



THE SUFFOLK LAWYER

THE OFFICIAL PUBLICATION OF THE SUFFOLK COUNTY BAR ASSOCIATION

DEDICATED TO LEGAL EXCELLENCE SINCE 1908

website: www.scba.org

Vol. 29 No. 4
December 2013

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SCBA Hosts Judiciary Night

By Laura Lane

The annual SCBA Judiciary Night was once again an evening of good food, great conversation and many moments to show the appreciation that attorney's experience each day while working with so many stellar judges in Suffolk's judicial system. This year everyone gathered at the elegant Lombardi's On the Bay on Oct. 30, for what has become one of the most popular bar events of the year.

"Tonight is a time to recognize the rela-

tionship between the bench and bar and honor our judiciary," said SCBA President Elect Bill Ferris. "I am honored to follow in the footsteps of my prior presidents who led Judiciary Night."

Mr. Ferris went on to mention each of the members of the bench who were at the event, and there were quite a few. Standing when mentioned, each judge received an appreciative round of applause from everyone who attended.

Judiciary Night is not an event that all bar association's host. And it isn't often



Photo by Barry Smolowitz

Former SCBA President Harvey Besunder, Hon. William B. Rebolini, Justice of the Suffolk Supreme Court, and Hon. Randall T. Eng, Presiding Justice, Appellate Division, Second Department, enjoyed Judiciary Night.

that attorneys are granted an opportunity to mingle with so many judges and casually be afforded the chance to socialize. The Suffolk County Bar Association's Judiciary Night is an event that is always well attended and this year was not any different.

Judge C. Randall Hinrichs, Administrative Judge for Suffolk County, thanked the bar on behalf of the judiciary for hosting Judiciary Night. "Many of my colleagues are here tonight," he said. "Thank you for the efforts you make each and

(Continued on page 20)



Photo by Ron Pacchiana, JPA Studios

SCBA's Veterans Military & Veterans Affairs Committee Host Luncheon

Our veterans were honored at the first SCBA Veterans Luncheon on Nov. 8 at the SCBA. Many people attended including, the Hon. Andrea H. Schiavoni, Southampton Town Court Justice; Hon. C. Randall Hinrichs, Suffolk County's District Administrative Judge and Hon. Donald Kitson, retired Supreme Court Justice. (See story and more photos on page 17)

PRESIDENT'S MESSAGE

Comp R Us

By Dennis R. Chase

Readers had to know this day would come . . . your President, after all, is at least in part, a workers' compensation practitioner. Yes, I am the proud bastard child of the personal injury attorney. I bring you the following message because the message is important to every employer and every employee, both of whom have the potential to experience the Workers' Compensation Law in all its illustrious glory. The following was NOT written by yours truly, but by one of my most learned colleagues in the field, Robert Grey of Grey and Grey (Farmingdale, New York). This is not the first time I have borrowed from Mr. Grey and certainly will not be the last; Mr. Grey is a leader in our field whom I hold in the highest regard. I have taken some liberties here to make his original piece a bit more understandable to the average practitioner, but the sentiments remain essentially the same.

On August 15, 2013, the Workers' Compensation Board announced a "business process re-engineering" initiative "designed to significantly improve the experience of injured workers and employers in the New York workers' compensation system." The board has asked "stakeholders" (injured workers, employers, doctors, lawyers, insurance carriers, and others) for their views of the system.

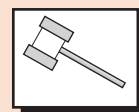
Most practitioners firmly believe that that some of the basic components of a good workers' compensation system should include:

- Clear communication to injured workers about the existence of the workers' compensation system, the type and availability of benefits, the rights (including the right to counsel) and obligations of injured workers.
- Timely delivery of indemnity benefits to injured workers by the workers' compensation insurance carriers AND consistent and effective penalties for non-compliance of the rules for employers and carriers.

(Continued on page 20)



Dennis R. Chase



BAR EVENTS

Council of Committee Chairs Tuesday, Dec. 3 at 5:30 p.m.

Great Hall

The annual meeting of committee chairs to discuss issues and matters of concern.

Holiday Party Friday, Dec. 6 from 4 to 7 p.m. Great Hall

Everybody is welcome to celebrate the start of the holiday season. Reservations required by calling the Bar at (631) 234-5511.

Judicial Swearing-In and Robing Ceremony

Monday, Jan. 13, 9 a.m.

Touro Law Center, Central Islip

The annual judicial ceremony of the newly appointed and reelected justices and judges hosted by the SCBA. All are welcome. Refreshments served.

Meet, Greet and Mingle Thursday, Jan. 23, 6 p.m.

Polish Hall, Riverhead

Please join your colleagues for the first evening in a series of complementary opportunities to meet, greet, mingle and network. Reservations are a must and can be made by clicking on the link, <http://www.scba.org/post/mgm1.pdf>.



Suffolk County Bar Association

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Our Mission

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

Join Our Leadership

The Nominating Committee of the SCBA is soliciting recommendations and expressions of interest from the members interested in holding the following positions: president elect, first vice president, second vice president, secretary, treasurer, four (4) directors (terms expiring 2017) and three (3) members of the Nominating (terms expiring 2017). 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.

Members of the Nominating Committee are: Hon. Peter H. Mayer; Sheryl L. Randazzo; Ted M. Rosenberg; John L. Buonora; Annamaria Donovan; Matthew E. Pachman; Louis E. Mazzola; Arthur E. Shulman; Michael J. Miller.

— LaCova

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

THOMAS MORE GROUP TWELVE-STEP MEETING

Every Wednesday at 6 p.m.,
Parish Outreach House, Kings Road - Hauppauge
All who are associated with the legal profession welcome.

LAWYERS COMMITTEE HELP-LINE: 631-697-2499

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

DECEMBER 2013

3 Tuesday	Council of Committee Chairs, 5:30 p.m., Board Room.
4 Wednesday	Appellate Practice, 5:30 p.m., E.B.T. Room.
5 Thursday	Bench Bar, 6:00 p.m., Board Room
6 Friday	SCBA's Annual Holiday Party, 4:00 p.m. to 7:00 p.m., Great Hall, Bar Center.
9 Monday	Executive Committee, 5:30 p.m., Board Room
11 Wednesday	Judicial Screening Task Force, 5:30 p.m., Board Room.
16 Monday	Board of Directors, 5:30 p.m., Board Room.
17 Tuesday	Surrogate Court Committee, 6:00 p.m., Board Room.
20 Friday	Labor & Employment Law, 8:00 a.m., Board Room.

JANUARY 2014

8 Wednesday	Appellate Practice, 5:30 p.m., Board Room.
13 Monday	Annual Judicial Robing & Swearing-In Ceremony, 9:00 a.m., Touro Law Center, Jacob B. Fuchsberg Law Center. Executive Committee, 5:30 p.m., Board Room. Surrogate's Court Committee, 6:00 p.m., E.B.T. Room.
15 Wednesday	Education Law, 12:30 p.m., Board Room. Elder Law & Estate Planning, 12:15 p.m., Great Hall. Professional Ethics & Civility, 6:00 p.m., Board Room.
17 Friday	Labor & Employment Law, 8:00 a.m., Board Room.
23 Thursday	Meet - Greet & Mingle - A complimentary cocktail reception for members, 6:00 p.m., Polish Hall, 214 Marcy Avenue, Riverhead. Registration is a must!. Call or e-mail marion@scba.org .
27 Monday	Board of Directors, 5:30 p.m., Board Room.



THE SUFFOLK LAWYER

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Publisher

Long Islander Newspapers
in conjunction with
The Suffolk County Bar Association

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The Suffolk Lawyer

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The Suffolk Lawyer

USPS Number: 006-995 is published monthly except July and August by Long Islander, LLC, 149 Main Street, Huntington, NY 11743, under the auspices of the Suffolk County Bar Association. Entered as periodical class paid postage at the Post Office at Huntington, NY and additional mailing offices under the Act of Congress. Postmaster send address changes to the Suffolk County Bar Association, 560 Wheeler Road, Hauppauge, NY 11788-4357.

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PRISM, the attorney-client privilege, and you

By Alison Besunder

The recent revelations by Edward Snowden of spying and surveillance by U.S. government agencies on, well, almost everyone (commonly referred to as “PRISM”) has had a ripple effect across the country and across the ocean to international diplomatic relations.

Leaving aside the broader implications of constitutional right violations, this article focuses on the question of how the PRISM revelations impact the attorney-client privilege, if at all. Regardless of the answer to that question, how can attorneys mitigate the risk of interception? Can encryption technology thwart third-party and government surveillance? How can lawyers realistically satisfy their ethical obligations to maintain confidentiality, and how do we educate our clients to communicate in a way that does not jeopardize the attorney-client privilege.

The place to start is the attorney-client privilege. The attorney-client relationship provides a privilege against disclosure of confidential communications between the parties. CPLR § 4503; Fed. R. Civ. P. Rule 26(b)(1); Prince, Richardson on Evidence 5-201, 207. “Confidential communications” encompass information and advice but not the underlying facts. The limits of the privilege are determined on a case-by-case basis; however, the scope of the attorney-client privilege has significantly narrowed in the last several decades. The communication must be confidential under circumstances showing that the client intended to make the communication in confidence and had a reasonable expectation of confidentiality.

Prince § 5-205.

PRISM directly threatens the “reasonable expectation of confidentiality,” and whether lawyers and our clients can comfortably have a reasonable expectation of confidentiality when communicating online or by phone.

What is PRISM?

In June 2013, Edward Snowden, a civilian NSA contractor, revealed a clandestine, mass electronic surveillance data mining program operated by the National Security Agency (“NSA”) since 2007, known as “PRISM.” Despite the attack on President Obama, electronic surveillance efforts began under the Bush administration with the Patriot Act, expanded to include the Foreign Intelligence Surveillance Act (FISA) in 2007. FISA (Section 702) authorizes the collection of communication content. The Patriot Act (Section 215) authorizes the collection of metadata from phone companies. The Protect America Act (PAA) of 2007 allows the attorney general and the NSA director to submit to a Foreign Intelligence Surveillance Act (FISA) court, a plan for intelligence surveillance on foreigners in general without naming any specific targets or locales. This led to the secret NSA program known as “PRISM” (US-984XN). The FISA court either approves or denies the request by secret order. Once approved, NSA can require companies to disclose data consistent with the classified plan. The government insists that it is only permitted to collect data



Alison Besunder

when permitted by the FISA court but the proceedings are closed and opaque.

What is the NSA Collecting?

The NSA is collecting private data of users of Internet services such as Gmail, Facebook, and Outlook.¹ The NSA can and does request information on specific people from companies such as Google, Yahoo, Facebook, Microsoft, Apple, PalTalk, AOL, Skype, and YouTube.

There are two categories of collected data: *metadata* from undersea telecommunications cables (the who, when, and where of a transmission), and *communication content* (the “what” and content of emails). PRISM slides revealed by the Washington Post in late June 2013 referred to “active surveillance targets,” and real-time monitoring of email, text, and voice chats. In October 2013 the NSA admitted in Senate Judiciary Hearings to tracking the cell phone location of American citizens.

Even before PRISM, the Storage Communications Act of the Electronic Communications Privacy Act already allows the government to search any information stored longer than 180 days in the “cloud,” armed only with a subpoena. Only the Sixth Circuit has found this law unconstitutional and requires the government to obtain a warrant before forcing an ISP to turn over such stored material in the “cloud.” See *U.S. v. Warshak*, 631 F.3d 266 (2010). In the remaining federal circuits, the government is free to capture this information with only a subpoena. Since the “cloud” is not only in the Sixth Circuit, this

presents a serious problem for the rest of us storing documents in the cloud. Although the pending Email Privacy Act bill would require warrants in order to obtain email contents is working its way through the House and Senate with bipartisan support, it has not yet passed.

Does Interception Vitate (or Pierce the Veil of) the Privilege in Communications?

In criminal cases, privileged conversations intercepted by court-ordered wiretaps must be suppressed and are not admissible. By extension the NSA’s bulk surveillance entrapping otherwise privileged communications should be protected under that analysis. It is not clear whether this same analogy would apply in a civil case.

The crux of the issue lies in whether there is any longer a “reasonable expectation” of confidentiality and privacy in the electronic communication. Now that we know about the government’s collection, storage, and likely review of our electronic communications, can we any longer claim an expectation that our communications were confidential? Is it now akin to talking loudly to a client across a crowded room versus a closed-door discussion?

There are circumstances where an email user does not have an expectation of privacy, and a communication with a lawyer is not privileged, such as an employee using a work email account. Employers have generally set policies reserving the right to inspect and monitor work email. There is a strong argument to be made that anyone using a Gmail email address, or writing to someone with a Gmail email

(Continued on page 21)

Meet Your SCBA Colleague

By Laura Lane

When you met Ken you weren’t an attorney, right? No. I was working at the alumni office at Brooklyn Law School as the Assistant Alumni Director. I decided to become an attorney a year after we married. I was thinking about it when we were dating and he kept encouraging me.

Why did you decide ultimately to go for it? I felt I could be an advocate for people who couldn’t speak for themselves to get their needs met. I really wanted to be in a position to help people.

Did you always know you’d work in Elder Law? Yes, from law school forward.

Why? As an elder law attorney I’m able to help seniors get the kind of care they need, which often means keeping them at home, or if they have to get into a facility, to get them into the facility they choose. My advocacy skills are very good.

In what way? I tell everyone who does this how important it is to be there. I always have an attorney present during nurse assessments.

What were some of the challenges you faced professionally when Ken passed away so suddenly? We had formed Grabie & Grabie in 2002. Ken was my guide. What he brought to our practice, besides having 30 years experience, was that he also came from a lot of practice areas. I don’t have that advantage and I

wish I did. I had to hire many associates to replace one Ken. Holding the practice together has been my greatest hurdle and greatest accomplishment.

You are a director at the Suffolk Academy of Law, a director for the SCBA since June 2013 and a member of the Board of Directors of the Elder Law Section of the New York State Bar Association. Would you say that since Ken’s death that you’ve gotten more involved in leadership positions? Yes. It’s helped to fill a void in a way, but also a great opportunity for camaraderie. People have been there for me. I’ve become a leader in my area and it has been a gradual climb.

Ken was your mentor? Yes. I respected him so much. I had him personally and professionally in my life. I never would have become an attorney without him.

What words of wisdom from Ken did you use to move forward after his death? Ken taught me that the way to practice law is to do the right thing and the rest will follow. I’ve lived by that and it worked. After he died I worked 14 hour days seven days a week and that was for two years. He really was the orchestra leader and for me to step into that position was difficult. I believed I had to do it. I’m proud that we are doing well.

Did any attorneys help you during and after what must have been a very difficult time for you? George Roach was Ken’s best friend. I was so grateful when

he came into the practice. My Associate, Dennis McCoy, and Frederica Claiborne, my paralegal, who worked for us before Ken’s death, stuck with my firm, and I’ve always appreciated that. Janna Visconti and Michael McCarthy came later and brought a lot to the firm. They’ve been great. They are active at the SCBA and that’s how I met Janna.

Why did you join the SCBA and when did you join? Actually, I was going to meetings even before I went to law school. I was the “wife guest” at that time. I went to all the functions too. I joined first as a law school student member.

Once an attorney, how did you initially get involved in the SCBA? The Elder Law Committee was my big involvement. I was the inexperienced co-chair but learned quickly. Being involved this way is great because you learn the phases of elder law practice that you may not come up with in your own practice. And you learn about the changes in the law – you are at the forefront of everything.

How has being a director of the Academy benefited you professionally? It allowed me to provide information in my area of law to get quality programming there and to learn about the different areas of law. You get a good overall view of the state of the law, the different practice areas and what the hot topics are in these areas. This all benefits me in my own practice. You can never have enough knowledge.



Jeanette Grabie

What do you enjoy about being an SCBA member? The network of friends – I’ve made great friends at the SCBA. Also, knowing there are a lot of people in the same boat, people that have had to overcome difficulties in life has helped me to know I could get through it.

Why would you recommend others join? Everybody needs camaraderie, having other people to talk to and share information. Being a member is good for an attorney at any level.

Do you believe Ken would be proud of your professional journey? Definitely – he’s still with me. Whenever I’m stuck I stop and think, “What would Ken have done?” The answer is very often found that way.

BENCH BRIEFS

By Elaine Colavito

SUFFOLK COUNTY SUPREME COURT

Honorable Paul J. Baisley, Jr.

Motion to appoint guardian ad litem granted upon submissions; plaintiff no longer capable of understanding proceedings herein.

In *Patricia Longley v. Good Samaritan Hospital Medical Center, Sumeet K. Anand, M.D., and Valerie Marano, R.N.*, Index No. 34187/2010, decided on February 19, 2013, the court granted the motion by attorneys for plaintiff for an order pursuant to CPLR §§1201 and 1202 appointing a guardian ad litem for the plaintiff, an adult alleged to be incapable of adequately prosecuting or defending her rights. In support of the application, counsel submitted the affirmation of plaintiff's treating physician and the affidavit of the proposed guardian ad litem. Based upon the submissions, the court granted the application.

Motion to disqualify counsel denied; defendants' submissions failed to set forth sufficient proof to establish the existence of a conflict of interest

In *Douglas Tolles and GERALYN McBride v. Kevin McBride*, Index No.: 28370/2010, decided on August 22, 2013, the court denied the motion by defendant for an order disqualifying plaintiffs' counsel pursuant to DR-105(a) and 22 NYCRR § 1200.2 on the grounds that there was a conflict in the representation of the plaintiffs. Defendant claimed that there was a conflict of interest between the plaintiffs. In denying the application, the court noted that in the first instance, the authority relied upon by defendant, Code of Professional Responsibility CR 5-105 (22 NYCRR §1200.24) has been superseded by rules of Professional Conduct

Rule 1.7 (22 NYCRR §1200.0). The court cited the rule as follows: "A lawyer shall not represent a client if a reasonable lawyer would conclude that ...the representation will involve the lawyer representing different interests." Here, defendant's bare assertions that the deposition testimony of plaintiff McBride and the records sought by defendant pertaining to plaintiff McBride contained admissions that were prejudicial to the claims of plaintiff Tolles in the action did not establish the existence of a conflict of interest between the two plaintiffs. To the extent that the alleged admissions may be deemed to be prejudicial, they were equally prejudicial to the claims of both plaintiffs, as they arise out of the same factual allegations. Accordingly, the court found that the defendants' submissions failed to set forth sufficient proof to establish the existence of a conflict of interest that would prevent plaintiffs' counsel from continuing to represent both plaintiffs in this action.

Motion to enjoin and restrain receiver from attempting to collect and/or collecting rents denied; defendant subject to the mortgage; new lease could not be used to frustrate the order appointing the receiver.

