calculation of the *tax levy limit* is as follows:

- Ascertain the total amount of taxes levied for the prior school year.
- Multiply the result by the *tax base growth factor*, if any.
- Add any payments in lieu of taxes that were receivable in the prior school year.
- Subtract the tax levy necessary to support the four categories of excluded expenditures[5].
- Multiply the result by the *allowable levy growth factor*[6].
- Subtract any payments in lieu of taxes receivable in the coming fiscal year.
- Add the *available carryover*[7], if any.

A budget may exceed the *tax levy limit* as calculated pursuant to this formula only if the budget is approved by 60 percent "of the votes cast thereon."[8,9] Where the proposed budget exceeds the *tax levy limit*, a statement must be included on the ballot informing the voters that adoption of the budget requires a tax levy increase that exceeds the statutory tax increase limit and must be approved by 60 percent "of the qualified voters present and voting.[10]

Randy Glasser

Kathryn J. Maier

If the qualified voters fail to pass a budget, the school district may resubmit it to the voters on the third Tuesday in June, and if it is not resubmitted or fails a second time, the district must levy a tax no greater than that levied for the prior school year.[11]

While these stringent budget requirements will undoubtedly place pressure on school district budgets, the legislation includes provisions amending state statutes aimed at mandate relief in the following areas: centralized services and contracts, transportation, census, amortization for projects approved by the Commissioner, superintendent sharing contracts[12], audit methodology for school districts with 10,000 or more students, deputy claims auditors and delegation of the claims audit function; and mandate review procedures.

Note: Randy Glasser is a partner with the Law Offices of Guercio & Guercio, LLP. Ms. Glasser is presently the chairperson of the Education Law Committee at the Nassau County Bar Association. She has been a member of the Alternate Dispute Resolution Committee at the Nassau County Bar Association and the Disabilities Law Committee of the New York State Bar Association as well. Ms. Glasser has lectured on special education issues and bullying at the Annual School Law Conference held by the Suffolk & Nassau Academies of Law, and has trained arbitrators for the American Arbitration Association. She concentrates on various aspects of representing municipalities, including school districts, libraries, water districts and fire districts.

Note: Kathryn J. Maier is an associate with the Law Offices of Guercio & Guercio, LLP. Ms. Maier is admitted to practice in New York State and Federal Courts and is a member of the New York State Bar Association. Ms. Maier frequently attends and participates in conferences held by the New York State School Boards Association and the Nassau and Suffolk County Bar Associations.

1. The tax cap is first applicable for the 2012-2013 school year, and does not apply to city school districts with more than 25,000 inhabitants. Chapter 97 Part A, § 13.

2. Education Law § 2023-A(2-A)(A).

3. Education Law § 2023-A(2-A)(3)(B).

4. Education Law § 2023-A(3)(A)(1-7).

5. Under the law, expenditures requiring the following tax levies are not subject to the *allowable levy growth limit* and are excluded from the calculation of the *tax levy limit*:

- a tax levy necessary for expenditures resulting from court orders or judgments arising out of tort actions for any amount that exceeds 5% the total tax levied in the prior school year;
- in years in which the system average actuarial contribution rate of the Employees' Retirement System ("ERS") increases by more than two percentage points from the previous year, the tax levy necessary for such employer contributions caused by the growth in the contribution rate minus two percentage points;
- in years in which the normal contribution rate of the Teachers' Retirement System ("TRS") increases by more than two percentage points from the previous year, the tax levy necessary for such employer contributions caused by the growth in the normal contribution rate minus two percentage points; and
- a capital tax levy.

These four tax levy categories are collectively referred to herein as the "excluded expenditures". Education Law 2023-A(2)(I)(I-IV).

6. School district tax levies are now subject to an "*allowable levy growth factor*" defined as "the lesser of: (i) one and two one-hundredths; or (ii) the sum of one plus the inflation factor. However, in no case would *the allowable levy growth factor* be less than one. Education Law § 2023-A(2)(A).

7. The *available carryover* is defined as "the amount by which the tax levy for the prior school year was below the applicable *tax levy* limit for such school year, if any, but no more than an amount that equals one and one-half percent of the tax levy *limit* for such school year." Education Law 2023-A)(2)(B).

8. Education Law § 2023-A(6)(A).

9. Notably, the law allows additional items of expenditures to be submitted to the voters for approval as separate propositions. However, except in cases of propositions related to expenditures for the tax levies referenced above that are excluded from the tax levy limit, if any proposition would result in a tax levy exceeding the levy limit, then the proposition must be approved by 60% of the votes cast. Education Law § 2023-A(9).

10. Education Law § 2023-A(6)(B).

11. Education Law §§ 2023(4)(a) and 2023-A(7-8).

12. Only applies to school districts with an enrollment of less than 1,000 students.

OPINION

When Divorce Leads to Murder

Extreme sadness came over me when I recently heard the shocking story of the attorney who beat his wife, shot his children and then committed suicide, but my feelings turned to shock and disbelief when I learned his name. I knew Sam Friedlander. We worked together (although some may have viewed us as adversaries) when I was an attorney for the Suffolk County Legal Aid Society and he was an ADA. In remembering Sam, I would describe a friendly and compassionate man, not at all the type of individual capable of committing such a vicious act. I keep asking myself what could have caused this transformation. What circumstances led up to this fateful day?

As a practicing psychologist, I have treated many couples who are in the midst of high-conflict divorce. They often act out against each other with enormous anger and cruelty, completely out of character from what I would consider their normal persona. Sam Friedlander went beyond the typical angst. Somehow he snapped, and so this horrific tragedy won't be in vain, we must attempt to figure out why.

The actions of Sam Friedlander should not be placed on our justice system, but we must examine if this system exacerbated the conflict between the parties. When I went to law school, I was indoctrinated with the adversarial methods we use to address conflict. My experience showed two lawyers fighting each other in hopes that ultimately some sort of truth will "win" out. This creates an atmosphere and energy of opposition. In a divorce scenario the dueling attorneys set the stage and often act as role models for litigants, perpetuating the need to fight. It is no surprise to me, then, to see loving people turn into warring nations.

As this transformation takes place, often fear and anger turn to vengeance, which can trigger violence. It is unfortunate that the power of litigants to resolve issues peacefully has been unwittingly taken away by our justice system. When we add in the highly charged emotions attached to losing a home, family and essentially life as we know it, the case of the Friedlanders can become a reality.

My colleague Donna Martini, a wellness and divorce coach from Long Island, sites a 2000 study from Harvard called "Effects of Divorce Laws on Suicide and Intimate Homicide." "The authors Betsey Stevenson and Justin Wolfers tell us that existing estimates suggest between one-quarter and one-half of women murdered are killed by their partner. Their research was focused on the introduction of new laws that made it easier to get out of a marriage and how that influenced the murder/suicide rate. Further findings showed a decrease in the rate of female suicide and a lower incidence of domestic violence and murder in each state that amended their strict divorce policies. Wouldn't this conclusion prove that the laws governing marriage and divorce, and the legal system as a whole, play a large part in instigating an unhealthy state of being for both husbands and wives?"

I concur with this conclusion. Recently, New York joined the nation as the last state to remove the requirement of each party seeking divorce to establish "fault." However, we must do more! We need to go much further if we want to deescalate the conflict of warring litigants. The legal system must become vigilant in perpetuating the family dynamic, and in trying to enforce mediation that will attempt to eradicate the anger and angst between the parties. Donna calls it, "The Ten Commandments of Divorce." We both agree, divorce is not a state of being. It is a decree that dictates a living condition and should not determine the emotional state of a family. Couples should be encouraged, most especially when children are involved, to, as she puts it, "work out their issues in a charitable way in order to preserve the same intentions they had when entering the marriage."

With domestic violence a frequent occurrence in our nation, and with almost half of all murdered women being killed by their partner, we know the current system is not working sufficiently. A judge once told my client, "An order of protection does not stop bullets or blades." However, constructive, positive dialogue between parties might deter them. Lawyers must encourage it and the courts must enforce it. Mediation and collaboration should not be seen as a sign of weakness, but instead be considered the road to restoration, bringing strength and integrity to both parties at a time when they need it the most. In the case of Sam Friedlanders, we may not ever know the *how* or *why* of his actions, but we most certainly can work harder to prevent the *who* in the future.