In *United International Bank v. Jul-Bet Enterprises, LLC, Dollar Storage, LLC, Jul-Bet Enterprises, Inc., Nicholas L. Yannello, Kimberly Lee Yannello a/k/a Kim K. Lee, Julius F. Klein, Santo Barretta and Sara Warner*, Index No.: 7851/2010, decided on August 12, 2013, the court denied the motion by defendants for an order pursuant to CPLR §§ 6301, 6311 and Real Property Actions and Proceedings Law § 1325 enjoining and restraining the receiver from attempting to collect and/or collecting rent from or otherwise contacting the customers of Dollar Storage, LLC and/or the subtenants of the real property located at 2080 River Road,



Elaine Colavito

Calverton, NY. In denying the motion, the court noted that Dollar Storage, LLC was subject to the provisions of the mortgage granting plaintiff a security interest in all of the rents and contracts affecting the premises and authorizing the appointment of a receiver, as well as by the plain terms of the order appointing a receiver, which contained no language limiting its applicability to the property owner. Moreover, the court stated, that the receiver was not bound by the purported month-to-month lease executed after the appointment of the receiver by the co-defendant as landlord and Dollar Storage, LLC, as tenant. The court found that the lease was collusive on its face and may not be used to frustrate the order appointing the receiver. Accordingly, the application was denied.

Honorable Arthur G. Pitts

Motion for substituted service granted; third-party defendants moved from last known address without forwarding address and insurance carrier aware of pending claim.

In *Wael Abdelhalim v. Erik Wilken*, Index No.: 19037/2011 decided on April 19, 2013, the court granted defendant's motion for an order pursuant to CPLR §308(5) directing expedient service upon third party defendants by mailing a copy of the summons and complaint to their last known address and delivering a copy of the summons and complaint to their insurer Liberty Mutual Fire Insurance Company. In granting the application, the court noted that the defendant demonstrated that the third party defendants moved from their last known address without leaving a forwarding address and that other statutory service alternatives would be impracticable. Furthermore, the court concluded that by way of the police accident report it appeared that Liberty Mutual was the third party defen-

dants' insurance carrier and it was aware of the pending claim. Accordingly, defendant's motion was granted.

Motion for fees related to independent medical examination denied; presence at a physical examination of a party's representative, including a physician should be allowed absent any valid countervailing reason.

In *Allan R. Conklin, Jr. v. Setauket Knolls Associates, L.P., and Setauket Knolls Garden Apartments*, Index No.: 1713/2011, decided on August 13, 2013, the court denied defendants' motion for an order compelling plaintiff to pay \$1,500.00 to cover the cost of a cancelled independent medical examination. The matter at bar is one for personal injuries. When plaintiff arrived for the independent medical examination, he was accompanied by psychologist, Dr. Stephen Honor to act as a third party observer. Upon their arrival, Dr. Abelow (the independent medical examiner), refused to conduct the examination in the presence of Dr. Honor averring that he could not do so because the presence of plaintiff's expert would substantially affect the outcome of the process. The plaintiff refused to move forward with the examination without Dr. Honor. In support of their motion for costs, the defendants proffered that only the plaintiff's attorney or other legal representative may be present for the examination, or if necessary, an interpreter. In denying the application, the court noted that the case law submitted did not hold that the plaintiff's physician must be excluded as a representative and observer of an independent medical examination. The cases cited simply address the issue of a legal representative or attorney being present. It has been held that the presence at a physical examination of a party's representative, including a physician should be allowed absent any valid countervailing reason. The burden of proof rests with the party opposing such attendance to show why the court should

(Continued on page 27)

COURT NOTES

By Ilene Sherwyn Cooper

APPELLATE DIVISION-SECOND DEPARTMENT

Attorney Reinstatements Granted

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

Charles Berkman

Attorney Resignations

Granted/Disciplinary Proceeding Pending

Jasleen K. Anand: By affidavit, respondent tendered her resignation on the grounds that she is currently the subject of an investigation pending against her by the Grievance Committee predicated upon allegations that she failed to safeguard funds entrusted to her as a fiduciary. She stated that she could not successfully defend herself on the merits against charges predicated upon the foregoing. Further, she stated her resignation was freely and voluntarily rendered, that she was fully aware of the implications of submitting her resignation, and that she was subject to an order directing that she make restitution and reimburse the Lawyers' Fund for Client Protection. In view of the foregoing, the respondent's resignation was accepted and she was disbarred from the practice of law in the State of New York.

Alan M. Rocoff: By affidavit, respondent tendered his resignation on the grounds that he is currently the subject of an investigation pending against him by the Grievance Committee for the Second, Eleventh and Thirteenth Judicial Districts as a result of his plea of guilty to petit lar-

ceny, a Class A misdemeanor. He stated that he could not successfully defend himself on the merits against charges predicated upon the foregoing. Further, he stated his resignation was freely and voluntarily rendered, that he was fully aware of the implications of submitting his resignation, and that he was subject to an order directing that he make restitution and reimburse the Lawyers' Fund for Client Protection. In view of the foregoing, the respondent's resignation was accepted and he was disbarred from the practice of law in the State of New York.

Attorneys Censured

Jeffrey Charles Daniels: By decision and order of the court, the Grievance Committee was authorized to institute a disciplinary proceeding against the respondent and the matter was referred to a Special Referee. The referee sustained all four charges against the respondent relating, *inter alia*, to his failure to preserve funds entrusted to his charge as a fiduciary. The Grievance Committee moved to confirm the report and have the court impose such discipline as it deemed just, and the respondent joined in the application. In determining the appropriate measure of discipline to impose, the court considered the fact that the respondent's conduct was not based upon any venal intent, but rather his negligence in maintaining his attorney trust account due to the grave illness and death of his wife and his own health issues. Accordingly, under the totality of circumstances, the respondent was publicly censured for his



Ilene S. Cooper

professional misconduct.

Henry Lung: By decision and order of the court, the Grievance Committee was authorized to institute a disciplinary proceeding against the respondent and the matter was referred to a Special Referee. The referee sustained the charges against the respondent relating, *inter alia*, to his sharing a legal fee with a non-lawyer. The Grievance Committee moved to confirm the report and have the court impose such discipline as it deemed just, and the court granted the application. In determining the appropriate measure of discipline to impose, the court considered the fact that the respondent had produced evidence of his good moral character, his generous charitable donations, and his extreme remorse. However, the court noted that the respondent had previously received three letters of admonition for, *inter alia*, negligently converting client funds, and two letters of caution for improperly seeking to limit his liability to a client for malpractice. Accordingly, under the totality of circumstances, the respondent was publicly censured for his professional misconduct.

Ann McCrane: By decision and order of the court, the Grievance Committee was authorized to institute a disciplinary proceeding against the respondent based upon the respondent's plea of guilty to operating a motor vehicle under the influence of alcohol or drugs, an unclassified misdemeanor, and the matter was referred to a Special Referee. The referee did not sustain the charge, and the Grievance Committee moved to disaffirm the report.

The respondent opposed the Grievance Committee's motion. The court found that the referee improperly failed to sustain the charge based upon the respondent's admissions and evidence adduced at the hearing, and therefore granted the Grievance Committee's motion. In determining the appropriate measure of discipline to impose, the court noted that the respondent successfully completed a rehabilitation program, and that she has remained sober. The court also considered however her prior history of alcohol-related offenses, and a letter of admonition due to her derogatory behavior at a closing. Accordingly, under the totality of circumstances, the respondent was publicly censured for her professional misconduct.

Attorneys Suspended:

Glen D. Hirsch: The Grievance Committee moved to suspend the respondent and for authorization to institute disciplinary proceedings against the respondent as a result of a notice received from the Lawyer's Fund based upon deficiencies in his escrow account. The respondent neither opposed the motion nor submitted a response relative thereto. Accordingly, the motion was granted and the respondent was suspended from the practice of law pending further order of the court.

Katherine Z. Pope: By decision and order of the court, the court suspended the respondent from the practice of law pending further court order based upon her conviction of a serious crime, and the Grievance Committee was authorized to institute a disciplinary proceeding against her. The matter was referred to a Special Referee. The referee sustained the charge

(Continued on page 21)

TAX

The PTIN Redux!

By Alan E. Weiner

Attention: matrimonial, real estate, negligence, and tax attorneys - You have heard this from me before, right here in *The Suffolk Lawyer*¹. Those articles were 'how to' articles. This year has a little bit of that but it's more of a reminder despite the Loving² case. Don't fail me, or you, now. It's time to renew.

The Loving case affected non-licensed tax professionals (i.e., it does not affect attorneys, CPAs, and enrolled agents) when it held that the non-licensed tax preparers do not need continuing education and competency testing. As an attorney, you already have been admitted to the bar and are required to obtain continuing legal education credits. That exempts you from additional continuing education and competency testing.

The reason for this alert is that when Loving was first announced, even some licensed tax practitioners felt that they no longer needed to renew their PTIN number. That is incorrect. You do need to keep your PTIN active.

The definition of tax preparer/tax practitioner is broad³. It includes anyone giving tax advice for compensation that can be used on a tax return (even if you are not the tax return preparer); for example, a matrimonial attorney who advises a client on the deductibility of alimony; a real estate attorney who advises a client as to the amount of a gain that is taxable from the sale of a principal residence; a negligence attorney who advises a client as to how much of the award will or won't be subject to tax - they all

might be considered "preparers."

Providing that you have a credit line of larger than \$63 (the renewal fee), do it now.

The Internal Revenue Service ("IRS") has been promoting PTIN renewal since Halloween (after the government shutdown ended).

For renewals:

- Go to www.irs.gov/ptin - PTIN Requirements for Tax Return Preparers.
- Click on "Renew Your PTIN."
- Enter your User ID and Password to log in.
- "Select" "PTIN Renewal."
- All of your information is pre-populated. You will not need your 2012 tax information.
- You will have a few questions to answer such as whether you were convicted of a felony.
- You will need your supervisor's PTIN if you are not qualified in your own right such as being an attorney, CPA, EA, or one of the other specified categories.
- Enter your professional designation information (such as attorney and/or CPA and/or EA, if you are one).
- Payment with your credit card should be easy.
- You'll have the opportunity to print whichever screens you want.
- Later the same evening, or the next day, you will receive a "PTIN



Alan E. Weiner

Renewal Welcome Letter" email. It tells you to log back into the system to retrieve a message. The message is a letter starting with "We've accepted your 2014 renewal for your Preparer Tax Identification Number (PTIN)." You're good to go! In fact, the second page of the Welcome Letter has a wallet size PTIN identification card that you can cut out and carry along with you right next to the photo of a loved one.

Miscellany

The IRS maintains a database of the information that you submit with your PTIN application and renewal. Much of this information is easily obtainable on a CD for \$35 by private entrepreneurs under the Freedom of Information Act ("FOIA")⁴. The released information does not include your PTIN.

You may have received communications, via email or hard copy, asking you to verify your PTIN information. It may look official but it's not. If you respond with your PTIN, and possibly other non-available information, you can expect more emails and correspondence from the private entrepreneur and from whomever he/she sells it to.

Some allowable thoughts to reduce PTN clutter

- Create a separate (but valid) email address for your PTIN application or renewal.

- Use a P.O. Box as the business address. Note that your personal mailing address is not released under a FOIA request.
- Obtain a separate business telephone number for use on the PTIN renewal.

Still have questions? Access the "Requirements for Tax Return Preparers: Frequently Asked Questions"⁵

Note: Alan E. Weiner, CPA, JD, LL.M. is Partner Emeritus of Baker Tilly (formerly Holtz Rubenstein Reminick and was its founding tax partner (1975)). He served as the 1999-2000 President of the 30,000 member New York State Society of CPAs and is active on the Tax Law Committees of the Suffolk and Nassau County Bar Associations. He is the author of All About Limited Liability Companies and Partnerships; Medicare Surtax: Analysis and Planning; and DFK International's Worldwide Tax Overview.

1. See *The Suffolk Lawyer* November/December 2010, page 4, <http://www.scba.org/eva/displayFile.php?id=47> and December 2011, page 10, <http://www.scba.org/eva/displayFile.php?id=1753>

2. *Loving v. IRS*, 917 F. Supp.2d 67 (D.D.C. January 18, 2013), on appeal, No. 13-5061 (D.C. Cir.)

3. IRS Treas. Reg. § 1.6109-2(g)

4. PTIN Information and the Freedom of Information Act (current as of September 11, 2013) <http://www.irs.gov/Tax-Professionals/PTIN-Information-and-the-Freedom-of-Information-Act>

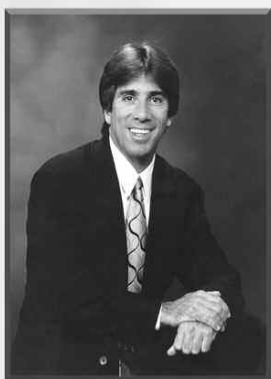
5. <http://www.irs.gov/Tax-Professionals/Requirements-for-Tax-Return-Preparers:-Frequently-Asked-Questions>

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COMMERCIAL LITIGATION

Finally! Depositions of Expert Witnesses in Commercial Division Cases

By Leo K. Barnes, Jr.

In the September 2012 column, we reviewed Chief Judge Jonathan Lippman's Task Force Report and Recommendations for the Commercial Division which included certain proposed procedural reforms to the Commercial Division Rules, the most notable being an amendment of the expert disclosure process to mirror expert disclosure in the Federal Courts.

On September 23, 2013, Chief Administrative Judge A. Gail Prudenti amended Rule 13 of the Rules of Practice for the Commercial Division,¹ effective immediately, by adding a new section (c) providing for enhanced expert disclosure in Commercial Division cases.

New Rule 13(c) provides that no later than 30 days prior to the completion of fact discovery, the parties shall confer on a schedule for expert disclosure (if any party intends to introduce expert testimony at trial). Rule 13(c) provides that all expert disclosure "shall be completed no later than four months after the completion of fact discovery." However, if a party objects to this procedure or timetable, the parties shall request a conference to discuss the objection with the court.

The schedule for expert disclosure includes the ordinary identification of experts and exchange of information concerning the expert's proposed testimony as

per CPLR 3101(d), but now expressly provides for *depositions of testifying experts*. Further, the new Rule 13(c) requires that expert disclosure be accompanied by a written report (unless otherwise stipulated or ordered by the court) that is prepared and signed by the witness if: (1) the witness is retained or specially employed to provide expert testimony in the case; or (2) the witness is a party's employee whose duties regularly involve giving expert testimony. Rule 13(c) mandates that the expert's written report must contain the following:

- a complete statement of all opinions the witness will express and the basis and the reasons for them;
- the data or other information considered by the witness in forming the opinion(s);
- any exhibits that will be used to summarize or support the opinion(s);
- the witness's qualifications, including a list of all publications authored in the previous 10 years;
- a list of all other cases at which the witness testified as an expert at trial or by deposition during the previous four years; and
- a statement of the compensation to be paid to the witness for the study and



Leo K. Barnes, Jr.

testimony in the case.

According to the new rules, the note of issue and certificate of readiness may not be filed until the completion of expert disclosure. Rule 13(c) also addresses late expert disclosure and expressly states that "Expert disclosure provided after these dates without good cause will be precluded from use at trial."

The alteration of Rule 13(c) provides a bright line timeframe to determine whether expert disclosure is timely, a welcome reprieve from the varying decisions that have historically addressed the topic of preclusion of expert testimony. For example, although the Second Department decision of *Construction by Singletree Inc. v. Lowe*, 55 A.D.3d 861, 866 N.Y.S.2d 702 (2nd Dep't 2008) stood for a bright-line rule on preclusion of an expert affidavit for untimely expert disclosure, the later decision in *Rivers v. Birnbaum*, 102 A.D.3d 26, 953 N.Y.S.2d 232 (2nd Dep't 2012) rejected a bright-line rule, stating that a trial court still maintains discretion to refuse to consider a proposed expert opinion when a disclosure is inexplicably not served prior to the filing of the Note of Issue/Certificate of Readiness. Specifically, *Rivers* held that:

the fact that the disclosure of an expert

pursuant to CPLR 3101(d)(1)(i) takes place after the filing of the note of issue and certificate of readiness does not, by itself, render the disclosure untimely. Rather, the fact that pretrial disclosure of an expert pursuant to CPLR 3101(d)(1)(i) has been made after the filing of the note of issue and certificate of readiness is but one factor in determining whether disclosure is untimely.

The addition of Rule 13(c) should help to limit some of the uncertainty, and provide a point of reference for counsel that abides by the governing rules.

Rule 13(c) is a huge opportunity for Commercial Division practitioners, and is the latest effort to streamline practice there, akin to practice in Federal Court. By mandating the service of expert reports, coupled with the opportunity to depose an expert witness prior to the filing of the Note of Issue, the new Rule will effectively mandate an earlier evaluation of the strengths and weaknesses of claims which, ideally, will correspond with an earlier resolution of cases.

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

1. Rule 13 of section 202.70(g) of the Uniform Civil Rules for the Supreme Court and the County Court.

TRUSTS AND ESTATES UPDATE

By Ilene Sherwyn Cooper

Commission to take testimony

In *In re Levine*, the court denied a request by the petitioner for an open commission to take the deposition of non-party witnesses in Florida. Pending before the court was a contested discovery proceeding, in which the executor of the estate sought information from the decedent's surviving spouse regarding, *inter alia*, certain personal and household effects contained in a Florida home that had been owned by the decedent. The application was opposed by the decedent's spouse. The court opined that in order to justify the issuance of a commission to take the deposition of an out-of-state non-party witness, the party seeking the commission must demonstrate that the information sought is material and necessary to the prosecution and defense of claims, and that a voluntary appearance or compliance by the witness is unlikely or that discovery cannot be obtained by stipulation or coop-

eration of the witness either in New York or the other state. Absent such a showing, the moving party has failed to sustain his burden of demonstrating that a commission is necessary or convenient. Based upon the foregoing, the court held that while the petitioner had demonstrated that the testimony and information sought was relevant, the application was devoid of information concerning the efforts, if any, made by petitioner's counsel to obtain the cooperation and voluntary appearance of the non-party witnesses. Accordingly, the motion for a commission was denied, without prejudice.

In re Levine, N.Y.L.J., Apr. 22, 2013, at 32 (Sur. Ct. Nassau County)

In Terrorem Clause

In *In re Weintraub*, the Surrogate's Court again had occasion to examine the safe harbor provisions of EPTL 3-3.5 and



Ilene S. Cooper

the provisions of SCPA 1404, within the context of the decisions in *Baughner*, *supra*, and *Singer*, *supra*. Before the court was an application by the decedent's son to examine the associate of the attorney-draftsman and attorney who supervised the execution of the propounded instrument pursuant to the provisions of SCPA 1404, in order the avoid triggering the

instrument's in terrorem clause. The court noted that following the decision in *Singer*, the legislature amended the provisions of both EPTL 3-3.5 and SCPA 1404 to authorize the court, upon a showing of special circumstances, to permit the examination "of any person whose examination the court determines may provide information with respect to the validity of the will that is of substantial importance or relevance to a decision to file objections to the will." The record revealed that the decedent had been diagnosed with

Alzheimer's disease prior to the execution of the will, which occurred in the hospital, and that two days prior to executing the will, she was confused as to how she wanted to dispose of her estate, and did not recall speaking with the attorney-draftsman about her testamentary plan, although she had done so. Based upon these circumstances, the court granted the application, finding that special circumstances existed to permit the requested examination as part of the SCPA 1404 examination.

In re Weintraub, 2103 NY Slip Op 5107 (U) (Sur. Ct. Nassau County)

Disclosure

In *re Selvaggio*, a contested probate proceeding, the court granted the objectant's request for, *inter alia*, financial records, including income tax returns, accounting records and books, and bank records of a corporate non-party. The record revealed that the corporation was either solely

(Continued on page 21)

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On the move...

Campolo, Middleton & McCormick, LLP, is merging with **Ellen Bissett DeRiggi, P.C.**, a general practice focused upon business law and commercial transactions. Ellen Bissett DeRiggi shall be Of Counsel to the firm, where she will be a member of the Corporate, Real Estate, Trusts and Estates and Labor and Employment practice groups.



Jacqueline Siben

Partner, Farrell Fritz, P.C.; **Lawrence Kushnick**, Partner, Kushnick Pallaci, PLLC (posthumously); **Nancy Burner**, Founder and Managing Partner, Nancy Burner & Associates, P.C.; and **Thomas J. Killeen**, Partner, Farrell Fritz, P.C. Lifetime Achievement Award.

Farrell Fritz, for the second year in a row, has received a Tier 1 Ranking by *Best Lawyers* and will be listed in the 2014 Edition of *U.S. News – Best Lawyers* “Best Law Firms.”

Announcements, Achievements, & Accolades...

Karen J. Halpern, of counsel to the firm Lawrence, Worden, Rainis & Bard, PC, presented a CLE approved lecture on Oct. 10, “Intake to Hearing: Representation of a Nurse in a Licensure Defense Case” at the 32nd Annual Meeting & Educational Conference of The American Association of Nurse Attorneys held in Savannah, Georgia. Ms. Halpern is currently the President of The New York Metropolitan Chapter of The American Association of Nurse Attorneys [TAANA].

Eric L. Morgenthal, Esq., C.P.A., M.S. (Taxation) presented on International Tax Controversy Law to the American Association of Attorney-CPA's at its Nationwide Education Conference in Las Vegas Nevada.

Condolences...

The Board of Directors sends its heartfelt sympathy to SCBA member **Annamarie Donovan** and her family on the recent passing of her brother Frank Biscardi. Frank was an investigator who did prep work for many attorneys in Suffolk County and his firm name was Integrity Claim Service of N.Y., Inc.

New Members...

The Suffolk County Bar Association extends a warm welcome to its newest members: **Usman Chaudhary, Robert M. Connelly, Peter Corey, Kathryn L. Coward, Tanying Dong, Richard L. Drum, Donna Ferrara, John R. Giacoppi, Alan E. Golomb, Michael Kalachman, Jacquelyn L. Mascetti, Michele D. Morley, Colleen R. Nugent, Patricia A. Powis, Michael G. Quartararo, Frank G. Roux, Jason A. Stern, Naomi Trainer, William P. Underwood, Louis Vlahos and David S. Welch.**

The SCBA also welcomes its newest student members and wishes them success in their progress towards a career in the Law: **Erika Castro, Harry Fournaris, Bailey Ince and Jeffrey Marchese.**

Ten lawyers have joined Forchelli, Curto, Deegan, Schwartz, Mineo & Terrana, LLP that were previously with Agovino & Asselta, LLP, a boutique Long Island law firm concentrating in construction law. Along with department co-chairs **Peter Agovino** **Joseph Asselta**, joining the firm are partners **David A. Loglisci** and **Jason L. Rothman**, of counsel **Robert C. Buff** and associates **Frank W. Brennan, John P. Bues, Raymond A. Castronovo, John M. Comiskey and Parshhueram T. Misir.**

Congratulations...

Congratulations to the **Law Firm Lewis Johs Avallone Aviles** who are celebrating their 20th year of practice. A firm that has always supported the SCBA, we are most appreciative and wish them many more years of success.

Congratulations to Presiding Justice of the Appellate Division of the Supreme Court, Second Judicial Department **Hon. Randall T. Eng**, who was the recipient of the 2013 Dynamic Achiever Award from the OCA-Westchester & Hudson Valley 33rd Anniversary Celebration on Saturday, Nov. 2, 2013.

Scott Middleton and Patrick McCormick, partners at Campolo, Middleton & McCormick, LLP have been selected for inclusion in the 2013 *New York Super Lawyers – Metro Edition*. Scott Middleton and Patrick McCormick were a part of the top 5% of attorneys in the state to earn the title “Super Lawyer.”

Congratulations to **Steven Taitz**, a founding partner of Roe Taroff Taitz and Portman, who has been selected as the 2013 New York Metro Super Lawyers list. Super Lawyers, a Thomson Reuters business, is a rating service of outstanding lawyers from more than 70 practice areas who have attained a high degree of peer recognition and professional achievement.

Congratulations to the following SCBA members who are the recipients of the Long Island Business News Leadership in Law Award: **Hon. John Flanagan**, Of Counsel/Special Counsel; **James Wicks**,

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Maria Dosso is the Pro Bono Project Liaison.



Suffolk attorneys were recognized for their pro bono work at a special luncheon held at the SCBA.

Photo by Ron Pachiana, JPA Studios



The Honorable Fern Fisher, Deputy Chief Administrative Judge of New York City Courts, attended the celebration.



SCBA Treasurer Patricia Meisenheimer at the luncheon.



Pro Bono volunteer Regina Brandow.

SCBA Pro Bono Foundation Celebrates Pro Bono Week

Since 1981 the SCBA Pro Bono Foundation has collaborated with Nassau/Suffolk Law Services to provide free legal representation to Suffolk's indigent in civil matters. Our pro bono attorney volunteers, which include bankruptcy and matrimonial clinics, a landlord/tenant, and a Foreclosure Settlement Conference initiative, have donated thousands of hours in litigation and court appearances, research and writing, interviewing clients, providing advice and counsel.

To commemorate National Pro Bono Week, on October 22, the foundation held a special luncheon at the Bar Center recognizing pro bono attorney volunteers for their dedication and commitment to representing the underserved in Suffolk County. We know they have made a difference and are proud of our efforts and our pledge to strengthen and expand the Pro Bono Project and our other pro bono activities in the finest tradition of the American lawyer, fulfilling the promise of equal justice for all citizens.

— LaCova



John R. Calcagni, Pro Bono Managing Director, gave certificates to the pro bono volunteers to thank them for their service.

REAL ESTATE

Dog Eat Dog Apartment World

By Andrew Lieb

Your longtime clients, Mr. and Mrs. Goldberg, are empty nesters. They want to downsize to an apartment because they can no longer think of maintaining their property. Your first conversation involves them selling everything that they own and moving to the City. It's not a consultation, but just a chat. Nevertheless, as an attorney, there is never such a thing as only having a conversation with a client. The Goldbergs tell you that they plan to only take themselves and their dog, Skippy, to the City and to rekindle their love once they lay down new roots in their apartment. Have you spotted the legal issue yet?

You see, many apartments, whether rentals, condominiums or cooperatives, have a no pet policy. Did the Goldbergs inquire about the pet policy in the prospective buildings that they are considering to move to? So, to find out, you ask them and Mrs. Goldberg tells you that her girlfriend Sherri said not to worry about what the apartment says with respect to pets as

these things can't be enforced anyway. Do you know what she is talking about?

In New York City, the Administrative Code provides, at section 27-2009.1(b), that "where a tenant in a multiple dwelling openly and notoriously for a period of three months or more following taking possession of a unit, harbors or has harbored a household pet ... such lease provision shall be deemed waived" when referring to a no pet policy. Nonetheless, while this law applies to both Cooperatives and rentals throughout the City of New York, the First Department (New York and Bronx Counties) does not apply it to condominiums within its jurisdiction while the Second Department (Queens, Kings, Richmond, Nassau, Suffolk, Dutchess, Orange, Putnam, Rockland and Westchester Counties) does. So, in Manhattan and the Bronx a client cannot consider a condominium regardless if they thought they could have the no pets policy waived, while in Queens, Brooklyn and Staten Island there



Andrew Lieb

is a chance that it can be waived, but the client must realize the inherent risks associated with banking on such a waiver. Moreover, you must remind the Goldbergs that the Pet Law, the NYC Code provision, or something similar thereto, does not exist in Nassau or Suffolk counties so it is irrelevant about the condominium v. cooperative distinction between the First and Second Departments when dealing with Long Island. Yet, a similar provision to New York City does exist in Westchester County should the Goldbergs want to expand their search for apartments to there.

So, in Nassau or Suffolk, the Goldbergs will have to rely on the common law rule for pets at apartments, which is that a no pet term of a lease cannot be waived if the parties expressly agreed otherwise in their lease, pursuant to *Re Paulsen Real Estate Corp. v. Grammick*, 244 AD2d 340 (2nd Dept., 1997). Therefore, the Goldbergs may want to hire you to review their lease before they agree to take their new apart-

ment to verify what the terms are on this issue. Yet, the Goldbergs are dead set on Manhattan. So, assuming that they are willing to take the three month waiver risk, they can keep all of their options open.

Regardless, you should advise the Goldbergs that a waiver does not constitute a continual waiver for successive pets during the duration of the tenancy pursuant to *Park Holding Co. v. Emicke*, 168 Misc.2d 133 (1st Dep., 1996). So, even if Skippy is waived in, after Skippy's demise there are no further pets unless each subsequent pet gets through the three months as well.

You advise Mrs. Goldberg, as discussed, but she says not to worry as Skippy is not a pet at all, but instead an Emotional Support Animal (ESA). Mrs. Goldberg tells you that her girlfriend, Renee, told her to just go to the National Service Animal Registry (NSAR) and that she can get a prescription from a licensed mental health professional and that she won't even have to mention Skippy to the housing provider when looking at units if Skippy is wearing a uniform

(Continued on page 20)

WHO'S YOUR EXPERT

The Medical Malpractice Expert

By Hillary Frommer

An expert physician is like any other expert witness. She can be a testifying witness or a litigation consultant. Under New York law, the expert testifying physician is a necessary witness in a medical malpractice claim. A plaintiff cannot sustain a case without one. The New York Court of Appeals has held that "in a medical malpractice action, expert medical opinion evidence is required to demonstrate merit."¹ A medical malpractice plaintiff needs an expert from the get-go, and may not wait until discovery has progressed to determine whether an expert is needed. Compare this to many commercial actions, where an expert testifying witness is not often used at all.

The complaint need not contain allegations concerning the expert's opinion; and a plaintiff does not have to allege the expert's theories. The complaint can be fairly "bare-bones." However, under CPLR § 3012-a, a complaint alleging medical malpractice must be accompanied by a Certificate of Merit which declares that the plaintiff's attorney either: (1) reviewed the facts and consulted with a physician knowledgeable in the relevant issues involved in the litigation and, based on that review and consultation, believes there is a reasonable basis to commence the action; or (2) that the attorney could not obtain the required consultation because the certificate could not reasonably be obtained before the statute of limitations barring the action would expire; or (3) the attorney made three separate good faith attempts to obtain the certificate but could not do so because the physicians would not agree to the consultation. Even if the plaintiff's

certificate of merit contains one of the latter two statements, the plaintiff still must have the expert physician.

To prove a medical malpractice action, a plaintiff must establish that the defendant's conduct deviated or departed from the generally accepted standard of care in the medical community, and proximately caused the plaintiff's alleged injury.² The plaintiff does this with an expert witness. Typically in medical malpractice actions, defendant physicians or health care providers move for summary judgment by presenting their own expert affidavits or sworn testimony attesting that there was no deviation from the standard of care or that the physician's conduct did not proximately cause the injury.³ As with any summary judgment motion, the plaintiff opposes the motion with evidence, which creates a genuine issue of fact. In a medical malpractice action, that evidence must be an affidavit or sworn testimony from the plaintiff's expert.⁴

In *Stukas v Streiter*,⁵ the Second Department clarified the standard to be applied in determining motions for summary judgment in medical malpractice actions. In that case, the defendant moved for summary judgment and made only a *prima facie* showing, through the necessary expert affidavit, that the defendant did not depart from good and accepted medical practice. The expert's opinion was silent on the issue of causation. The court questioned whether, in opposing that motion, the plaintiff was required to raise a triable issue of fact with respect to both the deviation from the stan-



Hillary Frommer

dard of care and causation. The court answered that question in the negative, reasoning that generally, a plaintiff opposing summary judgment must rebut only the moving defendant's *prima facie* showing, and that burden is not increased simply because the complaint alleges medical malpractice. Thus, because the defendant's only argument was that there was no deviation from the standard of care, the plaintiff

needed to raise an issue of fact only on that point. The court stated:

It is clear that where a defendant physician, in support of a motion for summary judgment, demonstrates only that he or she did not depart from the relevant standard of care, there is no requirement that the plaintiff address the element of proximate cause in addition to the element of departure... In the context of any motion for summary judgment, a party's *prima facie* showing of entitlement to judgment as a matter of law shifts the burden to the nonmoving party, not to prove his or her entire case, as he or she will have the burden of doing at trial, but merely to raise a triable issue of fact with respect to the elements of theories established by the nonmoving party. There is no valid reason for adopting a different rule in medical malpractice cases.⁶

However, the mere submission of an expert opinion is not enough. That expert opinion must be based in facts from the record. A purely conclusory opinion is insufficient to create an issue of fact. A plaintiff who relies solely on such deficient evidence will likely find himself facing dismissal of the action.⁷ Similarly, a defendant will not win summary

judgment with an expert opinion that concludes without any factual basis that the physician's conduct was not a departure from the generally accepted standard of care.⁸

The less common, but still equally important use of an expert affidavit, is in defending a defendant's motion to dismiss for want of prosecution under CPLR § 3216. The case law makes clear that to defeat such a motion, a plaintiff must present expert medical opinion to establish a "good and meritorious cause of action."⁹ The failure to do so can result in dismissal of the action. For example, in *Reed v Friedman*,¹⁰ the court held that the "plaintiff's failure to submit an affidavit of merit by a medical expert competent to attest to the meritorious nature of the claim" was fatal to the plaintiff's defense of a CPLR § 3216 motion and required dismissal of the complaint. Similarly, in *Salch v Paratore*,¹¹ the Appellate Division dismissed the medical malpractice action because the plaintiff failed to timely serve and file the note of issue. The Court of Appeals affirmed on the grounds that the plaintiff's failure to submit an expert affidavit of merit warranted such dismissal. Similarly, in *Stolowitz v Mount Sinai Hospital*,¹² the defendant moved to dismiss because the plaintiff failed to serve a complaint for a period of nine months. The Court of Appeals held that dismissal was warranted because the plaintiff failed to submit an affidavit of merit.

Note: Hillary A. Frommer is counsel in the commercial litigation department of Farrell Fritz, P.C. She represents large and small businesses, financial institutions, construction companies, and individuals in federal

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HEALTH AND HOSPITAL

Unintended Consequences and the Anti-Assignment Clause

By James G. Fouassier

Health care providers that elect to join plan and payer networks generally are precluded by their participation agreements from “balance billing” network members for eligible covered services.¹ Federal and state regulations similarly preclude providers who elect to treat “regular” (*i.e.*, fee for service) Medicare and Medicaid patients. As a result, the provider must accept the contracted rate of payment for the specific service, less patient responsible shares like deductibles and co-payments, and be bound by all of the claims preparation, submission and verification rules that the plan or payer establishes in the agreement (which usually incorporates by reference an administrative “provider manual” of hundreds of pages). These limitations also extend to determinations of medical or clinical necessity. In effect, by enrolling in a network or by accepting fee for service Medicare and Medicaid, the provider agrees that any dispute over the necessity of a given course of treatment or service must be resolved between the provider and the plan or payer; the provider may not look to the member-patient for payment if all or a part of a claim is denied by the payer for lack of medical necessity.²

When a provider is not “in network” with a health insurer or plan, however, the situation is entirely different. Privity is solely between the provider and the patient; it is the patient in turn who must secure reimbursement by forwarding a claim form and supporting documentation to his or her insurer or plan if the plan has “out of network” benefits and if the service is an eligible covered service under the terms of the benefit design. Under older indemnification models patients first were required to pay the providers before any policy benefits would reimburse. As health care costs began to soar in the ‘60s and ‘70s, non-network providers of all kinds began to realize that unless they rendered treatment on account they would drive away much of their business; most people simply could not afford to pay directly. After all, that is the idea of having a health plan in the first place. Thus developed over time the idea that the patient could assign the right of payment to the non-network provider. The provider then would submit the claim, along with all supporting documentation, to the insurer or plan administrator and anticipate receipt of a check, whereupon it would “balance bill” the patient for the difference between the claim amount and the payment amount.³

The process was not without difficulties. First, notwithstanding the terms of the assignment and the requirements of the common law, plans and payers routinely tendered payment to their members rather than the provider-assignees. Providers found themselves having to chase their patients for payment; not a particularly attractive way to nurture a doctor-patient relationship. Another problem presented when an error, omission or other glitch caused the claim to be denied or “short paid.” When the provider then “balance billed” the patient the response often was, “Well, doctor, your office agreed to file the claim for me and your office mailed it late, so why should I have to pay for your mistake?” On the other hand, as a practical matter non-network providers had little choice but to engage the plans and payers

almost as if they were the real parties in interest if they expected to be paid for their services. This situation became particularly acute when a claim was denied, in whole or in part, for clinical rather than administrative reasons.

Clearly, arguments addressed to sustaining clinical efficacy and necessity must be asserted by medical professionals. Lay people simply cannot carry the cudgels in the face of clinical denials of their health care claims. Most plan members are ill equipped and unable to maintain a thorough and documented clinical appeal in the same manner as a medical provider. In an “in network” context this is not an issue; by virtue of their network agreements providers are real parties in interest in the denials (especially since they cannot “balance bill” the patients) and are granted full appeal rights. The issue presents in the “out of network” situation we have been discussing. The problem has been acknowledged by our state legislature in effecting changes in the Insurance and Public Health Laws expressly allowing providers to appeal “adverse” claims determinations by health insurers and plans regulated by New York law, regardless of whether they are raised “in network” or “out of network.” The text of each statute is identical:

Ins Law § 4904. (a) An insured, the insured’s designee and, in connection with retrospective adverse determinations, *an insured’s health care provider*, may appeal an adverse determination rendered by a utilization review agent.