Note: Robert Goldman, JD, Psy.D. is an attorney and psychologist and the author of No Room for Vengeance in Justice and Healing (November 2011). Contributor Donna Martini is a wellness activist and author of The Ten Commandments of Divorce: How to leave your marriage without breaking up your family.

EMPLOYMENT LAW

Breach of Non-Compete Agreements: Establishing Damages

By Steven Aptheker and Russell Penzer

When employers require employees to sign employment agreements it is common for them to include in their employment agreements a covenant not to compete. This restricts an employee's ability to compete with the employer following termination of the employment relationship. If reasonable in duration and scope, such provisions are generally enforced by courts. Employers may seek both injunctive relief against the prohibited competition and monetary damages arising out of any unlawful competition that the former employee has already committed. Proving actual monetary damages in such cases, however, can be very difficult. To avoid having to meet the heavy burden of establishing such actual damages, attorneys representing employers should consider whether inclusion of a liquidated damages provision in their employment agreements is a viable option, especially for high salaried employees or employees that are compensated based on commissions or on performance.

Actual damages

Many employers, and some attorneys, mistakenly believe that they can establish actual damages by showing the earnings that a former employee has realized through its competitive enterprise and seek disgorgement of such earnings. While establishing a former employee's actual earnings would be relatively simple to do through traditional discovery devices, the law in New York is clear that the appropriate measure of actual damages for breach of a non-competition agreement is the profits that the employer can establish that it actually lost, not the extra earnings that the former employee received through his or her wrongful conduct.[1] Thus, to meet its burden of proof, the employer must not just show that the former employee sold products or services to a client or customer that it could have serviced, but also that, had the former employee not done so, the client or customer would have actually purchased such products or services from the employer.

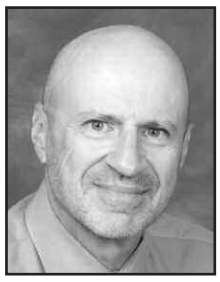
Meeting this burden is not an easy task, and often involves seeking discovery from the subject customers and clients, by subpoena or otherwise. In addition to being costly and time consuming, many employers feel that it is bad business to involve past or potential future customers in their litigation with a former employee. Thus, there are often both legal and business hurdles to proving actual damages in breach of restrictive covenant cases.

Liquidated damages

Given the difficulty in proving actual damages, counsel for employers should consider whether it makes sense, given their client's particular industry and the nature of the employment, to include liquidated damages provisions in their non-competition agreements.

Generally, a liquidated damage provision will be enforced when:

- the damages anticipated as a result of the contractual breach are uncertain in amount or difficult to prove;
- there is an intent by the parties to liquidate such damages in advance;
- and the stipulated sum is "not so grossly disproportionate to the probable anticipated loss as to actually be a penalty designed to induce performance, rather than a means to provide just compensation for losses".[2]


Steven Aptheker


Russell Penzer

In that damages in breach of non-competition cases are often difficult to prove, courts routinely enforce liquidated damage provisions in such agreements where the other requirements for enforcement of such provisions are met.[3] In the usual case, enforcement of a liquidated damage provision in an employment non-compete case turns on whether the amount of the agreed-upon damages is reasonable or constitutes an unenforceable penalty. Significantly, while the employer carries the burden of establishing actual damages in such a case, the party challenging the enforcement of a liquidated damages provision – the former employee – bears the burden of establishing that the provision constitutes an unenforceable penalty.[4] The burden is a heavy one and only where the agreed-upon liquidated damages are "grossly disproportionate to the probable loss" will courts find such a provision to be unenforceable.[5]

While the reasonableness of liquidates damages is a fluid test and depends on the circumstances of each case, such determination is a question of law for the court, and thus, there is a wealth of case-law from which attorneys can draw guideposts in drafting such provisions. As a starting point, employers should be careful not to overreach in fixing a liquidated damages amount. For example, while in one case involving employment by a medical group, liquidated damages of one year's gross salary was deemed to be an unenforceable penalty, in another case, also in the context of employment by a medical group, the court held that liquidated damages of one year's salary capped at $35,000 is reasonable.[6] Attention to such distinctions in drafting liquidated damages provisions will aid an attorney in drafting a provision that is more likely to be enforced by a court of law.

Additionally, courts have expressed a preference for liquidated damages premised upon a formula or calculation, such as one based upon the former employee's past productivity or profitability, rather than a fixed sum or mandatory minimum amount of damages. For example, in *GFI Brokers LLC v. Santana,* the plaintiff, a broker of financial products, sued one of its former employees for *inter alia* breaching a non-competition provision in the parties' employment contract. The employment contract contained a liquidated damages provision whereby damages for such a breach were to be calculated based upon a formula which factored in the former employee's net revenues for the twelve-month period immediately prior to the termination of employment and the number of months left in the agreed-upon term of employment. In enforcing the liquidated damages provision, the court held that "the rough correlation between liquidated damages and actual damages achieved by tying damages to the historical revenue stream – such that the more productive [the former employee] has been, the greater the damages – is a significant virtue over a formula setting a fixed sum or imposing a mandatory minimum amount of damages".[7]

Thus, while the reasonableness of liquidated damages provisions are judged on a case-by-case basis, attorneys can get a great deal of guidance from past decisions analyzing such provisions in drafting employment agreements for their clients. By doing things such as capping liquidated damages based upon gross revenues or providing a formula for the calculation of such damages as opposed to a flat number, it is more likely that the attorney will craft a liquidated damages provision that will be enforced.

While the use of liquidated damages provisions in non-competition agreements is likely to be a good option only in situations involving high salaried employees or employees who are compensated based upon their productivity, such provisions are nonetheless currently an underutilized tool. Attorneys representing employers should counsel their clients with respect to the availability of liquidated damages provisions in such agreements, as well as the potential difficulties in proving actual damages should a former employee breach a non-competition agreement. If armed with this information, an employer wants to include such a liquidated damages provision in its agreements, counsel should draft such a provision with an eye towards past decisional law and the types of liquidated damages provisions that courts have enforced, and those that courts have held to be unenforceable penalties.

Note: Steven Aptheker and Russell Penzer are partners with Lazer, Aptheker, Rosella & Yedid, P.C., which has offices in Melville, New York and West Palm Beach, Florida. Steven Aptheker can be contacted at (631) 761-0820 or at aptheker@larypc.com. Russell Penzer can be contacted at (631) 761-0848 or at penzer@larypc.com.

1. *Earth Alternation, LLC v. Farrell* 21 A.D.3d 873, 874 (2nd Dept. 2005); *Pencom Systems, Inc. v. Shapiro*, 193 A.D.2d 561 (1st Dept. 1993); *Robert Plan Corp. v. Onebeacon Ins.*, 10 Misc.3d 1053(A) (Sup. Ct. Nassau Co. 2005).

2. *Martin L. Ryan, M.D.P.C. v. Orris*, 95 A.D.2d 879, 881 (3rd Dept. 1983) (citations and quotations).

3. *GFI Brokers, LLC v. Santana*, 2009 U.S.Dist.LEXIS 7150 (S.D.N.Y. Aug. 13, 2009); *Martin L. Ryan, M.D.P.C*, 95 A.D.2d at 886.

4. *GFI Brokers, LLC*, 2009 U.S.Dist.LEXIS 7150 at *5.

5. *Id.* (citations and quotations omitted).

6. Compare *Novendstern v. Mt. Kisco Medical Group*, 177 A.D.2d 623 (2nd Dept. 1991) with *Martin L. Ryan, M.D.P.C.*, 95 A.D.2d 879.

7. 2009 U.S.Dist.LEXIS 71550, *9 (S.D.N.Y. Aug. 13, 2009).

Join the SCBA Speakers Bureau

The **Speakers Bureau**, sponsored by the Suffolk County Bar Association, offers the Suffolk County community speakers who speak **free of charge** on various topics of law to foster a further understanding of the legal issues important to individuals as well as the general public.