The value of the provider appeal is evident not only to providers and their patients but also to insurers and health plans. Less provider participation in out-of-network claims denials means fewer successful appeals and fewer payment denial reversals. One way we have seen health insurers and plans (especially self-funded plans subject only to ERISA) address this perceived problem is by adopting in their benefit designs a provision commonly known as an “anti-assignment” clause. In brief, the typical anti-assignment clause says that the member may not assign or transfer any benefits established in the plan. Since health plans routinely honor claims submitted by out-of-network providers when supported by an “assignment of benefits” regardless of any anti-assignment provisions, however, the issue becomes whether and to what extent out-of-network providers have standing to appeal claims denials, and subsequently to arbitrate or litigate if necessary.

Recently the federal district court in New Jersey entertained the question. In *North Jersey Brain and Spine Center v. St Peter’s University Hospital*, 2013 US Dist LEXIS 13840 (9-25-13), an out-of-network provider, as an assignee of “payment,” submitted its patient’s claims to the administrator of the ERISA plan covering the patient. The provider engaged in a series of internal appeals and requests for reconsideration with plan representatives. Eventually the provider sued under ERISA, asserting standing as an assignee,⁴ alleging that the claims were improperly paid because of arbitrary reductions resulting from the plan’s failures to process the



James G. Fouassier

claims according to the plan’s own processes and procedures. The plan then sought dismissal based on the ground, *inter alia*, that the provider derived no standing because the plan benefit design prohibited any assignment of “benefits.”

Addressing the validity of the anti-assignment clause, the court held that while such a prohibition may be subject to limitations imposed by state law

ERISA, being silent on the issue, leaves the matter to the agreement of the contracting parties. Citing to cases holding that as a general rule of law where the parties’ intent is clear the courts will enforce non-assignment provisions, the court found that the anti-assignment clause was not contrary to public policy and therefore was valid and enforceable.

Turning next to the argument by the provider that the plan somehow had waived its rights under the clause, the court considered the course of conduct of the parties. The plan administrator engaged in direct discussions with the provider over plan coverage, accepted direct submissions of claim forms, made direct payments to the provider, and engaged the provider in extensive communications on the issues raised by the provider. All of this documented conduct, the court held, evidenced a “voluntary relinquishment of a known right” and demonstrated “clear acts showing the intent to waive” the protections of the anti-assignment clause.

An interesting and important corollary is the finding that language of an assignment of “payment” suffices to assign any benefits reasonably necessary to secure payment. Here the defendant argued that the only right assigned was the right of payment, not any right to sue. The court rejected the argument, holding that all aspects of the “right to reimbursement” in fact were assigned by that language, because:

“[c]onstruing the assignments to only narrowly encompass the right to appeal an adverse determination, as Defendant would suggest, would undermine the obvious intent of the assignment - the right to seek reimbursement for medical procedures performed. . . . [t]he right to seek proper reimbursement for medical procedures . . . amounted to a full assignment.”

So the case proceeds to trial.

On to the “unintended consequences” part. Back in the ‘80s some health plans began developing products which, in theory, invested members in some treatment decisions by requiring them to bear larger self-pay portions than were current in most of the plans then being offered. These so-called “high deductible” or “consumer directed” plans (some of which employed health savings accounts or similar funding vehicles) created significant financial risk for members but also came with lower premiums. Members were expected to exercise some discretion and judgment in selecting what kind of care they needed, and ideally in making life style choices that improved their health. From the provider perspective one issue with “high deductible” products was that the provider had to chase the patient for a larger portion of the payment rate than with more “traditional” products. In response more and more providers expect-

ed that “payment be made at the time of the visit” and, barring genuine emergencies, would decline to see patients who did not pay their share in advance. For those of us doing our best to keep abreast of developments in the rollout of the Affordable Care Act, we know that each of the four “metal products” offered by the health exchanges has different levels of deductibles, copayments and other coinsurance. We can expect that many people currently insured through “traditional” plans may gravitate (or be pushed by their employers) into exchange products (one “unintended” consequence of Obamacare?) thus resulting in even more patients with larger self pay shares.

My concern is that if the holding in *North Jersey Brain and Spine Center* is adopted by other courts across the country, we may see plans and payers of all kinds, especially ERISA administrators,⁵ declining to accept *any* claims from out-of-network providers out of concern that in so doing they will be deemed to have waived whatever protections from suit are afforded them in the anti-assignment provisions of their respective benefit designs. Providers then may be expected to demand that their patients pay some or all of the estimated costs of their care and treatment in advance, or else make other financial accommodations that will secure payment to a greater extent than at present.⁶ Provider collection costs certainly will rise as payers tender payment directly to their members rather than to the provider assignees and as patients default in payment plans. Claims submissions and subsequent appeals by lay patients will evidence a much higher level of errors and omissions, and the exchange of communications between providers and payers in advancing clinical justifications for covered services will be thwarted.

Speaking of “unintended consequences”, on October 18th the American Health Lawyers’ Association reported on a Kaiser Foundation study that shows that some five million uninsured adults may be excluded from both Medicaid and exchange products because of the SCOTUS decision in *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012). The ACA intended that expanded Medicaid eligibility would allow those millions to be included in Medicaid, thus there was no perceived need to provide them with tax credits and subsidies for exchange products. *Surprise*; the Supreme Court’s ruling made the expansion of Medicaid optional, and some 26 states are not planning to implement the expansion. But the law already is in place (and it isn’t likely that Congress will pass any kind of *expansion* of Obamacare!). So, in those states, over 5 million poor, uninsured adults that have incomes above current Medicaid eligibility levels but below the federal poverty levels find themselves in a “coverage gap” by earning too much to qualify for Medicaid but not enough to qualify for ACA marketplace premium tax credits. It certainly is interesting how court decisions can have unintended consequences!!

Note: James Fouassier, Esq. is the Associate Administrator of Managed Care for Stony Brook University Hospital and Co-Chair of the Association’s Health and Hospital Law Committee. His opinions and comments are his own and may not reflect those of Stony Brook University Hospital,

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NYSBA Fall Meeting - Debate on Pro Bono

By Scott M. Karson

The annual fall meeting of the 77,000 member New York State Bar Association was held from Oct. 31 – Nov. 2, 2013 at the Bar Center in Albany, New York. The Association's policy-making body, the House of Delegates, met on Saturday, Nov. 2, 2013, with NYSBA President Elect Glenn Lau-Kee of New York City presiding as Chair of the House.

The meeting of the House featured a lively debate, which focused on recent amendments made by the Appellate Divisions to Rule 6.1 of the *New York Rules of Professional Conduct*, effective on May 1, 2013. Those amendments increased the aspirational number of pro bono hours to be provided annually by all lawyers from 20 to 50, and provided that lawyers should aspire to make annual financial contributions to organizations that provide legal services to poor persons in an amount at least equivalent to, *inter alia*, the amount typically billed by the lawyer (or the firm with which the lawyer is associated) for one hour of time.

Although the 50-hour goal and the billable hour financial contribution goal are aspirational, a concurrent amendment to section 118.1(e)(14) of the Rules of the Chief Administrator was enacted, requiring lawyers to report on their biennial registration forms: (a) the number of hours that the lawyer voluntarily spent providing unpaid legal services to poor and underserved clients during the previous biennial registration period; and (b) the amount of voluntary financial contributions the lawyer made to organizations primarily or substantially engaged in providing legal services to the poor and underserved during the previous biennial registration period.

The debate was triggered by a seemingly innocuous proposal by the NYSBA Committee on Standards of Attorney Conduct to amend the commentary to Rule 6.1 to reflect the change in the aspirational

goal from 20 to 50 hours (although the rules themselves are the exclusive province of the Appellate Divisions, the commentary is provided by NYSBA). However, former NYSBA President Robert Ostertag of Poughkeepsie rose in opposition, emphatically noting that the rules changes were contrary to established NYSBA policy opposing mandatory pro bono reporting, and had been imposed without consultation with NYSBA. Former President Ostertag opined that the public dissemination of highly-personal information about contributions of time and money by attorneys is patently intrusive, particular to solo and small firm practitioners in smaller cities and towns and rural areas of the state.

Although most of the speakers were critical of the new rules and urged NYSBA to take action against them, at least one, Susan Lindenauer of the New York County Lawyer's Association and former general counsel to the Legal Aid Society of New York City, argued that pro bono is not charity but a professional obligation, and that 50 hours is not too much to ask.

Ultimately, the motion to approve the revised commentary to Rule 6.1 was tabled, making it likely that the matter will be revisited at the next meeting of the House of Delegates in January 2014 during the NYSBA Annual Meeting in New York City.

The House also approved the Report of the NYSBA Special Committee on Human Trafficking. This authoritative and exhaustive report focuses on three types of trafficking: labor trafficking, sex trafficking and child trafficking.

Regarding labor trafficking, the report calls for the creation of a civil private right of action; enactment of an enterprise disclosure law requiring businesses with annual revenues exceeding \$100,000,000



Scott M. Karson

to file an oath of non-involvement with trafficking with the New York State Department of Labor; and providing monetary rewards and whistleblower immunity to employees of entities engaged in trafficking activities and citizens who report suspected trafficking which results in the prosecution of those responsible.

With respect to sex trafficking, the report recommends that section 70.02(1)(a) of the Penal Law be amended to classify sex trafficking as a class B violent felony; that prostitution in the third degree be included as a "designated offense" for purposes of expanding eavesdropping and video surveillance authority pursuant to CPL 700.05(8)(h); creating an affirmative defense for trafficking victims charged with offenses; amending the Vacating Convictions Law by expanding it to include non-prostitution offenses, eliminating the due diligence requirements and developing uniform court rules to protect the identities of trafficking victims; and expanding the victim referral process to the New York State Office of Temporary and Disability Assistance for services to include providers of social or legal services who are well positioned to identify victims of sex trafficking.

As to child trafficking, the report calls for the elimination of coercion as an element of sex trafficking when a person who is 19 years of age or older intentionally advances or profits from the prostitution of a person under the age of 18; the elimination of criminal prosecution of minor victims of sex trafficking by raising the age of criminal responsibility for such crimes to 18; making Family Court orders of protection available to victims of sex trafficking and sexual exploitation; amending the child protective provisions of the Family Court Act and Social Services Law to explicitly include child

victims of human trafficking; improving training for Family Court professionals; and amending mandated reporter requirements under the Social Services Law to include human trafficking.

The House overwhelmingly approved the report and recommendations, with the exception of that portion of the report dealing with orders of protection in Family Court, which was withdrawn by the Special Committee for further consideration.

Finally, the NYSBA Nominating Committee report to the House was delivered by Former NYSBA President and current Nominating Committee Chair Stephen P. Younger of New York City. Mr. Younger announced that David P. Miranda of Albany had been nominated as President Elect; Ellen G. Makofsky of Garden City had been nominated as Secretary; and Sharon Stern Gerstman of Buffalo had been nominated for Treasurer. Nominees for the office of Vice President for each judicial district, for members at large of the Executive Committee, and for delegates to the American Bar Association were also announced by Mr. Younger. These nominees will stand for election at the January 31, 2014 meeting of the House in New York City and, if elected, will assume office on June 1, 2014.

Note: Scott M. Karson is the Vice President of the NYSBA for the Tenth Judicial District and serves on the NYSBA Executive Committee and in the NYSBA House of Delegates. He is a sustaining member and former President of the SCBA, a member of the ABA House of Delegates, a member of the ABA Judicial Division Council of Appellate Lawyers, a Life Fellow of the New York Bar Foundation, a Fellow of the American Bar Foundation and Vice-Chair of the Board of Directors of Nassau Suffolk Law Services Committee. He is a partner at Lamb & Barnosky, LLP in Melville.

LANDLORD TENANT

Proof Required - Revisiting Well Settled Legal Principles and the Proof Necessary to Prevail

By Patrick McCormick

Three recent appellate decisions, although each is sparse on fact, nevertheless remind us of the relevance of well settled legal principles and confirm the proof required to prevail on each. The first, *Tewksbury Management Group, LLC v. Rogers Investments NV LP*,¹ involves application of the doctrine of *res judicata*; the second, *Bonacasa Realty Company, LLC v. Salvatore*,² discusses the concept of piercing the corporate veil; and the third, *MH Residential 1, LLC MH v. Barrett*,³ *inter alia*, discovery.

In *Tewksbury*, the commercial tenant commenced an action against its landlord claiming landlord breached the lease by failing to obtain a valid certificate of occupancy, remove building violations that allegedly interfered with tenant's use of the premises, to provide heat and to deliver possession of the entire premises. By order entered April 19, 2012, the Supreme Court granted landlord's motion to dismiss the complaint.

As it turns out, several years earlier in 2008, landlord commenced a nonpayment proceeding against tenant. That proceeding ended with a consent judgment of possession and judgment for rent arrears. In

affirming the dismissal of tenant's claims upon the doctrine of *res judicata*, the Appellate Division held that tenant's claims were "inextricably intertwined with defendant's claims in the summary proceeding" and could have been raised by tenant in that summary proceeding. Obviously, tenant's claims, if proved, would have provided a defense to landlord's claims for possession and rent. Having failed to raise the claims in the summary proceeding and, more importantly, having consented to a judgment for rent arrears and possession, tenant necessarily acknowledged rent was owed, thus precluding its claim that landlord breached the lease. If you represent a tenant and have claims that could provide a defense to a claim of nonpayment and that would also result in an award of damages, the claim must be raised in the summary proceeding or it may be forever lost.

In *Bonacasa*, tenant vacated the demised premises prior to the expiration of the lease. Landlord thereafter commenced an action against the corporate tenant for rent due and owing and also asserted claims



Patrick McCormick

against the corporation's principal. Landlord alleged that the corporation was a sham corporation "formed solely for the purpose of leasing the premises" and the individual defendant exercised dominion and control over the corporation and thus sought to pierce the corporate veil. In affirming the dismissal of the claim against the individual defendant, the Appellate

Division found the evidence supported the finding that the individual "executed the lease in his corporate capacity as a principal of [the corporate tenant] and that he did not exercise dominion and control over [the corporation] to commit a wrong or injustice against the plaintiff." The court further found that "a simple breach of contract, without more, does not constitute a fraud or wrong warranting the piercing of the corporate veil."

Finally, *MH Residential 1, LLC*, involved protracted residential holdover proceedings. Tenants filed two motions for leave to conduct various discovery. In affirming the denial of the first motion, the Appellate Term noted that the motion was made 11 months

after an unappealed order denied a prior motion for similar relief and tenant had not shown a "material change in circumstances."

As for the second motion, the court determined movant had not demonstrated "ample need" for the discovery sought. These standards for obtaining discovery are well known, but need to be remembered as litigation progresses.

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. 2013 WL 5712338, ___N.Y.S.2d___ (1st Dep't 2013)
2. 109 A.D.3d 946, 972 N.Y.S.2d 84 (2d Dep't 2013)
3. 41 Misc.3d 24, ___N.Y.S.2d___ (App. Term 1st Dep't 2013)

ANIMAL LAW

Important Update on Negligence Liability for Animal Owners in New York!

By Amy L. Chaitoff

Historical standard for liability

When it comes to liability, animal owners in New York have enjoyed a large amount of protection against liability. Until very recently, the New York Court of Appeals has held that “a person who is injured in an accident involving an animal can never have a claim for negligence against the animal’s owner, but can only recover in strict liability on a showing that the owner knew of the animal’s vicious propensities.” *see Petrone v. Fernandez*, 12 NY3d 546, (2009); and *Bard v. Jahnke*, 6 N.Y.3d 592, 595, 848 N.E.2d 463, 465 (2006).

In *Bard v. Jahnke*, 6 N.Y.3d 592, 595, 848 N.E.2d 463, 465 (2006) the plaintiff, who was doing carpentry work in a dairy barn located on the defendant’s farm, was injured when a bull charged him. The bull named “Fred” apparently had never been known to have injured any other farm animal or person and was permitted by the defendant to roam the farm freely and to breed with cows that had not been impregnated through artificial insemination. *See, Bard v. Jahnke*, 6 N.Y.3d 592, 595, 848 N.E.2d 463, 465 (2006). The New York Court of Appeals rejected the plaintiffs’ argument that the defendant was negligent in permitting a breeding bull, with a tendency to express its dominance through acts of aggression, to roam freely. The court reasoned that, the plaintiffs’ contentions that because Fred was not only a bull, but a breeding bull, that Jahnke was negligent in failing to restrain Fred, was essentially no different than arguing that Jahnke was negligent in that he “should have known” of Fred’s vicious propensities.” *See, Bard v. Jahnke*, 6 N.Y.3d 592, 598-99, 848 N.E.2d 463, 468 (2006). The court in *Bard* went on to hold that, “[w]e have never, however, held that particular breeds or kinds of domestic animals are dangerous, and therefore when an individual animal of the breed or kind causes harm, its owner is charged with knowledge of vicious propensities. Similarly, we have never held that male domestic animals kept for breeding or female domestic animals caring for their young are dangerous as a class. We decline to do so now or otherwise to dilute our traditional rule under the guise of a companion com-

mon-law cause of action for negligence. In sum, when harm is caused by a domestic animal, its owner’s liability is determined solely by application of the rule articulated in *Collier. See, Bard v. Jahnke*, 6 N.Y.3d 592, 598-99.

In *Petrone v. Fernandez*, 12 N.Y.3d 546, 547, 910 N.E.2d 993, 994 (2009), the New York Court of Appeals again refused to entertain a negligence claim, this time asserted by a mail carrier who was injured while running away from an unrestrained Rottweiler that had begun to chase her. *Petrone v. Fernandez*, 12 N.Y.3d 546, 547, 910 N.E.2d 993, 994 (2009). The court in *Petrone* held that, “[W]hen harm is caused by a domestic animal, its owner’s liability is determined solely by application of the rule articulated in *Collier*.” (*Bard v. Jahnke*, 6 N.Y.3d 592, 599, 815 N.Y.S.2d 16, 848 N.E.2d 463 [2006] [*emphasis added*])—i.e., the rule of strict liability for harm caused by a domestic animal whose owner knows or should have known of the animal’s vicious propensities (*see Collier*, 1 N.Y.3d at 446-447, 775 N.Y.S.2d 205, 807 N.E.2d 254; *see also Bard*, 6 N.Y.3d at 601, 815 N.Y.S.2d 16, 848 N.E.2d 463; *Petrone v. Fernandez*, 12 N.Y.3d 546, 550, 910 N.E.2d 993, 996 (2009). Therefore, the *Bard* and *Petrone* rule established by the New York Court of Appeals held that a plaintiff injured by a “domestic animal” could not recover unless the plaintiff could prove that a defendant had knowledge of the animal’s “vicious propensities,” which included injuries not caused by the “vicious” behavior of the animal, but by some negligent act of the human owner were however, some minor exceptions depending on the jurisdiction the action was brought. For example, The Third and Fourth Department previously have held to the strict liability standard, requiring that strict liability first be pled and a defendant owner’s knowledge of a “prior vicious propensity” proven before liability would ensue. The First and Second Departments have also overwhelmingly held to the strict liability standard and in only a handful of cases have applied an “enhanced duty” exception in cases where the defendant had



Amy L. Chaitoff

breached an enhanced duty, as set by the particular facts in the case. It is important to note that all of the cases in which the court applied an “enhanced duty” exception, all involved young children that had been seriously injured by a “domesticated animal”. These cases are the exception, and certainly not the rule. It is also important to note that many times courts will mistakenly use the terms “companion animal,” “domesticated animal,” or “pet” interchangeably when they each have distinct definitions and meanings under the Agriculture and Markets Law. For example, “dogs” are not defined as “domesticated animals” under New York State Agriculture and Markets Law §108(7), but are specifically defined under §108(5), and as “companion animals” under Article 26, §350(5). These are all important distinctions and should not be watered down or confused by using them interchangeably.

Recent Court of Appeals Ruling

Hastings v. Sauve

We now fast forward to May, 2013, and the new precedent setting case in which the New York Court of Appeals made what seems to be a drastic change to the rule of *Bard v. Jahnke*. In the May, 2013, case of *Hastings v. Sauve*, 21 N.Y.3d 122, 124, 989 N.E.2d 940, 941 (2013), the Court of Appeals held that the long standing rule of *Bard v. Jahnke* “no longer bars a suit for negligence when a farm animal has been allowed to stray from the property where it is kept.” [*emphasis added*], *See, Hastings v. Sauve*, 21 N.Y.3d 122, 124, 989 N.E.2d 940, 941 (2013). The Court of Appeals went on to explain that the difference between the *Bard* and *Petrone* cases and the case of *Hastings v. Sauve* was that the claim brought in the *Hastings* case was “fundamentally distinct” from that in *Bard* and previous cases before the court. The court explained that, in the *Hastings* case, “a farm animal was permitted to wander off the property where it was kept through the negligence of the owner of the property and the owner of the animal. *See, Hastings v. Sauve*, 21 N.Y.3d 122, 125. Therefore, the court reasoned that to apply the

rule of *Bard* where an owner’s liability is determined solely by the “vicious propensity rule” when the harm is caused by a domestic animal to the fact pattern in the *Hastings* case would be to essentially immunize defendants “who take little or no care to keep their livestock out of the roadway or off of other people’s property.” *Id.*

The court further clarified their ruling by holding that, “a landowner or the owner of an animal may be liable under ordinary tort-law principles when a farm animal - i.e., a domestic animal as that term is defined in the Agriculture and Markets Law §108(7) - is negligently allowed to stray from the property on which the animal is kept.” *Id.* The court however specifically did not consider whether the same type of negligence seen in the *Hastings* case would apply to dogs, cats or other household pets, the court provided the proverbial foot in the door, for a future adjudication on the issue for another case. *Id.*

Appellate Division, First Department Case of *Doerr v. Goldsmith*

The Court of Appeals did not have long to wait for the door on animal related negligence cases to continue to open, at least, in the First Department. This past October, the Appellate Division, First Department, decided the case of *Doerr v. Goldsmith*, 110 A.D.3d 453 (N.Y. App. Div. 2013), which involved the negligent actions of this time a dog owner. In *Doerr v. Goldsmith*, 110 A.D.3d 453, the plaintiff’s injuries occurred while plaintiff was riding his bicycle in Central Park when the defendant dog owner signaled to her dog to come to her on the other side of the road. The cyclist was allegedly unable to avoid colliding with the dog and was propelled off his bicycle. *Id.* The plaintiff sought to recover against defendants on a theory of negligence, however, it is important to note that the plaintiff *did not* claim that the dog’s actions were a result of any “vicious propensities” known to the defendants. *Id.*

Here, as in the *Hastings* case, the Appellate Division, First Department recognized that an accident caused by an animal’s “aggressive or threatening behavior” is “fundamentally distinct” from one caused by an animal owner’s

(Continued on page 27)

PRO BONO

Pro Bono attorney of the month – Stuart P. Gelberg

By Maria Dosso

The Suffolk Pro Bono Project is proud to recognize Stuart P. Gelberg, for his outstanding contribution to the pro bono efforts on Long Island. Gelberg’s generous involvement is especially noteworthy as he volunteers in both Nassau and Suffolk counties, accepting bankruptcy cases for pro bono representation as well as volunteering with Nassau Suffolk Law Services’ (NSLS) Attorney of the Day Project. He has been honored previously for his outstanding service, as Pro Bono Attorney of the Month, Volunteer Lawyer

of the Month, as well as being the recipient of the “Thomas Maligno Attorney of the Year” award, and most recently, as a Nassau County Bar Association “Access to Justice Champion.”

Gelberg graduated from the State University of New York at Albany in 1977, having spent a semester studying at the University of Copenhagen. He obtained his law degree from Buffalo School of Law, graduating in 1980 and launched his career soon afterwards as an associate in a firm that concentrated in the areas of foreclosure and bankruptcy. For over 20 years he served as a trustee

for the United States Bankruptcy Court, both the Eastern District and Southern District of New York, and is well respected among the bankruptcy bar. In addition to his membership in the Suffolk County Bar Association (SCBA) and the Nassau County Bar Association (NCBA), Gelberg is a member of the New York State Bar Association (NYSBA), the National Association of Chapter 13 Trustees, and the Capital Region Bankruptcy Bar Association. He has lectured extensively for SCBA, NCBA, NYSBA, the United States District Court Eastern Division of New York, the Brooklyn Bar Association, and the Bar Association of the City of New York.

Stuart Gelberg first became involved in pro bono over 10 years ago, volunteering his services with the NSLS Attorney of the Day/Landlord Tenant Project in Nassau County. Although he did not originally have a specific expertise in this area, the plan was to explore using Chapter 13 bankruptcies to create rent arrear payment plans as a way of preserving housing. Since that time he has gained considerable expertise in the area of landlord tenant law. The advantages of doing pro bono were obvious.

“It’s a two-way street,” he observed. “You get something out of the experience in terms of a marketable skill, and you help



Stuart P. Gelberg

people in need.”

But the greater part of his involvement is with NSLS’ Bankruptcy Clinics. Gelberg regularly serves on the screening panel for the pro bono clinics being operated in both counties. Applicants who have been determined to be financially eligible for pro bono services, attend the clinics where they are interviewed by experienced bankruptcy attorneys to determine whether a Chapter 7 bankruptcy is appropriate. After the interviews, the screening panel meets to discuss the cases and decide which ones warrant a pro bono Chapter 7 bankruptcy referral. The cases are then assigned to attorney members of the larger pro bono Bankruptcy Panel for representation, although members of the screening panel

(Continued on page 25)

SCBA Member Honored by Boy Scouts

Congratulations to long time SCBA member Floyd Sarisohn who was the recipient of the 2013 Distinguished Citizens Award from the Suffolk County Council Boy Scouts of America Award on November 22, 2013 at Flowerfield, St. James, NY.

Floyd received his Eagle Scott rank in 1946, while in Troup 50, Queens, New York and has been a member Order of the Arrow in the Suanhacky Lodge, Queens County since 1944.

Floyd served his country with distinction in Korea as a member of the US

Army from 1946-1948 and 1950-51. After that, he attended law school at St. Johns University, receiving his J.D. Degree in 1954. He is a senior partner in the law firm of Sarisohn Law Partners LLP and Sarisohn, Carner, LeBow and DeVita in Commack.

With his wife Bernice, Floyd has accumulated the largest collection of chess sets in the United States. He serves as a member of the Board of Directors of Chess Collectors International and of the St. Louis World Chess Hall of Fame and Chess Museum.

CONSUMER BANKRUPTCY

New Test for Re-Opening Case to Add P.I. Suits

Five-prong test determines good faith or cause

By Craig D. Robins



Craig D. Robins

Although debtors sometimes forget to schedule assets, trustees devote a substantial amount of attention to searching, in particular, for personal injury actions that debtors inadvertently omit. Despite being questioned at the meeting of creditors, a number of debtors still fail to advise the trustee that they have the right to sue for injuries sustained pre-petition.

As I explained previously, while such assets have high potential value, debtors often don't perceive of them as assets, since they are intangible, unliquidated and contingent. As a result, many debtors do not realize that they have to list them as potential assets.

What often happens when a debtor fails to schedule a P.I. cause of action is that the debtor eventually retains a P.I. attorney to bring suit after the bankruptcy case is closed and neglects to tell the P.I. attorney about the bankruptcy filing. Then, years later, the P.I. attorney freaks out because the defendant's counsel brings a motion to dismiss the P.I. case on the basis that the plaintiff (and former debtor) lacks standing to commence or continue the suit, as the cause of action is the sole property of the Chapter 7 trustee. This is because once a bankruptcy case is closed, non-disclosed causes of action and litigation remain the property of the bankruptcy estate, unless abandoned by the trustee. Case law provides that if the trustee never knew about the potential estate property, the trustee could not have abandoned it.

Previously I discussed the *Meneses* case in which Judge Alan S. Trust, sitting in the Central Islip Bankruptcy Court, refused to permit a debtor to re-open a closed Chapter 7 case to permit the trustee to administer a P.I. cause of action. The judge cited the debtor's lack of good faith in that case. *In re: Carlos Meneses* (05-86811-ast, Bankr. E.D.N.Y., March 3, 2010).

Now let's fast forward to October 17, 2013 where we have the opposite result and a new standard for evaluating such situations. Judge Trust issued a decision permitting two separate debtors to re-open their respective Chapter 7 cases to amend their schedules to list previously undisclosed personal injury actions. *In re Craig Warmbrand* (10-76058-ast, Bankr.E.D.N.Y.). Both of these matters were consolidated into one written decision.

Each of the two debtors in *Warmbrand* commenced a personal injury lawsuit post petition seeking to recover damages for injuries allegedly sustained prepetition, and each alleged mistake or inadvertence in neglecting to schedule or disclose the claim prior to the closing of his or her case.

In permitting each of these debtors to re-open their cases, the judge adopted a test for determining whether good faith or cause has been established to re-open a case to allow a debtor to schedule a previously undisclosed lawsuit: 1) the debtor's inadvertence in failing to schedule the lawsuit; 2) potential benefit to creditors; 3) indications of forum shopping or other inequitable conduct; 4) prejudice to objecting parties; and 5) benefit to the debtor.

The Warmbrands commenced a medical

malpractice case just eight days after filing their Chapter 7 petition, yet they did not disclose the case to Chapter 7 trustee Kenneth Kirschenbaum when he asked them about P.I. cases. It was three years later when they brought a motion to re-open. Warmbrand argued that his former bankruptcy attorney failed to properly advise him about his disclosure obligations.

In a separate case heard at about the same time, Craig Bowe commenced a P.I. action just two months after his Chapter 7 case was closed, for injuries he sustained two years before he filed. He, too, did not disclose the right to sue to his trustee, Neil Ackerman. Bowe brought his motion to re-open two years after the case was closed. He argued that he did not understand the questions that his former bankruptcy attorney asked him about personal injury suits and that his failure to schedule was due to mistake and inadvertent error.

In both cases, the attorneys for the defendants in the personal injury cases argued that based on *Meneses*, the court should deny the motions to re-open, based on the bad faith of the debtors and the importance of maintaining the integrity of the bankruptcy process.

Judge Trust determined the *Meneses* case was distinguishable from these cases. The judge applied a new five-prong analysis to Warmbrand and Bowe. He found that like *Meneses*, each of these debtors must have had a "consciousness" about their claims.

However, he found that unlike *Meneses*, these cases would provide benefit to creditors, there was no prejudice to the objecting parties even though years had passed since the cases were closed, there was no forum shopping, and there was potential benefit to the debtors.

The judge made it a point to state that he would not draw an inference that the debtors' failures to schedule their claims was inadvertent as doing so would create too great a license for debtors to avoid or ignore their disclosure requirements and later substitute a convenient "I forgot" or "I didn't know" response.

This new standard for reviewing situations involving omitted personal injury actions is important because it gives debtors a greater chance that they will be successful in re-opening their cases.

One important issue that was not resolved in Warmbrand is whether such debtors will be successful in exempting their personal injury proceeds. I would imagine the debtor's good faith would be instrumental here. Finally, it goes without saying that all attorneys should be extremely vigilant about questioning their clients as to whether they have a potential P.I. action.

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

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From left: Joseph P. Awad, Judith A. Donnel, Joseph Miklos, Joseph C. Muzio

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TO THE CONSTRUCTION LAW DEPARTMENT OF THE FIRM

LAND TITLE LAW

Size Might Matter, After All

By Lance R. Pomerantz

Longtime readers of this space are familiar with the amendments to the statutes concerning adverse possession made in 2008.¹ One of the signature elements of the amendments was the addition of Real Property Actions and Proceedings Law (“RPAPL”) §543. This section was designed to protect a record owner whose neighbor had engaged in various commonplace acts across a record boundary line. RPAPL §543(1) concerns the effect of “de minimus [sic] non-structural encroachments” and §543(2) concerns “acts of lawn mowing or similar maintenance.” Both provisions declare that each type of activity “shall be deemed permissive and non-adverse.”

Small enough to satisfy?

In a recent case, the Second Department considered the question of how small an encroachment must be to satisfy the *de minimis* requirement of §543(1). It turns out to be a fact question for trial. *Wright v. Sokoloff*, 2013 NY Slip Op 6856 (2nd Dept., Oct. 23, 2013).

Defendant’s predecessor in title had planted an eight-foot wide hedge on plaintiff’s property, and claimed title by adverse

possession. RPAPL §543(1) provides that “the existence of de minimus [sic] non-structural encroachments including, but not limited to, ... hedges, shrubbery, plantings, ... shall be deemed to be permissive and non-adverse.” The plaintiff contended that the statute mandated that “the existence of all encroaching hedges and shrubbery, no matter how large, shall be deemed permissive and non-adverse.”

The court flatly rejected this interpretation. It held that “[t]he more reasonable interpretation of RPAPL 543(1) is that the list contains examples of ‘non-structural encroachments’ which could still be adverse if they are not de minimis.” Accordingly, it concluded that “plaintiff raised a triable issue of fact as to whether, under the circumstances of this case, the eight-foot encroachment was de minimis within the meaning of RPAPL 543(1).”

This case appears to be at odds with the Third Department’s interpretation of §543(1). In *Sawyer v. Prusky*, 71 AD 3d 1325 (3rd Dept., 2010), the court appeared to say that any “non-structural encroachment” listed in the statute would be *per se*



Lance R. Pomerantz

“de minimis” and therefore “deemed permissive and non-adverse.”

A bigger enchilada

A different aspect of this case doesn’t make for sly, attention-grabbing headlines, but might be of greater concern. The court tacitly accepts that §543(1) alters the quantum of possession needed to establish title. “Deemed permissive” is treated as if it is an irrebuttable presumption that can transform previously non-permissive activity. The defendant’s sole recourse is to fight and win the *de minimis* battle, despite the plaintiff’s delay in bringing suit.

The planting in *Wright* occurred in 1999. The action was not commenced until 2010. According to the plaintiff in *Wright*, he immediately objected at the time of the planting and repeatedly asked the former neighbor to remove the hedge. After the defendants purchased their property in October 2006, they also refused to remove the hedge. Clearly, the encroachment had continued for more than the ten-year period without the plaintiff’s permission. Can the statute be read to grant the

plaintiff’s permission when the plaintiff himself has emphatically refused to do so?

This concern is not limited to transitional cases, where the possessory activity commenced less than 10 years before the effective date of §543. Nor is it limited to encroachments.¹¹ “Deemed permissive” might be appropriate when the plaintiff is unaware of minor incursions and, therefore, does not affirmatively withhold permission. It seems inequitable to reward inaction on the part of a plaintiff who affirmatively declares the activity non-permissive, yet fails to bring suit.

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

1. *Demonic Possession: What Hath the Legislature Wrought? The Suffolk Lawyer*, December, 2010, p.16.

2. Since both provisions of §543 employ identical language in this regard, the analysis can also be applied to maintenance activities under §543(2).

TRUSTS AND ESTATES

The Slayer Rule Revisited

By Robert M. Harper

In what has been described as a precedent-setting decision in *Matter of Brewer*, Nassau County Surrogate Edward W. McCarty, III recently addressed whether a killer is entitled to receive the proceeds of wrongful death claims arising from her victims’ deaths, given that the killer was excused from criminal liability for the deaths and found not guilty of criminal charges due to the killer’s mental disease or defect. As explained more fully below, Surrogate McCarty answered that question in the negative. Against the backdrop of the slayer rule, this article discusses Surrogate McCarty’s recent determination in *Brewer* and the legal principles upon which it is based.

The Slayer Rule

To view Surrogate McCarty’s determination through the proper lens, one must first understand the slayer rule, as articulated by the Court of Appeals in *Riggs v. Palmer* in 1889. In *Riggs*, the court held that “[n]o one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime.”¹ Although *Riggs*’s holding is oftentimes applied in cases concerning the intentional or reckless killing of another, its application is anything but straightforward and has resulted in a rich, sometimes conflicting body of case law.²

Under *Riggs* and its progeny, killers have forfeited their rights to the proceeds of their victims’ life insurance policies; to legacies under their victims’ wills; to take as their victims’ intestate distributees; and to receive sole title to bank accounts they owned with their victims, jointly with right of survivorship. Conversely, Surrogate’s Courts have excused killers from forfeiture when their victims’ deaths have resulted from self-defense; accidents;

or disabilities that negated any culpable mental state, such as insanity.³

For example, in *Matter of Wirth*, the decedent died at the hands of her husband, who was found “not guilty [of murder in the first degree] by reason of insanity.” In the context of the Public Administrator’s accounting as administrator of the decedent’s estate, the Surrogate’s Court, Erie County, addressed whether the husband was entitled to a share of the decedent’s estate as one of the decedent’s intestate distributees.

Former Erie County Surrogate William J. Regan answered that question in the affirmative. In doing so, the surrogate stated that “insanity is a defense against punishment for crime.” Surrogate Regan also reasoned as follows: (a) “where one benefitted from an unlawful act, such as a killing committed without intent because of insanity, it cannot be concluded that he perpetrated the act with the end in view of profiting thereby”; and (b) “it is not against . . . public policy . . . to permit one who has killed while insane subsequently to take a share of the estate of the deceased” One fact that may have influenced Surrogate Regan’s decision is that all of the decedent’s distributees (of course, other than the husband), including the children she had from a prior marriage, consented to the husband receiving an intestate share of the decedent’s estate. Given the foregoing, the Surrogate’s Court found that the husband could inherit from the decedent’s estate.

Recently, in *Brewer*, Surrogate McCarty decided a slightly different issue than the one resolved in *Wirth*. Specifically, in *Brewer*, Surrogate McCarty fashioned the issue as whether a person found not guilty of a crime by reason of mental disease or defect, but who possessed the ability to



Robert M. Harper

understand that her conduct was morally wrong when undertaken can financially benefit from her criminal act.⁴ As explained below, the surrogate answered that question in the negative.