The following attorney members have shared their expertise with the community:

Lita Smith-Mines - Lindenhurst Public Library - *How to Avoid Foreclosure and Related Issues;*
Felicia Pasculli - Lindenhurst Public Library - *Elder Law & Estate Planning* ;
Steven A. Kass - Funeral Consumers Alliance of LI/NYC - *Estate Planning & New Family Health Care Provision Act*;
George R. Tilschner - Family Service League - *Wills, Trusts and Power of Attorney;*
John C. Zaher - Alternative Board - *Ethics in Advertising* ;
Joseph A. Hanshe - Smithtown High School West - *Criminal Law* Overview ;
Patricia C. Delaney - Smithtown High School West - *Civil Law Overview.*

If you would like to participate in this rewarding community service, please contact Joy Ferrari at the Bar Association at (631) 234-5511 ext 224 or joy@scba.org

Not Business As Usual

Many lawyers advise businesses, but not many lawyers take business courses. The Academy of Law is contemplating a comprehensive **"Business School for Lawyers"** series modeled, roughly, on "executive" CLE courses (i.e., expensive) offered by some out-of-town law schools. Our series would be more moderately priced and would focus on skills of value to Long Island lawyers. The program would comprise 24 credits and would cover such topics as interpreting financial statements; budgeting and project decisions; decision making in the current economy; evaluating risk vs. reward, and buy-sell decisions. The faculty would include experienced corporate-commercial lawyers, accountants, and visiting professors from nearby MBA programs. Before proceeding with this ambitious project, the Academy would like to ensure that there is sufficient interest among our constituents and to gather input on the topics and formats potential participants would find useful. Please help us to plan a program that meets your needs. Email your comments (with the subject-line "Biz School") to dorothy@scba.org.

SUFFOLK ACADEMY OF LAW

OF THE SUFFOLK COUNTY BAR ASSOCIATION

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DECEMBER CLE

The Suffolk Academy of Law, the educational arm of the Suffolk County Bar Association, provides a comprehensive curriculum of continuing legal education courses. Programs listed in this issue will be presented during December 2011.

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 SCBA website (www.scba.org – Internet CLE)**.**

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

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

NOTES:
Program Locations: Most, but not all, programs are held at the SCBA Center; be sure to check listings for locations and times.
Tuition & Registration: Tuition prices listed in the registration form are for ***discounted pre-registration.*** **At-door registrations entail higher fees.** You may pre-register for classes by returning the registration coupon with your payment.
Refunds: Refund requests must be received 48 hours in advance.
Non SCBA Member Attorneys: Tuition prices are discounted for SCBA members. If you attend a course at non-member rates and join the Suffolk County Bar Association within 30 days, you may apply the tuition differential you paid to your SCBA membership dues.
Americans with Disabilities Act: If you plan to attend a program and need assistance related to a disability provided for under the ADA,, please let us know.
Disclaimer: Speakers and topics are subject to change without notice. The Suffolk Academy of Law is not liable for errors or omissions in this publicity information.
Tax-Deductible Support for CLE: Tuition does not fully support the Academy's educational program. As a 501©)(3) organization, the Academy can accept your tax deductible donation. Please take a moment, when registering, to add a contribution to your tuition payment.
Financial Aid: For information on needs-based scholarships, payment plans, or volunteer service in lieu of tuition, please call the Academy at 631-233-5588.
INQUIRIES: 631-234-5588.

UPDATES

FAMILY COURT UPDATE: PART TWO–SUPPORT ISSUES

Wednesday, December 7, 2011

This second part of the 2011 Update focuses on important support issues. (Part One is available as a recoring.)
- Update on support and paternity cases
- Whose responsibility is it to pay for college?
- Visitation Proceedings
- Setting Aside Default Judgments: 5015 Applications
- More

Presenters: **Hon. John Kelly** (Family Court Judge–Acting NYS Supreme Court); Academy Dean); **Hon. Isabel Buse** (Family Court Support Magistrate); **Hon. John Raimondi** (Family Court Support Magistrate); **Jennifer Mendelsohn, Esq.** (Ronkonkoma)**;** Others TBA.

EACH NIGHT:
Time: 6:00 – 9:00 p.m. (Sign-in from 5:30 p.m.)
Location: SCBA Center
Refreshments: Light Supper
MCLE: 3 Hours (professional practice) [Non-Transitional and Transitional]

BANKRUPTCY LAW UPDATE

Monday, December 19, 2011 – NOTE NEW DATE

Experienced bankruptcy practitioners review case law, changes in the rules, trends in filings, economic and practical influences, and other factors that affect bankruptcy practice. Topics include:
- Issues Involving the Office of the U.S. Trustee and
- Bankruptcy Petitions
- Chapter 13 Issues
- Chapter 7 Issues from the Perspective of a Bankruptcy Trustee
- *Stern v. Marshall* and Other Significant Cases
- Clawbacks in Bankruptcy Cases (as in, for example, Madoff and Agape)

Presenters: **Christine H. Black, Esq.** (U.S. Department of Justice); **Salvatore LaMonica, Esq.** (LaMonica, Herbst & Maniscalco, LLP); **Marc Pergament, Esq.** (Weinberg Gross & Pergament, LLP); **Kenneth Silverman, Esq.** (Silverman Acampora LLP); **Michael J. Macco, Esq.** (Macco & Stern, LLP)**; Richard L. Stern** (Macco & Stern, LLP)
Program Coordinator: **Richard L. Stern** (Immediate Past Academy Dean)

Time: 6:00 – 9:00 p.m. (Sign-in from 5:30 p.m.)
Location: SCBA Center
Refreshments: Light Supper
MCLE: 3 Hours (professional practice) [Non-Transitional and Transitional]

CONFERENCES & SEMINARS

RECOGNIZING & ELIMINATING ABUSE AMONG THE ELDERLY

Friday, December 2, 2011

This **Fourth Annual Symposium from the Suffolk County Task Force to Prevent Family Violence** is presented in conjunction with Touro Law Center – at Touro Law Center. Topics include:
- A Lawyer's Ethical Duty to Recognize Elder Abuse
- Recognizing and Identifying Abusive Behavior (financial, emotional, physical, criminal)
- Remedies and Legal Protections for Elderly Victims (legal and prosecution; guardianship, orders of protection; more)

Presenters: **DSS Commissioner Gregory J. Blass, Esq.; Touro Dean Lawrence Raful; Denise Marzano-Doty** (Senior Citizen Law Project–Touro); **Edwin D. Robertson, Esq.** (Cadwalader, Wickersham & Taft, LLP)**; Raquel M. Romanick, Esq.** (Brookdale Center)**; Sergeant Nancie Byrne** (Elder Abuse Bureau, Suffolk County Police)**; Timothy Ferguson** (Suffolk County Department of Social Services–Adult Protective Services); **Maureen McCormick Esq** (Elder Abuse Unit–Office of the Suffolk County District Attorney)**; Hon. Joel Asarch** (Supreme Court Guardianship Part–Nassau)**; Gail Bauer, LCSW** (VIBS)
Coordinators: Commissioner Gregory J. Blass; Professor Lewis Silverman (Director, Toro Family Law Clinic)
Academy Liaison: Hon. Isabel Buse
Time: 8:15 a.m.–1:00 p.m.
Location: Touro Law Center
Refreshments: Continental Breakfast
MCLE: 3 Hours (2.5 professional practice; 0.5 ethics) [Non-Transitional and Transitional]

ANNUAL SCHOOL LAW CONFERENCE

Monday, December 5, 2011

This annual conference, presented in conjunction with the Nassau Academy of Law, covers new and timely issues in the field of education law. It is intended for lawyers, school administrators, school board members, bargaining unit representatives, and others with an interest in the field. This year's plenary sessions focus on ramifications of the property tax cap. Breakouts cover special-interest areas.