Matter of Brewer

In *Brewer*, Leatrice Brewer (“Leatrice”) killed her three children in February, 2008.⁵ Leatrice apparently did so because she believed that by killing her children, she would save them from a voodoo curse. Leatrice was found “not responsible for the children’s deaths due to mental disease or defect.” She has undergone psychiatric treatment in an upstate facility since being found not guilty.

Following Leatrice’s criminal proceedings, the children’s fathers commenced a wrongful death action against Nassau County, alleging that its social workers failed to properly monitor Leatrice and her children. “Caseworkers visited [Leatrice’s] apartment two days before the killings and found no one home but neglected to schedule an immediate follow-up visit.”

After the children’s fathers settled the wrongful death claims against Nassau County for \$350,000, Leatrice objected to the fathers receiving the proceeds thereof. A contested proceeding ensued in the Surrogate’s Court. In that proceeding, Leatrice argued that the father had abandoned the children and, therefore, forfeited their rights to receive any of the wrongful death settlement proceeds. Notably, due to the fact that the state has a \$1,300,000 lien against Leatrice’s property, it was unlikely that Leatrice would receive any of the wrongful death proceeds, even if the Surrogate’s Court ruled in her favor.

In addressing Leatrice’s objections,

Surrogate McCarty apparently discussed the slayer rule and the Son of Sam laws (which prohibit a criminal from profiting from her crimes). Surrogate McCarty began by acknowledging that, due to the fact that Leatrice was found not guilty by reason of mental disease or defect, she was properly excused from criminal punishment for killing her children. However, in reasoning that appears to contradict *Wirth*, Surrogate McCarty also explained that: (a) a “finding of insanity in the criminal context is not tantamount to an absence of a mens rea;” (b) Leatrice was still morally responsible for her children’s deaths; and (c) “[t]he fact that the state cannot criminally punish an insane defendant is irrelevant to a determination of whether it is equitable for the killer to inherit from the victim.”

Surrogate McCarty continued “[i]t is one thing to say that the state should imprison one who was insane when she committed the murder,” but it is “quite another to say that the insane murderer can financially profit from her crime.” He stated: “The only relevant focus here must be upon the killer’s moral and personal responsibility for the crime.[] If the insane killer has intentionally killed her victim, if she has acted with the required mens rea for the crime, she is personally and morally responsible for her wrong, and equity demands that she will not benefit from the deed.” According to Surrogate McCarty, “[i]t is repugnant to decency to say that an insane murderer can finance her rehabilitation with new found wealth from her victim’s estate.”

Based upon the foregoing principles, Surrogate McCarty found that Leatrice forfeited her interest in the wrongful death proceeds because she possessed the mens rea to cause her children’s deaths at the time that she killed them. Indeed, Surrogate McCarty reasoned that, regard-

(Continued on page 26)

The SCBA Salutes Veterans

The SCBA's Veterans Military and Veterans Affairs Committee hosted a luncheon on Friday, Nov. 8 for Suffolk County veterans to thank them for their service to protect our liberty, the nation and our freedoms. Justice Peter H. Mayer and Ted Rosenberg, co-chairs of the committee, welcomed the SCBA member veterans and the veteran guests who attended. Thomas Ronayne, Director of the Suffolk County Veterans Service Agency, spoke in detail about the services the agency provides for our veterans.

Suffolk County Administrative Judge C. Randall Hinrichs addressed the audience and announced the formation of the East End Veterans County which will convene on Wednesday, Nov. 20, 2013. He said the court has been modeled on the Suffolk County Veterans Court presided over by Judge John J. Toomey in Central Islip. Southampton Town Court Justice Andrea H. Schiavoni will preside pursuant to an Administrative Order issued by New York State Chief Administrative Judge A. Gail Prudenti.

SCBA President Dennis R. Chase

reminded the audience that Veterans Day originated as "Armistice Day" on Nov. 11, 1919, the first anniversary of the end of World War I. Congress passed a resolution in 1926 for an annual observance, and Nov. 11 became a national holiday beginning in 1938. In 1954 President Eisenhower officially changed the name of the holiday from Armistice Day to Veterans Day. Veterans Day pays tribute to all American veterans who served their country honorably during war or peacetime.

Thank you to the Suffolk County Court Officers Honor Guard for presenting the colors and to John Zollo for his marvelous rendition of *I'm Proud to be an American*. We also thank the many SCBA attorney volunteers who have helped our Suffolk County veterans and their families with a myriad of legal issues thereby easing their plight. This is a huge endeavor and we always need more volunteers to help. If you are in a position to volunteer, please email jane@scba.org or call the office and put your name and area of expertise on Jane's list.

— LaCova



Major Leonard Badia, Suffolk County Court Officer, left; Donna England, SCBA's First VP; Patricia M. Meisenheimer, SCBA Treasurer and Jane LaCova, Executive Director.



The Suffolk County Court Officers Honor Guard's presence was much appreciated.



The Hon. Peter H. Mayer, Co-Chair of the Veterans & Military Affairs Committee.



The Hon. Glen A. Murphy, Acting County Court Judge, left, and the Hon. W. Gerard Asher, Supreme Court Justice.



Jacob Kubetz, Assistant District Attorney, left, who works out of the Veterans Court; Jane LaCova, Bill T. Ferris, SCBA President Elect; Hon. Peter H. Mayer; Hon. Andrea H. Schiavoni; District Administrative Judge C. Randall Hinrichs and Tom Ronayne.



Thomas Ronayne, Director, Suffolk County Veterans Service Agency.

TAX

Splitting Up the Family Corporation

By Lou Vlahos

Many of us encounter family-owned corporations in which the founder's children are engaged in the business to varying degrees. They may even own shares in the corporation. These situations present difficult estate and succession planning considerations for the family and the business.

Scenarios

It may be that two sibling actively participate in the business. They are capable and each aspires to lead the corporation. Eventually, their competing goals, personalities, or divergent management styles may generate enough friction between them, and within the business, so as to jeopardize the continued well-being of the business.

Alternatively, the siblings are interested in different parts of the corporation's business. Each sibling may be responsible for a different line of business; for example, a different product, service, or geographic region. Their differing interests may lead to disagreements as to the allocation of resources.

In other situations, the founder and his children may not see eye-to-eye. For example, the parent wants to emphasize the corporation's traditional line of business, while his children seek to develop an offshoot of that business.

The problem

It may be difficult, using traditional estate planning techniques, to accommodate the varying interests of family members involved in a single corporation. For example, assume that Corp. is owned 80 percent by Parent, 10 percent by Daughter and 10 percent by Son; it operates two lines of business; one line is managed by Son and the other by Daughter; neither has any interest in the other's line of business; how should Parent transfer his shares of Corp.?

Equal gifts or bequests to each child would leave them as equal shareholders, with the potential for disagreement. Moreover, to the extent Daughter's efforts increase the value of her business while

Son's business remains unchanged will Son be unfairly benefitted? Alternatively, what if an older line of business is operated by Parent, while a newer line is operated by Son and Daughter? There is little growth potential for the older line, but the newer line is poised to take off. What estate planning can Parent implement to shift the future appreciation of the new business line to the children and out of his estate?

A solution may be found in a transaction that is associated with corporate tax planning, but which may yield estate planning benefits: the tax-free corporate separation.

Tax-Free separations

When a corporation distributes appreciated property to its shareholders as a dividend or liquidating distribution, the corporation is treated as having sold that property for an amount equal to the property's fair market value, and it is taxed accordingly. The shareholders are taxed on their receipt of the property, either as a dividend, or as payment in exchange for their shares.

There is an exception to this recognition rule, however, for certain distributions. In general, no gain will be recognized by either the distributing corporation ("Distributing") or its shareholders if the following requirements are satisfied:

- Distributing distributes to some or all of its shareholders all of the stock of a subsidiary corporation controlled by Distributing ("Controlled");
- The distribution is not used principally as a device to distribute the earnings and profits of either corporation;
- Each of Distributing and Controlled is engaged, immediately after the distribution, in the active conduct of a trade or business which has been actively conducted (by Distributing or Controlled) throughout the five-year period ending on the date of the distribution;



Lou Vlahos

tribution;

- There is a real and substantial business purpose for the distribution that cannot be accomplished by another nontaxable alternative which is neither impractical, or unduly expensive;
- The distributee shareholders did not acquire their shares in Distributing by purchase during the five-year period ending on the date of distribution;
- Neither active trade or business was acquired in a taxable transaction during that period; and
- The distribution is not made pursuant to a plan by which at least 50% of Distributing or Controlled is acquired by third parties.

A closer look

The determination of whether a trade or business is actively conducted is based on all the facts and circumstances. Generally, the corporation is required itself to perform active and substantial management and operational functions, though some of its activities may be performed by others. The holding of property for investment does not constitute the active conduct of a trade business; generally, neither does the ownership and operation of real estate.

Historically, the IRS has accepted a number of valid business purposes, including the following: (1) To provide equity in a business of Distributing or Controlled to a key employee; (2) To enhance the success of a line of Distributing's business by enabling the corporation to resolve management and other problems that arise in (or are exacerbated by) Distributing's operation of different businesses within a single corporation; (3) To resolve shareholder disputes in the management of a business.

These business purposes may be accomplished by contributing business assets to a new subsidiary (Controlled). These assets may represent a fraction of the assets used by Distributing in a single business; or they may represent a distinct

business, separate from that retained by Distributing. After this asset transfer, Distributing distributes Controlled to some of Distributing's shareholders, in respect of or in exchange for some or all of their Distributing stock.

A solution?

Assuming these requirements are satisfied, the three scenarios described above may be addressed as follows:

- Distributing creates Controlled, to which it contributes one-half of the business conducted by Distributing; Distributing then distributes Controlled to Parent and Son, in exchange for all of Son's shares in Distributing; this leaves Parent and Son as the owners of Controlled, while Parent and Daughter own Distributing; Parent may now transfer shares in separate corporations to each child.
- Distributing contributes one business to Controlled and then distributes Controlled to Parent and Son, as above. Parent and Daughter continue to own Distributing and to operate the other business.
- Distributing contributes the "children's business" to Controlled and then distributes Controlled to Son and Daughter in exchange for all of their Distributing stock.

In each instance, the parties and their respective businesses may be separated without incurring income tax. This enables the children to pursue their own interests and retain the benefits of their own efforts. It allows Parent to maintain some level of involvement, while also enabling Parent to better tailor his gift and estate planning. In light of these benefits, a taxpayer should, in the appropriate circumstances, consider the application of a corporate separation to a family-owned business.

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

VEHICLE AND TRAFFIC

Review of Cell Phone and Portable Electronic Device Violations

By David A. Mansfield

The recent increase to five points for improper cell phone use §1225-c and use of portable electronic devices §1225-d effective, June 1, 2013 mandates a review of existing statutes and case law. New restrictions for operators of commercial vehicles also went into effect Oct. 28, 2013.

The assignment of five points 15 NYCRR Part §131.3(4) (iii) means that these violations are now defined as a high-point value of Part §132.1(c.) In an extreme case, if your client is validly licensed, but is subject to lifetime review under the regulations Part §132, a conviction could lead to a permanent license revocation for these offenses.

The cell phone law was enacted as a no point violation, effective Dec. 1, 2001. On Feb. 16, 2011, it was designated a two point offense. It was raised to three points on Oct. 5, 2011.

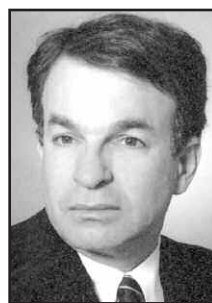
There is a presumption that holding a mobile telephone to or in the immediate proximity of the user's ear is that someone is engaged in a call.

The presumption is rebuttable and the vehicle must be in motion except for operators of commercial motor vehicles effective, Oct. 28, 2013.

The exemptions are calls made regarding an emergency situation to an emergency response operator, a hospital, physicians or ambulance company or corps, a fire department, a fire district or fire company or a police department.

Effective Oct. 28, 2013, under §1225-c (2)(a) no person shall operate a commercial motor vehicle while using a mobile telephone to engage in a call on a public highway including while temporarily stationary because of a traffic control device or other momentary delay.

A person operating a commercial motor vehicle will not be deemed to be operating a commercial motor vehicle while using a mobile telephone to engage in a call if



David A. Mansfield

such vehicle is stopped at the side of or off on a public highway or in a location where such vehicles are not otherwise prohibited to stop by law or regulation or lawful order. There is an exception for calls made at the direction of a police officer.

§1225-c(2)(b) creates a new presumption for the operator of a commercial motor vehicle who holds a mobile telephone,

even if temporarily stationary because of stopped traffic, a traffic control device or other momentary delays is presumed to be engaged in a call unless the vehicle is off the roadway in a legally permitted area.

§1225-c(1) (c) creates a separate definition of using a mobile telephone for operators of commercial motor vehicles as holding a mobile telephone in the immediate proximity of the user's ear or dialing or answering a mobile telephone by pressing more than a single button or reaching for a mobile phone in the manner that requires such person to maneuver or he or she is no longer seated in the driving position,

restrained by a seat belt installed in accordance with the Title §49 §393(3) of the Code of Federal Regulations.

It is likely these restrictions will eventually be placed on all drivers.

An Article §78 action against the Department of Motor Vehicles Appeals Board upheld the Traffic Violations Bureau conviction for the use of a speaker enabled iPhone while the operator was using one of his hands to hold the device next to his ear. *Smlow v. New York State Department of Motor Vehicles*, 95 AD 3rd 1023, 944 NYS 2nd, 948 (2012). A review of the record apparently convinced the court that the only dispute was how far was the speaker enabled iPhone from the operator's ear.

Two cases were recently decided by Brighton Town Justice Karen Morris in Monroe County who found the defendant guilty of a cellphone violation while using the phone while stopped at a red light. The statute states "while in motion" but Justice Morris distinguished being stopped at a red light from being pulled over on the

(Continued on page 26)

PRACTICE MANAGEMENT

Using External Deadlines to Manage Time

By Allison C. Shields

Some tasks and activities get done or goals get met, even if they get done at the last minute after late nights at the office. Usually, those goals, tasks, or activities get done because they have built in *deadlines*.

Deadlines create urgency. Readers of Steven Covey's *7 Habits of Highly Effective People* know that "urgent" tasks tend to get done. For example, when you have a scheduled meeting with a client or a hearing date for a motion, somehow the preparation work gets done on time. Those deadlines create urgency and provide a framework within which to structure your activities.

But what about those activities that Steven Covey calls "important but not urgent?" Those are the tasks that often get carried on a never ending to do list because they do not have built in deadlines even though they are the activities that will make the biggest difference to your practice — they'll save you time and money or generate more revenue in the long run.

One way to actually get these "important but not urgent" tasks done is by creating external deadlines.

Even concrete goals are useless without external deadlines. Without a "drop dead" date for accomplishing a particular task or activity within your practice, chances are you'll never manage to get around to accomplishing your goal. This is particularly true when the goal or activity doesn't immediately strike you as urgent or doesn't directly affect a specific client engagement.

Steps to making external deadlines work for you

Decide what goals you'd like to accomplish. Choose a limited number of goals at a time (3 works well).

Choose an outside deadline for accom-

plishing each goal. The deadline should be a bit of a 'stretch' for you, or take a concerted effort on your part to reach, but it shouldn't be so unrealistic that you'll blow it right away. In other words, don't make the deadline too short so that it's impossible, but don't make it so long that you put the activity or goal right back on the back burner again.

List the steps you'll need to accomplish to reach the goal, and set deadlines for *each step* (or at least for the first step). For example, if one of your goals is to get a website up and running, steps could include things like choosing a web designer, deciding on a style, creating the content for the pages, choosing a web host, etc. Even those steps can be broken up into smaller steps. Think about what the "next action" — the smallest next step is that will need to be accomplished to make progress toward your goal.

Make the deadline an external one.

The most important step — the external deadline

One of the reasons that deadlines are effective is that there are consequences for your failure to meet them. If you don't file your motion timely you may be precluded from making the argument; if you don't complete the contract, the client's deal might fall through, etc.

But "important, not urgent" tasks often have no consequences (or at least no immediate consequences) if you fail to complete them. Setting your own deadlines — and even putting them on your calendar — may have failed in the past. That may be because those kinds of deadlines are internal — you're the only one who knows about them, so they are easy to ignore. These deadlines



Allison C. Shields

need to be external. That means they need to be shared and have consequences.

The most important aspect of setting external deadlines is *making those deadlines have meaning outside of your own personal wish list or calendar*. The way to make deadlines external is by sharing them with someone else, and by asking them to hold you accountable for accomplishing your goals.

The nature of your goal will determine who to share it (and the deadline) with and what the consequences for failure to meet it will be. Sometimes it's an attorney or staff member within your office. Other times, a consultant or colleague is more appropriate. Often, sharing your goals and deadlines with clients is the most effective way to accomplish your goal.

Why external deadlines work

External deadlines use the power of peer pressure. They work because they act like commitments to other people, even if the only one that really benefits is you. Nobody likes to break their word or fail to fulfill a promise to someone else. Sharing your goals and deadlines also works because nobody likes to look like a failure or give the impression that they can't follow through.

External deadlines also work because they often create a support system for your efforts where you wouldn't normally have support. When you share your deadlines with others and ask them to keep you accountable, you've created a cheering section — and perhaps even an offer of help. At the very least, you'll have moral support.

For example, if your goal is to go through the publications on your office floor, your

assistant may be the most appropriate person to share the deadline with. Most likely, your assistant will be just as happy as you are to see the clutter disappear. And your assistant can help you, either by actively going through them with you or by helping to clear your schedule and reduce or eliminate interruptions.

Publicize your deadlines

To make your external deadlines truly effective, publicize them.

Plan to ramp up your business development efforts? Devise a seminar topic and set an external deadline. Publicize the date on your website, do a press release, and/or send a mailing to your clients notifying them of the seminar. Short of canceling the event, there's no way out.

Want to finally get that website up and running? Choose a launch date and send postcards to clients and strategic alliances letting them know when you'll finally be on line. With this much build-up, you're much more likely to get moving on the project.

If a task or activity is truly important to you and your practice but it doesn't have a built in deadline, create one. Then, to be sure that you won't wriggle out of it, make the deadline public by sharing it with someone else.

Try setting external deadlines for some of the "important, not urgent" items on your list.

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

AMERICAN PERSPECTIVES

Politics, Economics, the Constitution and the States

New York State and MMA

By Justin Giordano

Assembly Bill A.6506

In mid-July, Sheldon Silver, the leader of the New York State Assembly, decided not to bring up the matter of legalizing professional MMA (mixed martial arts) events, thus effectively shelving the legislation for another year. The New York State Senate has passed a bill legalizing MMA for the past four years including this year. The Republican controlled Senate's bill is also supported by Governor Andrew Cuomo, but the State Assembly, where Democrats hold 100 of the 150 seats, have refused to go along based on their leader, Sheldon Silver's opposition.

Former Governor George Pataki had opposed legalizing MMA in New York State back in 1997 when this form of combat sport entertainment was in his nascent state. At the time Governor Pataki was echoing the majority view, which essentially considered MMA as rather barbaric. However in the intervening time frame the sport has evolved considerably by establishing weight classes, developing better and more consistent rules, such as the prohibition of certain type of blows, eye gouging, and other similar debilitating blows. The objective of these rules was to make MMA a more palpable and legitimate sport as opposed to these events being free for all savage brawls.

Furthermore, the noticeable increase of

women's involvement with MMA, not only by constituting a substantial portion of the viewing audience, but also by becoming direct participants as fighters inside the cage, has been instrumental in providing a veneer of legitimacy to the sport.

Consequently, the strategy of legitimizing MMA with the large segment of the public and not just a select small number, has succeeded even beyond the expectations of its founders, among them Dana White who heads the most successful of these enterprises, the UFC (Ultimate Fighting Championship). The paying public has welcomed this new form of combat sport entertainment with open arms, resulting in huge audiences for these live and televised events. In fact, where its major competitor boxing, has been steadily declining in its mass appeal, MMA has been unrelentingly increasing. The accompanying revenues that MMA as an industry has generated are equally impressive and the trend seems destined to continue on this trajectory in the foreseeable future particularly since its draw is strongest among the younger (under 35 years of age) demographic.

Obviously corporate revenues entail taxes and New York State by not allowing live MMA events to take place within its borders is unquestionably forgoing a great



Justin Giordano

deal of tax revenues for its coffers. This at a time when New York State has had to deal with severe financial shortcomings as reflected through its budgets, especially since the financial crisis of 2008. It easy to see that New York City and venues such as the legendary sport Mecca Madison Square Garden, the new Barclay Center in Brooklyn or Nassau Veteran's Coliseum, would be ideal forums for host-

ing such events. MMA events in these settings would doubtlessly generate full houses and thus huge taxable revenues for the state, which could potentially amount from tens to hundreds millions of dollars over the years. More specifically under the proposed bill (Assembly Bill A.6506) that was tabled and will not be considered this year, New York State would collect 8.5 percent sales taxes on gross ticket receipts and 3 percent of gross receipts for broadcast rights, capped at \$50,000. There would also be additional economic benefits and derivatives from hotels, restaurants, shopping — an estimated \$23 million per year statewide, according to a 2011 independent study by strategic firm HR&A Advisors. At a time when unemployment in the state remains unacceptably high, any creation of new jobs would be most welcome.

As of this past summer, MMA was legal in 48 other states leaving New York as only

one of two states where it is still not permitted. The reports are that MMA has been successful in generating revenues in all of the aforementioned 48 states. Proponents of the Assembly Bill are confident that if Speaker Silver would allow an up-or-down vote from the entire Assembly the measure would pass.

In June 2013, around the same time as Speaker Silver moved to prevent the Assembly Bill from being considered, the neighboring state of Connecticut legalized mixed martial arts. This left New York the lone remaining state with a ban on the sport. Furthering New York's isolation, Canada, its continental neighbor to the north, also legalized MMA in all of its provinces as of June 2013.

Based on all of the aforementioned financially speaking, the conclusion is evident — New York State should legalize MMA as soon as possible since it's needlessly forgoing much needed tax revenue as well as the accompanying economic gains that the state could derive.

So who is in opposing legalizing MMA and what are their reasons? Is this opposition reasonable and/or rational?

The current CEO and chairman of Ultimate Fighting Championship, Lorenzo Fertitta, claims that there are 64 members of the New York State Assembly who sponsored the bill to legalize MMA, and nine of those are women and thus getting to the bill

(Continued on page 26)

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

- Strict enforcement of injury reporting and filing requirements by employers and carriers.
- Medical reporting that transmits necessary claim information without imposing undue and overly burdensome requirements on health care providers.
- Initial formal hearings for all injured employees that ensure access to benefits in all cases.
- Access to high-quality medical care resulting from outreach, regulation, and fee schedules that encourage provider participation from high quality health care providers.
- Consistent interpretation and enforcement of statutory and regulatory provisions by the Workers' Compensation Board.
- Discouragement of frivolous litigation by the Workers' Compensation Board.
- Timely scheduling of hearings when required as requested.
- Testimony before the trier of fact to enhance credibility determinations by Workers' Compensation Law Judges.
- Timely decision of claims at the hearing level and, more importantly, those cases on appeal.
- Efficient and effective data collection to inform public policy, legislation, regulation, and administration.
- Professional and respectful communication among the agency, injured workers, employers, insurers, and attorneys.

When comparing these components to the current workers' compensation system, a number of specific concerns emerge.

- The number of claims indexed or assembled by the Board declined from 174,802 in 2001 to 123,245 in 2011. Although there is a long-term trend in declining frequency of claims, it is unlikely that this accounts for the extraordinary decline in indexed/assembled claims. It is probable that there is a significant lack of information and access to benefits by low-wage workers, and that the decline in claims is partially representative of a loss of benefits by this population.
- There are significant obstacles to claim filing. These obstacles disproportionately impact the group of workers that is most likely to require access to the system. The cumbersome initial claim filing form and the hyper-technical requirements for case assembly/indexing are significant factors. The lack of direct outreach by the state agency to injured workers, as well as the absence of a requirement that employers distribute information is also relevant.
- Communication about worker rights in the system is ineffective. The use of non-hearing determinations is problematic as they cannot and do not effectively provide information to injured workers due to language, literacy and other obstacles.
- There is inadequate access to medical care in the workers' compensation system. From 2004 to date the board has removed 330 doctors from its provider lists (through suspension and voluntary resignation). 306 of the 330 have been removed since 2007. There is a clear relationship between the loss of providers and the mushrooming number, length, and content of medical reporting forms. The board's website currently lists 37 forms for use by health care providers, virtually all of which are multi-page forms.
- Benefits remain inadequate despite the increase in the statutory maximum rate. From 1992 -2006 the minimum

rate of \$40 was 10 percent of the maximum rate of \$400. The increase of the minimum rate to \$100 in 2007 made it 20 percent of the maximum rate of \$500. However by 2012 it had declined to 12 percent of the maximum rate of \$792.07 due to the failure to index the minimum rate. The 2013 increase to \$150 has restored the minimum rate to 18 percent of the maximum rate (still short of its 2007 percentage). However, it will inevitably sink back into irrelevance until it is indexed to the maximum rate.

- The standard for temporary disability must be revisited. The general principle of total disability is that a worker must be unemployable. However, in cases of temporary disability a worker's hypothetical ability to perform other work is largely irrelevant. As a matter of practicality, it is unreasonable to expect a temporarily disabled worker to seek out other employment or to engage in vocational retraining when that worker has a reasonable expectation of returning to his or her previous employment (and employer) and in fact may be prohibited from seeking other employment due to a collective bargaining agreement, employer policy, or employment contract. A temporarily disabled worker should be paid for total disability as long as they are unable to return to their former employment or any modified duty position reasonably offered by the employer.
- Data must be collected and oversight brought to the use of so-called "independent medical examiners" by insurers. The frequency and extent to which IMEs report disability and need for treatment should be tracked, as well as the frequency with which their opinions are accepted following litigation.
- Administrative inefficiency must be eliminated. Hearing requests must be processed in a timely manner. Litigation should be discouraged in the absence of a "joined issue," as should duplicative or "investigatory" testimony. Depositions should be eliminated in favor of in-person testimony, or restricted to extraordinary circumstances. To the extent that depositions are retained, regulatory guidance must be provided as well as real-time access to a WCL Judge to obtain rulings on disputed matters. Reserved decisions should be issued within 30 days. Appeals should be decided within 60 days.
- A worker-friendly culture consistent with the intent of the statute should be encouraged on the part of Board personnel, including WCL Judges. In the current environment, the carriers' RFA-2 Forms are treated as credible, whereas the claimants' RFA-1 Forms are routinely treated with skepticism. Insurer lack of compliance is routinely excused. Current statutory and regulatory provisions are inconsistently enforced.
- The Medical Treatment Guidelines should be withdrawn.
- The 2012 Guidelines should be applied as intended, and supplemented with a consistent mechanism that creates predictability of claim values and which can be effectively implemented by WCL Judges and attorneys.
- There are many subsidiary issues that must be considered in correcting the systemic problems that obstruct access to benefits for injured workers; the list above is not intended to be comprehensive. Any initiative to "re-engi-

neer" the system must restore the Workers' Compensation Law its original purpose: protecting and compensating those who are injured or become ill in the course of their employment. Over the past twenty years, this purpose has been obscured by disingenuous and well-orchestrated

(and well financed) campaigns to boost insurer profits at the expense of worker benefits. It is time for the system to "get back to basics" and take care of injured workers.

Thank you, Mr. Grey, for setting the record straight.

Who's Your Expert *(Continued from page 9)*

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

1. *Fiore v Galang*, 64 NY2d 999 [1985].
2. *See Gross v Friedman*, 73 NY2d 721 [1988]; *Thompson v Orner*, 36 AD3d 791 [2d Dept 2007];
3. *See Rebozo v Wilen*, 41 AD3d 457 [2d Dept 2007]; *Korcz v Merritt*, 10 Misc3d 1055[A] [Sup Ct Onondaga County 2005] [court noted that sworn deposition testimony itself can be sufficient evidentiary proof to support a defendant's summary judgment motion, but then found that the testimony the defendant presented failed to

establish that there was no deviation from the standard of care which warranted dismissal of the action].

4. *See Diaz v New York Downtown Hosp.*, 99 NY2d 542 [2002] [stating "[o]rdinarily, the opinion of a qualified expert that a plaintiff's injuries were caused by a deviation from relevant industry standards would preclude a grant of summary judgment in favor of the defendants"].
5. 83 AD3d 18 [2d Dept 2011].
6. *Id.* at 24-25.
7. *See Rivera v Greenstein*, 79 AD3d 564 [1st Dept 2010] [finding the expert's assertion that the doctor could have identified and treated the condition was speculative and did not support malpractice liability]; *DiMitri v Monsouri*, 302 AD2d 420 [2d Dept 2003]; *McCord v Paksima*, 2012 WL 5682662 [Sup Ct, Kings County Oct. 26, 2012] [granting the defendant's motion for summary judgment upon finding that the plaintiff's expert based his opinion on facts that were not supported by the evidence].
8. *Korcz v Merritt*, *supra*; *Bastin v Soldiers & Sailors Hosp.*, 258 AD2d 922 [4th Dept 1999].
9. *See Moshberg v Elahi*, 80 NY2d 941 [1992]; CPLR § 3216[e].
10. 117 AD2d 661 [2d Dept 1976].
11. 60 NY2d 851 [1983].
12. 60 NY2d 685 [1983].

Real Estate *(Continued from page 8)*

at all times. You are familiar with the Fair Housing Act and know that being handicapped is a protected class thereunder. You also know that the New York State Human Rights Law calls this protected class being disabled rather than handicapped, but that handicapped and disabled mean the same thing under the law.

Nonetheless, while evaluating Mrs. Goldberg's claim, you remember that the Americans with Disabilities Act (ADA) had revised regulations issued by the Department of Justice (DOJ) and on/after March 15, 2011 ESAs are no longer recognized as a reasonable accommodation to people with disabilities, but instead only service animals are recognized. You understand the distinction between ESAs and service animals is that a service animal is trained to perform a specific task whereas an ESA is not. You know that Skippy is not trained. However, you recall that while the ADA is applicable to hotels, motels and inns, the Fair Housing Act and the New York State Human Rights Law are applicable to apartments and therefore Mrs. Goldberg is correct with respect to Skippy and their housing needs.

To maintain your value to your clients there is still legal advice that should be

rendered. The Goldbergs do not need to buy a uniform or certificate for Skippy to qualify if Skippy is truly an ESA. Instead, *Green v. Housing Authority of Clackamas County*, 994 F. Supp. 1253 (D. Oregon 1998) renders the ESA's outfit irrelevant to the inquiry. More so, the housing provider cannot charge a pet deposit incident to Skippy's presence as Skippy is not a pet at all, but instead an ESA.

Lastly, you must advise that while Skippy sounds like a sweet dog, you know that he has a propensity to bite and that it may be reasonable for the housing provider to require a muzzle incident to permitting Skippy to walk the halls of the building, as the standard used to evaluate ESAs is a case-by-case balancing of the reasonableness of the accommodation sought. So, it may be a reasonable alternative to the accommodation request being granted outright for the housing provider to grant the accommodation subject to securing the safety of the other residents.

Remember, when you play the game, it's a dog eat dog apartment world.

Note: Andrew M. Lieb is Managing Attorney of Lieb at Law. P.C. and a frequent contributor to this publication.

Judiciary Night *(Continued from page 1)*

every day serving the public."

This year marked the first time the Alan B. Oshrin Award of Excellence award was given to a member of the court community, an opportunity to recognize outstanding service to the county and court. The late Hon. Oshrin was a District Administrative Judge for Suffolk County. The SCBA named the award of excellence in his memory to show their appreciation for all of his fine work for the Suffolk legal community.

Frederick J. Crockett III, the court clerk at the New York State Supreme Court, was given the honor. Crockett was described as a mentor for others and someone who goes above and beyond serving the members of the matrimonial bar and the judges. He is the highest ranking person in the clerk's office in Central Islip.

"The matrimonial people are a good bunch," Crockett said. "They try hard and do a good job and their job is tough. I appreciate them."

PRISM and Attorney Client Privilege (Continued from page 3)

address, has effectively waived privilege because (1) the NSA has regularly obtained information from Gmail and (2) Gmail users consent in the terms of use to automatic scanning of their messages.

As for metadata, there is a strong argument to be made that metadata (the data surrounding the communication content) is not privileged at all. Case law in “analog” circumstances indicates that the “what” of a person’s conduct is not privileged. Thus GPS trackers on suspect’s cars to track their whereabouts are acceptable under the Fourth Amendment. Even on a privilege log produced in a civil case must show the date, time, sender, recipient, and subject of a document over which privilege is asserted. This is the same data contained in “metadata.”

Document storage

Electronic communications are not the only issue. The “cloud” is rapidly replacing the local hard drive and server as a means of document and data storage.

The Code (and prior Professional Rules) impose on lawyers a duty to preserve the confidentiality and security of client information. This duty is broader than the attorney-client privilege although it is a component of it.

“A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent.” Rule 1.6. Rule 1.6 also includes the provision that “[a] lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.”

As one blogger noted, “with [the government having] an unfettered pipe to all of the major players in the data storage space, lawyers have to question how safe their client data is.” (<http://thedroidlawyer.com/2013/06/the-implications-of-the-nsa-and-your-law-practice/>).

Does a secret surveillance constitute an “inadvertent” disclosure? Can it still be said to be “inadvertent” if it is now widely known that the government can access that data at any time? In 2010 the New York State Bar Association said that a lawyer may use online cloud providers to store and back up client files provided that the lawyer takes reasonable care to ensure that confidentiality will be maintained in a manner consistent with Rule 1.6. See NYSBA Eth. Op. 842 (Sept. 10, 2010). The opinion assumes, however, that those providing internet services are acting as the law firm’s agent, just as a court reporter or interpreter would be. Most other ethical opinions allow cloud storage if lawyers make “reasonable attempts” to prevent unauthorized disclosure. If the lawyer has ensured security with the provider — aside from this previously unknown fact about the government’s snooping — has the ethical obligation been satisfied?

Notwithstanding the “agent” analogy, it is safe to say that at a minimum, lawyers can no longer fulfill their duty of confidentiality by storing documents on Gmail or Google Docs given the revelations and Google’s own terms of use. In fact, Gmail is officially off-limits for confidential medical information (<http://luxsci.com/blog/gmail-not-hipaa-compliant-email.html>) because doctors cannot sign individual contracts with Google as required by HIPAA. Google has changed its privacy policy so many times since the NYSBA ethical opinion that it is unclear

whether the same result would be reached today. If the provider’s Terms of Use claims license over uploaded content (like Facebook), you could waive privilege without knowing it.

As Blogger Jacob Small said, “If you were representing white-collar defendants who do business in Yemen [...] maybe it’s best for you just not to use a cloud service at all.” [Heinonline.org].

Before you go all analog and keep everything on local drives in your office file cabinet behind a lock and key, consider this: The office of the Legal Aid Society of San Mateo was burglarized and ten laptops were stolen. The laptops, used by attorneys assisting clients, contained personal information such as names, Social Security numbers, date of birth, and medical and health information. Did Legal Aid fulfill its duty to keep client information confidential? Was the burglary foreseeable?

Despite services targeting the medical and legal industries to protect confidential information, the problem remains: If all the government needs to do is issue a subpoena, the provider is bound by law to comply. The Snowden revelations indicate that these subpoenas are not infrequent or rare.

What to do in the meantime? Lawyers are left with the quandry of balancing privacy with convenience. The profession needs better guidance than inconsistent ethical opinions, especially when the bar associations lack the expertise necessary to stay apprised on the ever-changing technology. A best-practices source is needed to help lawyers be informed about what is a moving target. Counsel the clients to resist the temptation to “share.” Ask them to contemplate, when they write an email, being deposed for days on the contents of that email. Tell them to consider whether the conversation would be better had by phone than email. True, the phone calls are also tapped, but a written email is forever preserved and more easily searched and re-transmitted.

Additional Sources:

- <http://www.theverge.com/2013/7/17/4517480/nsa-spying-prism-surveillance-cheat-sheet>
- <http://www.theverge.com/policy/2013/3/11/4088842/electronic-communications-privacy-act-modernization-reform#senate-judiciary-committee-approves-bill-requiring-authorities-to>
- <http://projects.propublica.org/graphics/surveillance-suits>
- <http://www.propublica.org/article/the-nsa-secret-campaign-to-crack-undermine-internet-encryption#odni-response>

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

¹ The New York Times reported on November 7, 2013 that the C.I.A. is paying AT&T under a voluntary contract more than \$10 million a year to exploit its database of phone records, which includes Americans’ international calls.

FREEZE FRAME



The SCBA’s Supreme Court Committee hosted a retirement dinner for Justice John J.J. Jones, Jr. on Nov. 14 at the Watermill Restaurant. Enjoying the evening were Supreme Court Justice John J.J. Jones, Jr., his wife Khris, mother Margaret and father, Justice John J.J. Jones, Sr. who also retired from the Supreme Court.

Court Notes (Continued from page 4)

against the respondent, which was based upon her conviction of identity theft in the third degree, a Class A misdemeanor. The respondent failed to submit opposition or a response to the motion, other than a letter from her husband, which the court declined to consider. Accordingly, under the totality of the circumstances, the respondent was suspended from the practice of law for a period of two years.

Thomas C. Sledjeski: The Grievance Committee moved to suspend the respondent and for authorization to institute disciplinary proceedings against the respondent as a result of his failure to comply with the lawful demands of the Grievance Committee and his alleged acts of professional misconduct, including claims of fraud and violations of Judiciary Law Sec. 487. The respondent neither opposed the motion nor submitted a response relative thereto. Accordingly, the motion was granted and the respondent was suspended from the practice of law pending further order of the court.