Topics:
Plenary Session - Property Tax Cap: Tax Levy Limits and Budget Development
Morning Breakouts
The New APPR for Teachers and Principals
Bullying and the "Dignity for All Students Act"
Hot Topics in Employment Discrimination Law
Plenary Session: Property Tax Cap: Collective Bargaining Implications, Retirement Incentives and Layoffs
Afternoon Breakouts
Special Education and Section 504
The Survivor's Guide to School Board Meetings
Public Employment Law Trends: Mediation, Factfinding, Arbitration

Faculty (order of appearance):
Laura A. Ferrugiari, Esq.; Robert H. Cohen, Esq.; Mary Anne Sadowski, Esq.; Gary L. Steffanetta, Esq.; Ryan J. Ruf; Charles A. Szuberia, Jr.; Christie R. Medina, Esq.; Barbara P. Aloe, Esq.; Ronald L. Friedman, Ph.D; Richard Shane, Esq.; Carol A. Melnick, Esq.; Randy P. Glasser, Esq.; Christopher M. Powers, Esq.; Samantha Fredrickson, Esq.; Howard M. Miller, Esq.; Rick Ostrove, Esq.; Steven C. Stern, Esq.; Richard J. Guercio, Esq.; Neil M. Block, Esq.; Florence T. Frazer, Esq.; Thomas M. Volz, Esq.; Vincent P. Lyons, Esq.; Alan C. Adcock; Bernadette Gallagher-Gaffney, Esq.; Jacob S. Feldman, Esq.; Colleen Chin, Esq.; Terri A. Russo, Esq.; Mara N. Harvey, Esq.; Lawrence J. Tenenbaum, Esq.; Susan Bergtraum; Carol M. Hoffman, Esq.; Arthur A. Riegel, Esq.; Robert Sapir, Esq.; Sharon N. Berlin, Esq.
Suffolk Coordinators: SCBA Education Law Committee Chairs Richard Guercio and Gary Lee Steffanetta
Time: 9:00 a.m.–3:30 p.m.
Location: Nassau County Bar Association–Mineola
Refreshments: Continental Breakfast / Buffet Lunch
MCLE: 6 Hours (5.5 professional practice; 0.5 ethics) [Non-Transitional and Transitional]

Extended Lunch 'n Learn
UNCONTESTED MATRIMONIALS

Tuesday, December 6, 2011

This in-depth program is a must-attend for both novice and experienced matrimonial attorneys. Checklists, forms, and advice for preparing papers properly the first time will be disseminated by a presenter with an incalculable amount of knowledge and expertise.
Presenters: **Frederick Crockett** (Management Analyst–Matrimonial Part); **Hon. John Kelly**
Coordinator: **Hon. John Kelly** (Academy Dean)
Time: 1:00–4:00 p.m. (Sign-in from 12:30 p.m.)
Location: SCBA Center
Refreshments: Lunch
MCLE: 3 Hours (skills) [Non-Transitional and Transitional]

Morning Seminar
IRA DISTRIBUTION RULES & IRS COMPLIANCE ISSUES

Thursday, December 8, 2011

Learn how to prevent clients' headaches with knowledge and planning: IRS has announced a service-wide strategy to address growing noncompliance involving IRA excess

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contributions and violations of the minimum distribution rules. This program will help you to help your client stay clear of IRS problems. Topics include:

- Overview of the IRA Distribution Rules
- 50% IRS Penalty Issues
- 10% Early Distribution Penalty Issues
- Important IRA Distribution Tax Trap to Know About Trust IRA Beneficiary
- Excess Contributions
- Legal Issues Involving Roth IRAs
- Statute of Limitation Issues Involving IRA Penalties

BONUS: Registrants for this four-credit CLE/CPE program will receive the instructor's just-written manual, **"IRA Distribution Rules and IRS Compliance Issues,"** at no extra cost. The manual will sell for $60 after the seminar.

Presenter: **Seymour Goldberg, CPA, MBA, JD**
Coordinator: **Eileen Coen Cacioppo, Esq.** (Academy Curriculum Co-Chair)

Time: 9:00 a.m.–12:45 p.m. (Sign-in from 8:30 a.m.)

Location: SCBA Center

Refreshments: Breakfast Buffet

MCLE: 4 Hours (professional practice) [Non-Transitional only]

CPE: 4 Credit Hours (Intermediate)

CLE RECORDINGS

Keep in mind that past Academy programs are seldom "gone." Most remain available as recordings.

FOR DVDS AND AUDIO CDS, see the Academy's "Recorded Continuing Legal Education Catalog," mailed to SCBA members and also available on the SCBA website. SCBA members receive a 10 percent discount on all recordings, and if you buy three, you get an additional one free.

FOR ON-LINE VIDEO REPLAYS, available 24-7, go to the SCBA website (www.scba.org); click "MCLE"; choose "On-Line Video Replays and Webcasts." Browse through the many recordings organized by practice area. You may even sample a recording before deciding to make a purchase.

DECEMBER 2011 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) and take a $5 discount per course.

Sales Tax Included in recording & material orders.

COURSE	SCBA Member	SCBA Student Member	Non-Member Attorney	Season Pass	12 Sess. Pass	MCLE Pass	New Lawyer MCLE Pass	DVD	Audio CD	Course Book
UPDATES										
Family Court Update (Part Two)	$80	$40	$105	Yes	Yes	3 cpn	3 cpn	$100	$95	$40
Bankruptcy Law Update	$120	$50	$140	Yes	Yes	3 cpn	3 cpn	$140	$130	$20
SEMINARS & CONFERENCES										
Elder Abuse Symposium	$50	$25	$50	N/A	N/A	N/A	N/A	N/A	N/A	N/A
School Law Conference	$175	$175	$175	Yes	2 uses	5 cpns	5 cpns	$175	$170	$50
Uncontested Matrimonials	$65	$40	$75	Yes	Yes	3 cpns	3 cpns	$100	$90	$25
IRA Distribution Rules & IRS Issues	$149	$149	$149	Yes	Yes	4 cpn	4 cpn	$150	$145	$75

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

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

Account # _____ Exp. Date: _____ Signature: _____

History of Pro Bono and the 18B Assignment (Continued from Page 5)

compensation for assigned attorneys, it must be kept in mind that:

"Prior to the enactment of 18B, it was seen as the obligation of attorneys to represent indigent defendants without compensation. Article 18B sought to ameliorate what to some seemed an unfair burden upon those attorneys who would accept assignments. However, it was not intended to completely eliminate the pro bono public aspect of a lawyer's role in representing indigent defendants. (People v. Washington, 83 Misc.2d 807 (1975)) and cases cited therein.

Justice Goodman in his scholarly opinion also noted that:

in considering issues related to representation of the indigent that there are several public policy concerns. Among them "the expenditure of precious municipal funds at a time of fiscal difficulties (sound familiar?), the need to assure adequate and effective representation for criminal defendants….And

the need to assure that the compensation provided to assigned counsel is fair and equitable taking into account the well established quasi pro bono nature of the 18B program (Brisman, Supra). Yet further, Justice Goodman noted that

"the legislative history of Article 18B reveals that the defense bar, prosecutors and governmental agencies have long recognized that adequate compensation for attorneys is essential to assure quality representation and to enhance the quality of criminal justice in our State" (*Brisman, ibid*).

Justice Goodman, in discussing the obligation of members of the bar to serve the public stated that:

Section 722-b (of Article 18B) was designed to ease the burden of lawyers who served… The lawyers who participate do so willingly, in the highest traditions of the profession, knowing that the limited fees provided fall far short of full, or even fair, compensation for their services. In so participating, the lawyers undertake an important public service, which before the statute was enacted they performed without any compensation at all (ibid).

The American Bar Association's view

The long history of pro bono was also memorialized in the 2005 Report of the American Bar Association's Standing Committee on Pro Bono and Public Service entitled *"Supporting Justice: A Report on the Pro Bono Work of America's Lawyers."* In its Report the Committee stated that:

Pro Bono Publico is fundamental to the practice of law and has been viewed as an ethical responsibility of lawyers both formally and informally since the beginning of the profession. (Ibid).

Many states either require or recommend varying hours of pro bono service. The American Bar Association has recommended 50 hours while the New York State Bar Association recommends 20 hours. For many years now there has been a call by some for a mandatory pro bono requirement, which is opposed by most practicing attorneys. It would seem that one way of preventing the imposition of mandated pro bono is for lawyers to contribute significant numbers of hours of such work.

History of Suffolk County's 18B Plan

In essence Article 18B of the County Law (Section 722) provides that the counties are to provide a "Plan" for the representation of the indigent which can be comprised of a Legal Aid Society and/or participation of private attorneys. Article 18B applies to representation of indigent defendants in the criminal courts as well as parties in Family Court Proceedings under Sections 262 and 1120 of the Family Court Act and in the Surrogate's Court to protection of persons under a disability pursuant to Section 407 of the Surrogate's Court Procedure Act.

Pursuant to this legislative mandate the County of Suffolk (i.e. the County Executive), The Suffolk County Bar Association and the Suffolk County Criminal Bar Association entered into an agreement providing for an 18B Plan in October of 1966. The plan, formally known as the Assigned Counsel Defender Plan, had been previously approved by the two Bar Associations in January of 1965. The plan was adopted by the Appellate Division in 1969.

The agreement and the plan contained therein has been renewed annually in substantially the same form ever since. In its approximately 45 years of existence, the plan has had only three administrators. The first was Hon. Leonard Wexler who served for many years prior to his appointment as a United States District Court Judge in 1983. Judge Wexler was followed by Suffolk County Bar Association Past President Bob Quinlan who served until 2006. Bob was succeeded by Suffolk County Bar Association Past President Dave Besso who is currently serving as administrator of the plan.

The terms of Suffolk's 18B Plan

The plan calls for representation of the indigent first by the Legal Aid Society and then in the case of conflicts by qualified attorneys selected from an 18B List. In addition, defendants charged with Class A Felonies such as murder are assigned exclusively from the list of private attorneys. This list is referred to as the "A List." Additionally, the "B List" is comprised of those attorneys qualified to represent defendants on other felonies and misdemeanors. The "C List" is comprised of those attorneys qualified to represent defendants on misdemeanor charges. (While not all represented parties are criminal "defendants," e.g. Family Court parties, and others, for the sake of simplicity we will discuss these issues in the context of criminal cases. The issues are the same for all types of representations).

Attorneys are selected in order from a list although judges have the authority to assign a particular attorney. Attorneys are assigned to arraignment parts in Riverhead and Hauppauge as "18B lawyer for the day" on a rotating basis. Defendants are not permitted to select their own lawyers. Representation for eligible parties is provided for at the trial level as well as on appeals.

The current rate of payment for 18B representation on misdemeanors is $60 per hour plus expenses and $75 per hour plus expenses for felonies and all other matters. Unless extraordinary circumstances exist, the maximum payment on any one case for misdemeanor representation is $2,400 and $4,400 for felony representation. No assigned counsel may accept a fee from a defendant assigned pursuant to Article 18B without approval from the court.

The payment process

Vouchers are submitted for approval by the assigned attorney to the judge presiding over the assigned case. The vouchers are then sent to the plan administrator's office where they are reviewed for accuracy, that proper guidelines are followed and for errors. The plan administrator then forwards the vouchers to the County Attorney for further processing. According to Administrator Besso, most vouchers are processed by his office and forwarded to the County Attorney within 30 days or in some cases 45 days unless it is returned to the judge for procedural or substantive issues. The County Attorney's Office reviews the vouchers before sending them to the Comptroller's Office. According to County Attorney Malafi, her office takes about two weeks to process the vouchers before sending them onto the Comptroller who takes anywhere from two to four weeks more to issue checks according to what Ms. Malafi's been told by the Comptroller's Office. Of course, if there's no money in the pipeline, no checks go out.

What does all of this have to do with the current 18B program?

There are principles that to some would appear to be contradictory. On the one hand there is the traditional philosophy that lawyers have a professional duty to perform pro bono work without payment as indicated by those who espouse either recommended or mandated pro bono work. On the other hand there is the belief held by most of us that lawyers should get paid for the work they do, if not at market rates at least to an extent that is *fair and equitable taking into account the well established quasi pro bono nature of the 18B program. Judge Goodman (Supra).* As this quote makes clear the purpose of Article 18B is to guarantee that lawyers get paid for the work they do in the service of the public.

Another set of principles mandates that all indigent defendants are guaranteed by the Constitutions of the United States and the State of New York to effective representation by competent counsel. Judges must see to it that all eligible defendants are represented. Yet they must do so in the context of a severe downturn in the economy with fewer and fewer resources available to carry out constitutional mandates. This economic downturn has also resulted in an increase in the number of cases assigned to the Legal Aid Society and to 18B attorneys.

Lawyers have a professional responsibility to perform pro bono work in representing indigent defendants. While lawyers who provide legal services to the indigent are performing a function that is primarily pro bono publico they are nonetheless entitled to compensation that is fair, equitable and reasonably prompt in light of the pro bono nature of their representation.

Note: John L. Buonora is a Past President of the Suffolk County Bar Association and the Suffolk County Criminal Bar Association. He recently retired as Suffolk County Chief Assistant District Attorney and is an Adjunct Professor of Law at Touro Law Center.

Ethical Propriety of Referral Fees

(Continued from Page 13)

of a lawyer. *See, e.g., Benjamin v. Koeppel*, 85 N.Y2d 549 (1995) (client interviews, case evaluation, and discussions and meetings with receiving attorney and client sufficient; fee upheld); *Easton & Echtman*, 835 N.Y.S.2d 23, 2007 N.Y. Slip. Op. 02971 (2007) (fee upheld where referring attorney listed as "of counsel" on receiving firm's letterhead and Martindale-Hubbell listing); *Nicholson*, 192 A.D.2d at 474 (1993) (mere search for potential clients and conducting non-investigative interviews insufficient; fee disallowed).

"Ambulance chasing" or outright solicitation, directly or indirectly, will patently violate the rules (*see Matter of Ravitch*, 82 A.D.3d 126, 919 N.Y.S.2d 141 (2011) (attorney given three month suspension for instructing paralegal to seek out and persuade medical clinic patients to retain firm after the patient had declined the clinic's suggested referral to the attorney)), as will obviously "sham" or pretextual arrangements (*see Matter of Meyerson*, 46 A.D.3d 141, 845 N.Y.S.2d 227 (2007) (*quid pro quo* arrangement of paying clinic for narrative reports never received as an inducement for a continued referral stream of clinic patients to attorney); *Matter of Rudgayzer*, 80 A.D.3d 151, 915 N.Y.S.2d 22 (2010) (firm's payment for narrative reports as inducement to "keep referrals flowing")).

Under the code or the rules, the "difficult question" remains the same: "whether a lawyer may share fees with a lawyer who does nothing but refer a case […] in a ratio far out of proportion to the amount of work that the other lawyer does on the case." *Weiser & Assoc. v. Anthony Donofrio & Assoc.*, 2009 N.Y. Slip. Op. 31393(U).

Practice Tips

When appropriate, the referring attorney is entitled to a fee. The referring attorney can protect his or her expectation of a referral fee by (1) advising the client in writing; (2) obtaining the client's written consent; (3) continuing to remain involved in the case; and (4) maintaining contemporaneous time records to support the referring attorney's assertions. Ideally, the referring attorney should receive some form of confirmation in writing, even in an email, that delineates the parameters of the arrangement between the referring attorney and the handling attorney. This will help to set expectations at the outset, when perhaps the receiving attorney is more willing to acknowledge the obligation to share a fee that has not yet materialized.

Note: Alison Arden Besunder is the principal of the Law Offices of Alison Arden Besunder P.C. in Manhattan and Brooklyn, and of counsel to Bracken Margolin Besunder LLP in Islandia. In addition to trusts and estates, estate planning, and estate and commercial litigation, she also handles intellectual property matters including trademark and copyright infringement.

This article does not address fees received pursuant to a "contractual arrangement" with another entity or referral fee organization.

1. The prior Code of Professional Responsibility (the "Code") also prohibited fee-sharing among attorneys not associated in the same firm, unless the client consented to employment of the other lawyer after full disclosure. Failure to obtain client consent would result in an inability to collect any referral fees. 22 NYCRR 1200.12 (DR § 2-107). The new Rules 7.2 and 7.3 are identical to the prior DR § 2-103. Rule 1.5(g) is similar in substance to the prior DR § 2-107(A), but Rule 1.5(g)'s opening phrase replaces the phrase "is not a partner in a law firm" with the broader phrase "is not associated in the same law firm." Rule 1.5(g)(2) requires disclosure to the client of the "share each lawyer will receive" and requires that the client's agreement is confirmed in writing.

Bench Briefs *(Continued from Page 4)*

by the defendants. The court noted that pursuant to CPLR § 3012(d), a motion to extend the time to serve an answer may be granted upon a showing of a reasonable excuse for delay and default and is addressed to the sound discretion of the trial court. The court pointed out that said section did not require an affidavit of merit as a precondition in obtaining relief when the delay in failing to answer has been of a reasonably short duration. In granting the cross-motion, the court noted that the delay in answering was relatively short.

Defendant's motion for summary judgment granted; plaintiffs precluded from recovery in contract or quantum merit as they failed to submit any evidence that they were licensed at the time the services were rendered

In *Emergency Restoration Services Corporation d/b/a Servpro of the North Fork, Joseph Giambone v. Nicole Corrado, Metlife Auto & Home Insurance Agency, Inc.* Index No.: 46015/09, decided on September 28, 2011, the court granted the defendant, Nicole Corrado's motion for summary judgment as to the first, second and third causes of action of the plaintiffs' complaint.

The court noted that this was an action for breach of contract, quantum merit, conversion, and libel. In support of the instant motion the defendant averred that the plaintiffs were not licensed home improvement contractors as required by Article II, Section 345-126 of the Laws of Suffolk County as well as Chapter 143-2 of the Town Code of the Town of Southampton. As such, the defendant argued that the plaintiffs were precluded from recovery in either contract or quantum merit.

In opposition thereto, the plaintiffs failed to submit any evidence that they were licensed at the time the alleged services were rendered. Accordingly, the plaintiffs were not entitled to recover payment for those services and the defendant's motion for summary judgment was granted as to the first, second and third causes of action in the complaint.

Motion for leave to intervene granted; proposed intervenor's rights would be adversely affected by any change in the status of ownership of the subject property.

In *Gail Stubbolo v. Abraham Goldoegger, Bernard Shafran, East Gate Properties, LLC, Real Spec Ventures, and Re-equity Servicing, LLC,* Index No.: 48927/09, decided on February 25, 2011, the court granted the motion by non-party Deutsche Bank National Trust Company for leave to intervene pursuant to CPLR § 1012 (a)(3).Plaintiff alleged that she was the owner of the premises located at 6 East Gate Road, Huntington, Suffolk County, New York and was fraudulently induced to transfer the property to defendant East Gate Propertied, LLC. Defendant East Gate encumbered the property with a mortgage in the amount of $1,680,000.00 to First Central Savings Bank. The proposed intervenor was the successor in interest to First Central Savings as to the subject mortgage by way of an assignment of mortgage, and was the present holder of the note and mortgage. In granting the motion, the court pointed out that the proposed intervenor's rights would be adversely affected by any change in the status of ownership of the subject property that it allegedly encumbers by the subject mortgage.

HONORABLE WILLIAM B. REBOLINI

Motion to limit defendants' deposition testimony denied; failure to support motion with affirmation of good faith; nonetheless, imposition of a protective order limiting the deposition to one general question would be inappropriate, where as in this case, the defendants failed to show that the infant defendant was declared incompetent to proceed, was psychologically incapable of being deposed, or that testifying would cause him permanent damage or be life impairing.

In *Joshua Alperin, an infant by his parent and natural guardian, Michelle Alperin-Smith and Michelle Alperin-Smith, individually, and Michael Smith, individually v. Smithtown Central School District, Justin Deleo, an infant by his parents and natural guardians "Carrie and Rick" Deleo and "Carrie and Rick" Deleo, individually and as parents and natural guardians of Justin Deleo,* Index No.: 21664/09, the court denied the defendants' motion to limit the deposition of the infant defendant. The defendants' sought to limit the infant defendant's deposition. Plaintiffs argued that such a limitation would prevent them from establishing their prima facie case. In particular, the plaintiffs argued that limiting the questioning of the infant defendant to one general question regarding his abuse of the infant plaintiff would hinder its ability to defend itself.

The School District further argued that the imposition of such a protective order would be inappropriate unless the infant defendant was declared incompetent to testify or it was shown that such deposition would be psychologically harmful to him. The court found that the defendants' failure to support their motion with a good faith affirmation required summary dismissal of the motion. Nonetheless, the court noted that the imposition of a protective order limiting the deposition to one general question would be inappropriate, where as in this case, the defendants failed to show that the infant defendant was declared incompetent to proceed, was psychologically incapable of being deposed, or that testifying would cause him permanent damage or be life impairing. Finally, the court pointed out that while they had the authority to make an anticipatory ruling regarding the questions that may be asked during a disclosure proceeding, ordinarily a ruling on the propriety of a deposition question should be made after a specific question has been asked and the witness has refused to answer it.

Motion for an order directing the execution of a deposition transcript denied; refusal or delay in signing or returning a deposition transcript was not a disclosure violation.

In *Mary Theresa Murphy v. County of Suffolk, Suffolk County Police Department, County of Suffolk and Suffolk County Police Department v. Joseph LePore,* Index No.: 38407/08, decided on June 25, 2011, the court denied the plaintiff's motion for an order directing Police Officer William Michaelis to execute his deposition transcript and return and deliver the executed transcript to the plaintiff's attorney. In denying the motion, the court noted that the plaintiff's attorney failed to provide the required affirmation of a good faith effort to resolve the parties' discovery dispute. Nonetheless, the court noted that to the extent that the plaintiff sought to compel the defendants to return a signed deposition transcript, it was pointed out that any refusal or delay in signing or returning a deposition transcript was not a disclosure violation since there was a statutory direction for the use of such transcript as if it were signed.

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. To be considered for inclusion in the January 2012 issue, submission must be received on or before December 1, 2011. Submissions are accepted on a continual basis.

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

Role of Legal Advisor in Facilitating Hospital Discharges *(Continued from Page 10)*

when stable, optimally might be accommodated at home with adequate support tailored to the patient's needs but vendors will not commit to providing necessary home health aides and nurses, durable medical equipment or pharmaceuticals without payment. A hospital will not discharge a patient to his or her home without such support in place because the discharge would be medically inappropriate and possibly unsafe, and the deficiencies well may result in a rapid readmission. Hence home placement also is frustrated for lack of funds.

Sometimes discharge planning is complicated by the absence of a legal representative for an incompetent or incapacitated patient unable to facilitate his or her own discharge by approving admissions and by filing applications for insurance and health plan benefits, Medicare or Medicaid, and who might access and collate the documentation necessary to support such applications. Most subacute, rehabilitation and long term care facilities insist that the person purporting to sign admission papers and obligate payment be someone with appropriate legal authority to act. [5] Rare is the patient (especially a younger one now suddenly suffering the effects of a catastrophic illness or severe trauma) who had the foresight to execute a durable power of attorney, a health care proxy or another advance directive allowing an agent to act as decision maker on his or her behalf. In these cases the only viable option is for a family member or the hospital to commence proceedings for the appointment of a guardian. [6] Where family members are unwilling or unable to pay for the legal services, the hospital may be the only party that has sufficient interest and the wherewithal to incur the expense. Guardianship proceedings are also time consuming. Staff members must assist counsel in the preparation of necessary affidavits and documents and appear in court as witnesses. Court calendars are congested and, barring a true emergency, hearing dates will be scheduled next in the order of filing. If there is resistance by the family or even by the patient, the proceedings may be more protracted. In this writer's experience, it is not unusual for a routine proceeding, from the filing of initial papers to the issuance of an order appointing a guardian, to the guardian accepting and qualifying, to average three months or more.

One of the more difficult institutional issues is presented by the regulations governing approval of Medicaid eligibility for followup care. Medicare or some unusually generous commercial insurance or health plan will cover some subacute and chronic care only for relatively short courses of treatment. Most chronic care providers, knowing this, will decline to accept a patient without either a commitment to pay privately, or approved Medicaid eligibility, for fear of being "stuck" with the patient after any short term coverage is exhausted. Unlike Medicare, which is a government entitlement program, Medicaid eligibility is a function of financial need. Since younger patients and/or those with financial means generally are not eligible, the issue of obtaining Medicaid to cover long term chronic care usually does not even arise until the illness or injury occurs, the patient already is in the hospital bed, and the need for a funding source for an appropriate plan of long term care presents itself. Consequently, all of the work and all of the time consumed in the complex environment of Medicaid application and eligibility (including the appeal of initial denials of eligibility via "fair hearings" and even possible lawsuits) is borne at the expense and exposure of the hospital.

Leaving aside financial issues, the greatest social barrier to a timely discharge is a lack of cooperation by the patient or family in the discharge process or the outright refusal of the patient to consent to the discharge. There are many reasons. Even though fully licensed and qualified to address the patient's needs, often a subjective dissatisfaction with the recommended facility or nursing home prevents discharge. ("It's too far;" "it's smelly;" "my aunt's neighbor had her mother there and hated it") The refusal, unwillingness or inability to marshal assets and commit financial resources is another reason. (Understandably the family unit may suffer hardship if a significant revenue stream must be diverted to chronic care.) Notwithstanding acceptance by an appropriate rehabilitation or chronic care facility, sometimes the patient or family refuses to consent to discharge or to sign admission papers. This last tactic frustrates the subacute or chronic care facility's ability to bill for its services and be paid for the care it renders and, quite understandably, is often fatal to any acceptance. (Objecting family members sometimes make known their complaints to the facility considering accepting the patient, a strategy that often results in a declination by a facility administrator.) Patient and family concerns also may be expressed in a myriad of other factors not directly relevant to the medical propriety of the facility; sometimes the issues are advanced precisely to impede discharge from the hospital. Often the patient or family is unwilling to accept the medical diagnoses, prognoses and recommendations of the hospital staff for necessary subacute, rehabilitative, custodial and other long term care and discharge planning because the patient or family believes that their loved one will receive the "best" care by remaining in the hospital.

Here is one area in particular in which the family attorney can assist. The cooperation of the patient and family is essential to marshalling patient assets and securing coverage from third parties, especially Medicaid, so there are funds from which to pay for additional rehabilitative or chronic care. The refusal of a patient or family members to disclose and expose assets which must be made available to satisfy Medicaid eligibility requirements denies the availability of the most common source of funding for any subacute or chronic care. Since facilities rendering such care are not mandated by law to accept an indigent patient or bear the burden of extensive uncompensated care, placement is unlikely and the patient remains in the hospital's acute care bed. *When a patient is uninsured or underinsured the patient and/or family may be required to address significant acute care hospital costs that are substantially greater than charges incurred at facilities providing care at lower acuity levels.* Even with hospital coverage through commercial insurance or Medicare, when the patient is stable insurers are quick to deny continued hospitalization as "not medically necessary," cutting off hospital payment. Hospitals take seriously their responsibility to advocate for patients requiring continued acute care in the face of aggressive denial strategies by insurers but when continued inpatient care is not required a hospital will not assert the contrary in bad faith. Consequently, when uncompensated days are incurred because of a lack of cooperation in the discharge process it is neither unfair nor unlawful (given proper notice and appeal rights) that the patient be held financially accountable. *Your clients should know that they will be !!*

Besides, patients who unnecessarily remain at acute care hospitals are at risk to develop decubitii (commonly known as "bed sores"), assorted antibiotic resistant conditions such as "MRSA" and "VRE" [7] and other "hospital acquired conditions". A patient's strength deteriorates as physical and occupational therapy needs cannot fully be addressed over the long term. Hospital care and services made necessary as a result of "hospital acquired conditions" may not be compensated even when there is a third party source of payment (e.g., Medicare's comprehensive new plan to deny payments for certain "adverse events," an idea now being picked up by Medicaid and commercial health plans).

Note: James Fouassier, Esq. is the Associate Administrator of Managed Care for Stony Brook University Hospital. He is a past Co-Chair of the Association's Health and Hospital Law Committee. His opinions and comments are his own. He may be reached at james.fouassier@sbumed.org.

1. See, e.g., NY Pub. Health Law Articles 28 (hospitals); 28-D (nursing homes); 35 (radiological diagnostic centers); 46-B (assisted living facilities); also, generally, Article 2 Title 2 (Public Health Council).

2. In the wake of federal class actions challenging the tax exempt status of not for profit hospitals, a number of states adopted legislation mandating financial assistance or charity care for "indigent" patients. In New York, eligibility is based on a percentage of the federal income poverty level. NY Pub Health Law 2807-k(9-a); *see also* Letter of Richard F. Daines, MD, Commissioner, to hospital chief executive officers dated June 22, 2007.

3. Emergency Medical Treatment and Active Labor Act, 42 USC 1395dd; see, also, 42 CFR 489.24

4. A "short" payment implies a payment less than what a provider will accept. The concept is relevant when a provider is not being paid a fixed negotiated rate as a part of a provider network but instead is "out of network" for the patient's insurer or, alternatively, when the patient is uninsured.

5. Contrary to popular opinion, absent a valid power of attorney or health care proxy a "spouse" or adult child is not legally empowered to make financial or health care decisions for an incapacitated or incompetent adult. In New York, for powers of attorney established by statute see General Obligations Law sections 5-1501 through 5-1506; for health care proxies and agents see Pub Health Law sections 2980 through 2994.

6. New York Mental Hygiene Law Article 81. The burden of proof which must be met by a party seeking the appointment of a guardian is high. In New York, under Article 81 an appointment requires proof by the standard of "clear and convincing evidence" that the patient is likely to suffer harm because he or she is unable to provide for his or her own personal needs or manage his or her property *and that* the patient cannot adequately understand and appreciate the nature and consequences of his functional limitations and inabilities. Where a patient is *unable* to cooperate with discharge planning due to some physical or mental limitation a showing of need usually is straightforward (regardless of what the family says or does); where the patient is *able but unwilling* an entirely different situation is presented. See the discussion in the main article, *infra*. A stubborn or recalcitrant patient with a "difficult personality" still may be capable of understanding the risks inherent in remaining in an acute care hospital bed, or the financial or social problems he perpetuates, but if he also is capable of making his own personal and financial decisions a court will not appoint a guardian for him. *See, e.g., Matter of Louis Koch*, (Sup Ct Queens Co. 11-16-99; 16743/99): "The Court recognizes and appreciates [the hospital's] dilemma. It is beyond question that Mr. Koch is a difficult and uncooperative individual. He continues to be a patient at [the hospital] despite the fact that he has not been in need of acute care [for five months]. Nevertheless, [the guardianship provision of] the Mental Hygiene Law is not the appropriate vehicle to redress the predicament in which [the hospital] finds itself."

7. *Methicillin-resistant Staphylococcus aureus*, or MRSA, must be treated with other strong antibiotics. Some strains of *Enterococci* are resistant to Vancomycin are called *Vancomycin-resistant Enterococci*, or VRE, and also are very difficult to treat.

COMMITTEE CORNER

News & Notes From SCBA Committees

Elder Law & Estate Planning
Steven A. Kass,
and Janna P. Visconti, Co-Chairs

Shannon Mallon, of Guildnet, presented a program on Medicaid Managed Care Programs. The members learned of the options for Medicaid Recipients to utilize Medicaid Managed Care Programs, which may be required of all Medicaid Home Care Recipients in the future. A discussion was also held on 11ADM-08, regarding Medicaid's Estate Recovery law.

Creditors' Rights Law
Elliott M. Portman, Chair

The meeting was organizational in nature with the purpose of setting goals and C.L.E. objectives. There was a lively discussion regarding the use of Restraining Notices with and without Information Subpoenas, the Certificate of Conformity issue and the three in-committee (hopefully joint) C.L.E. programs regarding debt collection and judgment enforcement. The committee will meet every other month going forward.

District Court
Hon. William G. Ford
and Harry Tilis, Co-Chairs

A discussion was held concerning issues that effect District Court practitioners including the establishment of trial parts, improvements in efficiencies and the leadership of The Hon. Ricardo Montano in providing much needed relief for the 18B indigent defense fund. District Administrative Judge C. Randall Hinrichs, the Committee's guest, participated in a vibrant discussion of matters of concern facing the system.

Matrimonial & Family Law
Laura Golightly
and Karyn A. Villar, Co-Chairs

The co-chairs and attendees were able to select future meeting dates and select approrpirate topics and issues to be addressed during the upcoming meetings. It was suggested that it would be better if all (or a majority) of the committee members actually attend a meeting.

ACADEMY OF LAW NEWS

"THE TWELVE DAYS OF CLE"

(And How They Can Help Your Practice)

On the first day of CLE, the speaker gave to me... a course book from the Academy.
On the second day of CLE, the speaker gave to me, two practice tips and a course book from the Academy.
On the third day of CLE, the speaker gave to me... three useful forms, two practice tips, and a course book from the Academy.
On the fourth day of CLE, the speaker gave to me... four spot-on cases, three useful forms, two practice tips, and a course book from the Academy.
On the fifth day of CLE, the speaker gave to me... FIVE GOLDEN CLIENTS...

By Dorothy Paine Ceparano

Well maybe not exactly.... But if the musical analogy (despite the poorly constructed meter) is carried to its twelve-day conclusion, that's at least 24–36 MCLE credits, which not only meet the full biennial requirement for New York lawyers, but could very well translate into more clients or more services for existing clients.

Lawyers who want to bone up on a practice area, learn a new skill or competency, find out what is new in a field, or discover how to do something in a new or better way can look to continuing legal education – and the willingness of CLE instructors, unpaid volunteers all, to share their time and knowledge – for the answers. In this gift-giving season, it seems appropriate to call attention, not only to the value of CLE, but to the generous offerings the Academy's volunteer presenters bestow upon colleagues all year long. The Academy – and its constituents – are indeed fortunate to have so many talented educational benefactors.

December CLE

December is a case in point. In the midst of busy holiday festivities and obligations, the Academy, through its volunteer presenters, is nevertheless able to provide an assortment of CLE classes on a variety of substantive topics. December programs cover school law, uncontested matrimonials, child support, IRA distribution rules, elder abuse, and bankruptcy law developments.

The month includes three programs intended not only for lawyers, but for other professionals with whom lawyers often work hand-in-hand.

On the morning of Friday, December 2, the Academy joins Touro Law Center and the Suffolk County Executive Task Force to Prevent Family Violence for a symposium on **"Recognizing and Eliminating Abuse among the Elderly."** Topics include lawyers' ethical duties when recognizing elder abuse; identifying financial, emotional, and physical abuse; and legal protections for elderly victims. Lawyers, social workers and others may attend tuition free; there is a nominal charge, however, for those who wish the three MCLE credits (including a half credit in ethics) that will be awarded through the Academy. At this writing, more than 100 people are already enrolled in the program, which will be presented at Touro in the auditorium.

Six MCLE credits (including a half credit in ethics) will be awarded at the **Annual School Law Conference** presented by the Suffolk and Nassau Academies and the SCBA and NCBA Education Law Committees on Monday, December 8, at the Nassau Bar Association in Mineola. With a focus on the property tax cap and its ramifications for budget development, collective bargaining, retirement, layoffs, and so forth, the conference, as it traditionally has, will draw an audience of lawyers, school administrators, school board members, teachers, representatives of bargaining groups, and others with an interest in legal issues affecting Long Island schools. In addition to the tax-cap plenary sessions, this year's conference includes break-out sessions on bullying, employment discrimination, the new APPR for teachers and principals, special education and Section 504, effective participation in school board meetings, and public employment law trends.

The third inter-professional offering in December is a four-credit presentation on **"IRA Distribution Rules and IRS Compliance Issues"** for lawyers and accountants. The program, scheduled for the morning of Thursday, December 8, at the SCBA Center, features the highly informed and informative Seymour Goldberg, CPA, MBA, JD, who will discuss the IRS plan to implement a service-wide strategy to address growing non-compliance involving IRA excess contributions and violations of the required minimum distribution rules. Both CLE and CPE credits will be awarded.

December also includes three important programs (all at the SCBA Center) for attorneys who practice – or would like to practice – in the given fields. On Tuesday, December 6, Frederick Crocket III (Management Analyst for the Matrimonial Part in Suffolk County) will join Academy Dean, the Honorable John Kelly, for an extended lunch program on **Uncontested Matrimonial Actions.** On the evening of Wednesday, December 7, the second part of this year's two-session **Family Court Update** will provide in-depth analysis of important child support issues (including paternity cases, college tuition issues, violation proceedings, and 5015 motions). And finally, on the evening of Monday, December 19, Immediate Past Dean Richard Stern and a faculty of experienced bankruptcy practitioners will present this year's **Bankruptcy Law Update,** which will address, among other things, Chapter 7 and Chapter 13 issues, important new cases, and clawbacks in bankruptcy matters**.**

Winter 2012

As 2011 draws to a close, the Academy is in the process of planning its Winter 2012 term. Watch for a four-session **Criminal Law Series;** an evening seminar on **Wrongful Death Actions;** a lunch program on the **Medicaid Estate Recovery Act;** a four-credit primer, **Negligence 101;** a lunch program on **SCPA 2211 Examinations,** an evening program on **Grievances;** the annual **Law in the Workplace Conference;** George Roach's **Elder Law Update;** the Annual March Mondays **Matrimonial Law Update and Series;** an evening program on **Will Contests;** two lunch programs on **Advising Clients on Buying or Selling Distressed Real Estate,** and many other programs that will help lawyers to hone their skills and acquire new ones.

In these difficult financial times, many lawyers who concentrated their practices now need to diversify, and many general practitioners need to add new areas to their lists of competencies. Hence, continuing legal education may be one of the best practice development strategies available. Why not plan to give yourself the gifts of CLE in this holiday season and in the coming months? The Academy's multi-faceted curriculum, designed with Long Island lawyers in mind, goes on not just for "12 CLE Days," but throughout 12 months of the year and for more than 100 annual educational offerings.

We wish our constituents a joyous holiday season and a happy and professionally rewarding new year!

Note: The writer is the executive director of the Suffolk Academy of Law (and definitely not a composer of holiday tunes).

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.

December

2	Friday	**Elder Abuse Conference.** 8:30 a.m.–1:00 p.m. Touro Law Center (Central Islip)
5	Monday	**School Law Conference.** 9:00 a.m.–3:00 p.m. Nassau Bar Association (Mineola)
6	Tuesday	**Uncontested Matrimonials.** 1:00–4:00 p.m. Sign-in and lunch from 12:30 p.m.
7	Wednesday	**Family Court Update.** Part 2 (Child Support). 6–9 p.m. Sign-in and light supper from 5:30
8	Thursday	**IRA Distribution Rules & IRS Compliance Issues.** 9:00 a.m.–12:45 p.m. Breakfast buffet from 8:30 a.m.
9	Friday	**NOTE NEW DATE:** Meeting of Academy Officers & Volunteers. 7:30–9:00 a.m. Breakfast buffet. All SCBA members welcome.
19	Monday	**Bankruptcy Update.** 6–9 p.m. Sign-in and light supper from 5:30

January

5	Thursday	**District Court–Criminal Law Series** begins. Continues on January 12, 19, 26. Each evening, 6–9 p.m. Sign-in and light supper from 5:30
6	Friday	Meeting of Academy Officers & Volunteers. 7:30–9:00 a.m. Breakfast buffet. All SCBA members welcome.
17	Tuesday	**Wrongful Death Cases.**.6–9 p.m. Sign-in and light supper from 5:30
18	Wednesday	**Negligence 101** (Four-Credit Program). 5–9 p.m. Sign-in and light supper from 5:30
31	Tuesday	**Medicaid Estate Recovery & LTC Policies as One Option.** 12:30–2:10 p.m. Lunch from noon.

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