Learie Richard Wilson: By decision and order of the court, the Grievance Committee was authorized to institute a disciplinary proceeding against the respondent and the matter was referred to a Special Referee. The Grievance

Committee served a petition upon the respondent containing three charges of professional misconduct. The referee sustained one of the three charges and the Grievance Committee moved to confirm in part, and disaffirm the balance. The respondent moved to confirm in part and disaffirm in part. The charges alleged, *inter alia*, that the respondent engaged in various acts of dishonesty and deceit in connection with a real estate transaction. Based upon the evidence adduced, the court held that the referee improperly declined to sustain charge two, but properly declined to sustain charge three. In determining a proper measure of discipline to impose, the court considered the character references submitted by the respondent, and his prior disciplinary history. Accordingly, the respondent was suspended from the practice of law for a period of one year.

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

Trusts and Estates Update (Continued from page 10)

owned by the decedent, or owned jointly by the decedent and one or both of the petitioners. Thus, the court held that the relationship between the family members in the closely held corporation, and particularly the existence of any transactions between them as shareholders, appeared relevant to the issue of undue influence. Moreover, the court found that the records were relevant to the decedent’s financial status, and thus to the issues of fraud, and again undue influence, where the value of the decedent’s estate is a proper scope of inquiry. The court directed that the records be produced for a period that extended beyond the scope of the three

year/two year period concluding that the objectant had submitted sufficient evidence of a continuing course of conduct of undue influence or a scheme to defraud the decedent.

In re Selvaggio, N.Y.L.J., Oct. 17, 2013, at 25 (Sur. Ct. Queens County).

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



SUFFOLK ACADEMY OF LAW

OF THE SUFFOLK COUNTY BAR ASSOCIATION

560 WHEELER ROAD, HAUPPAUGE, NY 11788 • (631) 234-5588

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 2013.

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

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

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

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

NOTES:

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

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

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

Non SCBA Member Attorneys: Tuition prices are discounted for SCBA members. If you attend a course at non-member rates and join the Suffolk County Bar

Association within 30 days, you may apply the tuition differential you paid to your SCBA membership dues.

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

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

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

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

INQUIRIES: 631-234-5588.

UPDATES

ANNUAL FAMILY COURT UPDATE: PART TWO

Wednesday, December 4, 2013

(Part One of the 2013 Update, which dealt with custody and visitation, maintenance vs. spouse support, and ethical issues, is available as an on-line video replay or as a DVD or audio CD recording.)

This session will emphasize **Child Support and Family Offense Issues**: Judge's View and Update on Family Offenses

- NYS Family Court Improvement Project
- Family Court Child Support Update
- Defending Clients in Support Matters and Family Offense Proceedings

Faculty: Hon. John Kelly; Hon. Theresa Whelan; Hon. Isabel Buse; Jose Canosa, Esq.

MCLE: 3 Hours (1.5 professional practice; 1 skills; 0.5 ethics) [Transitional or Non-Transitional]

Time: 6:00 – 9:00 p.m.

Location: SCBA Center – Hauppauge

Refreshments: Light supper from 5:30

SEMINARS, CONFERENCES, & SERIES

Part Two of Series

2013 ALLEN SAK MUNICIPAL LAW SERIES: PART TWO

Thursday, December 5, 2013

This program is financially supported by the Academy's Municipal Law Scholarship Fund, which was endowed by a bequest from the estate of the late Allen I. Sak, former Brookhaven Town Attorney. Through the scholarship fund, new municipal lawyers (admitted 10 years or less) may request a 50 percent tuition discount; municipalities or firms sending two or more attorneys who are not eligible for the new municipal lawyer "scholarship" may also take the discount.

(Part One of the Series, which covered "Getting a Building Project Approved," is available as an on-line video replay or as a DVD or audio CD recording.)

Seminar Two covers "Hot Issues in Land Use & Municipal Law":

Land Use / Municipal Case Law Updates **Dean Patricia E. Salkin** (Touro Law Center)

Cell Tower Issues & Cases **A. Thomas Levin, Esq.** (Meyer, Suozzi, English & Klein, PC)

Religious Land Use and Institutionalized Persons Act (RLUIPA Issues and Cases **Lance R. Pomerantz, Esq.** (Land Title Law)

Non-Conforming Zoning Uses: Issues and Cases **Vincent J. Messina, Esq.** (Sinnreich, Koskoff & Messina, LLP)

DEC Permitting Issues (including Hurricane Sandy rebuilding permits) **Craig L. Elgut, Esq.**

(Acting Regional Attorney, Region One, NYS DEC)

Moderators **Hon. Thomas F. Whelan** and **Hon. John Leo**

(Justices, NYS Supreme Court—Suffolk)

Program Chair: **Edward J. Gutleber, Esq.** (Meyer, Suozzi, English & Klein, PC // Former Academy Dean)

Program Committee: **Dean Patricia Salkin; Hon. Thomas Whelan; Hon. John Leo; Lance Pomerantz; Stephen Beyer; Brian Egan; Christopher Modelewski; John Zollo; Cheryl Mintz; William Bonesso; Matthew Pachman; Carrie O'Farrell**

Time: 6:00 – 9:00 p.m.

Location: SCBA Center – Hauppauge

Refreshments: Light supper from 5:30

MCLE: 3 Hours (professional practice) [Transitional or Non-Transitional]

Full Day Program Presented by the Education Law Committees of the Suffolk and Nassau Bar Associations

ANNUAL SCHOOL LAW CONFERENCE

Monday, December 9, 2013

at Nassau Bar Association in Mineola

This annual program covers key issues affecting the school community:

- Fallout from the NYS Regents Reform Agenda
- Reductions in Force
- Impact of Social Media on Discipline of Students and Employees
- Hot Topics in ADA and Section 504 Litigation
- The Affordable Care Act
- Students in Nontraditional Living Arrangements
- Bullying and Students with Disabilities
- Surveillance Cameras in the School Building

Faculty: John Gross, Esq.; Eugene Barnosky, Esq.; Florence Frazer, Esq.; Richard Guercio, Esq.; Robert Sapir, Esq.; Warren Richmond, Esq.; Gary Steffanetta, Esq.; Christopher Powers, Esq.; Joseph Lilly, Esq.; Michael Vigliotta, Esq.; Robert H. Cohen, Esq.; Randy Glasser, Esq.; Candace Gomez, Esq.; Bernadette Gallagher-Gaffney; Alyson Mathews, Esq.; John Sheahan, Esq.; Thomas Volz, Esq.; Christie Jacobson, Esq.; Susan Fine, Esq.; Michael Raniere, Esq.; Christopher Venator, Esq.; Mara Harvey, Esq.; Jacob Feldman, Esq.; Carol Melnick, Esq.; Mary Anne Sadowski, Esq.; Lawrence Tenenbaum, Esq.; Christopher Clayton, Esq.; Laura Ferrugiari, Esq.; Eileen Buckley, Esq.; Amol Sinha, Esq.; Barbara van Riper, Esq.; Anthony Carfiora (Nassau Boces); NYSUT Representative: NYCLU Representative.

Program Coordinators: Neil Block, Esq.; MaryAnne Sadowski, Esq.; Douglas Libby, Esq.; Christie Jacobson, Esq.

Time: 8:30 a.m. – 3:30 p.m.

Location: Nassau Bar Association – 15th and West Streets, Mineola

Refreshments: Continental breakfast and lunch

MCLE: 5.5 Hours (professional practice) [Transitional or Non-Transitional]

Morning Seminar

INHERITED IRAs: What the Practitioner Needs to Knows

Tuesday, December 10, 2013

Making the right move with retirement funds can be financially beneficial; conversely, the wrong move can be hazardous. This program – featuring an outstanding authority in the area – will help you avoid common errors when dealing with retirement assets during your client's lifetime and after your client's death, from both an IRS and New York State point of view. Topics include:

- Common errors in retirement distribution planning.
- Why many IRA beneficiary forms are defective.
- How the inherited IRA rules work.
- How the spousal IRA rules work.
- Recent creditors' rights developments involving inherited IRAs.
- Use of irrevocable spendthrift trust as IRA beneficiary for asset protection purposes.
- The impact of the New York version of the Uniform Principal and Income Act on IRA trusts (the ten percent rule).
- Who should pay the estate tax on retirement accounts?
- How to tie in an estate plan with retirement accounts.
- Recent IRA developments and the IRS.
- New York State creditor rights issues regarding IRAs and 403(b) plans.

Faculty: Seymour Goldberg, CPA, MBA, JD (Goldberg & Goldberg, PC)

Coordinator: Eileen Coen Cacioppo, Esq. (Academy Curriculum Chair)

Time: 9:00 a.m. – Noon.

Location: SCBA Center – Hauppauge

Refreshments: Breakfast buffet (from 8:30 a.m.)

MCLE: 3 Hours (professional practice) [Non-Transitional] CPE 3 Hours

Evening Seminar

NAVIGATING THE TRAFFIC & PARKING VIOLATIONS AGENCY

Tuesday, December 10, 2013

A knowledgeable faculty explains the workings of Suffolk's new Traffic and Parking Violations Agency and provides tips for effective advocacy. Topics include:

- The Day-to-Day Process
- Pleas
- Trials
- Motion Practice
- Appeals
- Tips and Techniques
- Collateral Consequences

Faculty: David Mansfield, Esq.; Barry Smolowitz, Esq.; Wayne Donovan, Esq.; Larry Gustavson, Esq.; Paul Margiotta, Esq.

Program Coordinator: Barry Smolowitz, Esq. (Former Academy Dean)

MCLE: 3 Hours (2.5 professional practice; 0.5 skills) [Transitional or Non-Transitional]

Time: 6:00 – 9:00 p.m. **Location:** SCBA Center – Hauppauge

Refreshments: Light supper from 5:30



SUFFOLK ACADEMY OF LAW

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Lunch 'n Learn Presented by the SCBA Health & Hospital Law Committee

HOW CAN THE AFFORDABLE CARE ACT & THE HEALTH EXCHANGES BENEFIT SMALL & MEDIUM SIZE LAW FIRMS & THE CLIENTS THEY SERVE?

Wednesday, December 11, 2013

A knowledgeable panel will discuss the legal framework of the ACA's small business exchange options; the choices in plans, programs, and benefits; and assorted pitfalls and traps of which the general practitioner should be aware. Issues covered include:

- The ACA's "Employer "Mandate" and the Extent to Which It Impacts Small and Medium-Size Employers
- The Small Business Health Options Program ("SHOP")
- A Review of the Different Kinds of Insurance Products Being Offered by Different Companies to Different Kinds of Small and Medium Size Businesses via the Health Exchanges.

Faculty: **Craig Greenfield, Esq.** (General Counsel at MagnaCare); **Desmond Hussey** (Vice President for Products and Innovation at United Healthcare); **Kelly Murray, Esq.** (Director of the Access Program at the Health and Welfare Council of Long Island)

Program Coordinator: **James Fouassier, Esq.** (Co-Chair, SCBA Health & Hospital Committee)

MCLE: 2 Hours (professional practice) [Transitional or Non-Transitional]

Time: 12:30-2:10 p.m.

Location: SCBA Center – Hauppauge

Refreshments: Lunch from noon

Early Evening Program

MEDICAID, TAXES, AND THE SALE OF A HOME WITH A LIFE ESTATE

Wednesday, December 11, 2013

A knowledgeable presenter will address the oftentimes complicated Income Tax and Medicaid questions that arise during the sale of a home with a life estate. Topics include:

- IRS requirements for allocation of proceeds for tax
- Cost basis allocations among life tenant and remainder
- Applying the Sec 121 \$250k exclusions to a bifurcated deed
- How to allocate proceeds for Medicaid and the related issues
- Compliance and tax filings
- Gift tax requirements

Faculty: **David DePinto, Esq.** (DePinto, Nornes & Associates – Melville)

Program Coordinator: Eileen Coen Cacioppo, Esq. (Curriculum Chair)

MCLE: 2 Hours (professional practice) [Transitional or Non-Transitional]

Time: 5:30–7:30 p.m.

Location: SCBA Center – Hauppauge

Refreshments: Light supper from 5:00 p.m.

Afternoon Program

FORECLOSURE SETTLEMENT CONFERENCES: A Free Training Program

Thursday, December 12, 2013

The goal of this free training program is two-fold: to recruit volunteer attorneys to handle foreclosure settlement conferences for Suffolk residents in danger of losing their homes and to provide an easy opportunity for our constituents to gain important new skills and information. The Academy presents this program in conjunction with the SCBA Pro Bono Foundation and Nassau Suffolk Law Services. The training is mandatory for those who currently volunteer with the SCBA Foreclosure Settlement Project and wish to maintain their involvement. Others may also attend tuition-free, with MCLE credit awarded to new recruits who complete four appearance dates for the project. Topics, covered by a panel with a great deal of experience in the area of foreclosure law, include:

- Foreclosure Developments in Suffolk County
- The Settlement Process
- How the SCBA's Foreclosure Settlement Project Works
- Foreclosure Litigation Trends.

Faculty: **Michael Wigutow, Esq.; Barry Lites, Esq.; Ray Lang, Esq.; Eric Sackstein, Esq.; Glenn Warmuth, Esq.; Barry Smolowitz, Esq.**

Coordinator: **Barry M. Smolowitz, Esq.**

(Project Coordinator for the Attorneys)

MCLE: 3 Hours (professional practice) [Transitional or Non-Transitional]

Time: 1:00–4:00 p.m. **Location:** SCBA Center – Hauppauge

Refreshments: Complimentary lunch from 12:30

DECEMBER 2013 REGISTRATION FORM

Return to Suffolk Academy of Law, 560 Wheeler Road, Hauppauge, NY 11788

Circle course choices & mail form with payment // Charged Registrations may be faxed (631-234-5899) or phoned in (631-234-5588).

Register on-line (www.scba.org).

Sales Tax Included in recording & material orders.

COURSE	SCBA Member	SCBA Student Member	Non-Member Attorney	Season Pass	12 Sess. Pass	MCLE Pass	New Lawyer MCLE Pass	DVD	Audio CD	Course Book
ANNUAL UPDATES										
Family Court Update Q Session Two	\$80	\$50	\$105	Yes	Yes	3 cpn	3 cpn	\$100	\$90	\$20
SEMINARS & SERIES										
Allen Sak Municipal Law Series Q Session 2 - Hot Topics	\$85	\$42.50	\$85	Yes	Yes	3 cpn	3 cpn	\$100	\$90	\$20
Scholarship Prices Q Session 2 - Hot Topics	\$42.50	\$42.50	\$42.50							
School Law Conference	\$175	\$100	\$175	Yes	Yes-2	5cpn	5cpn	\$175	\$165	\$50
Inherited IRAs	\$115	N/A	\$115	Yes	Yes	3 cpn	N/A	N/A	N/A	N/A
Traffic Violations & Parking Agency	\$75	\$50	\$75	Yes	Yes	3 cpn	3 cpn	\$100	\$90	\$20
Affordable Care Act	\$55	\$35	\$75	Yes	Yes	2 cpn	2 cpn	\$100	\$90	\$20
Sale of Home with a Life Estate	\$65	\$45	\$75	Yes	Yes	2 cpn	2 cpn	\$100	\$90	\$20
Foreclosure Settlement	Free	Free	Free	N/A	N/A	N/A	N/A	N/A	N/A	N/A

Name: _____

Address: _____

Phone: _____ E-Mail: _____

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

METHOD OF PAYMENT _____ Check (check payable to Suffolk Academy of Law) _____ Cash

Credit Card: GAmerican Express GMasterCard GVISA GDiscover

Account # _____ Exp. Date: _____ Signature: _____



ACADEMY OF LAW NEWS

“Home” for the Holidays

By Dorothy Paine Ceparano

Bar leaders hope that members consider the Suffolk County Bar Association their “professional home” – a place where interactions with other lawyers are congenial and non-adversarial, where support and even comfort are forthcoming, and where learning new things is prized and encouraged.

The learning part is where the Academy, the SCBA’s educational arm, plays a prominent role. Despite the fact that the holiday season is a busy time for most, the Academy has not slacked off in offering educational opportunities. The first two weeks of December hold a number of continuing legal education courses practitioners should find of interest and value.

Two of the programs are continuations of CLE’s that began in November.

Part Two of the **Allan Sak Municipal Law Program** will take place on Thursday, December 5 (6:00 to 9:00 p.m.). This session covers “Hot Issues in Municipal Law and Land Use.” Information and insights will be dispensed by a celebrated faculty: Touro Law School Dean Patricia Salkin, a well known presenter and published author on the topic, will address land use developments; Thomas Levin of Meyer Suozzi will cover cell tower issues; Lance Pomerantz of Land Title Law will discuss the Religious Land Use and Institutionalized Persons Act; Vincent Messina of Sinnreich, Kosskoff and Messina will present on non-conforming zoning issues; and Craig Elgut from the DEC will talk about pending DEC issues, including Hurricane Sandy recovery. The illustrious panel will be led by Supreme Court Justices Thomas Whelan and John Leo.

Part Two of this year’s **Family Court Update** is scheduled for Wednesday,

December 4 (6:00 to 9:00 p.m.). Updates on child support developments and family offenses anchor this session, which also includes discussion of the New York State Family Court Improvement Project and defense strategies for clients in support or family offense proceedings. The knowledgeable faculty includes Family Court Judges John Kelly and Theresa Whelan; Support Magistrate Isabel Buse; and Joseph Canosa of the Suffolk County Legal Aid Society.

December also includes a number of newly developed CLE offerings.

One is a program many Suffolk County practitioners have been waiting for: a seminar on Suffolk’s new **Traffic and Parking Violations Agency**. Scheduled for Tuesday, December 10 (6:00 to 9:00 p.m.), the program will provide tips and techniques for representing clients in day-to-day processes, pleas, trials, motion practice, appeals, and dealing with collateral consequences. The faculty features practitioners with much skill and experience in the area of traffic law: Wayne Donovan, Larry Gustavson, David Mansfield, and Paul Margiotta. Former Academy Dean Barry Smolowitz is the program coordinator.

Mr. Smolowitz also coordinates a December training program for **pro-bono attorneys who handle Foreclosure Settlement Conferences**. That program, scheduled for the afternoon of Thursday, December 12 (1:00 to 4:00), is free and open to all attendees, who will be awarded MCLE credit if they agree to handle four appearance dates for the SCBA Foreclosure Project. The training is mandatory for those who are already part of the project and want to remain involved. Underwritten by the SCBA Pro Bono Foundation and presented in conjunction with Nassau-Suffolk Law Services, the program represents an opportunity to both gain new skills and provide needed service for Suffolk County citizens. Topics include: foreclosure trends in the county; tips for the settlement process; the role of the SCBA Foreclosure Project; and litigation trends. A complimentary lunch will be served prior to the program.

Another timely topic – one that is prominent in the news these days – will be addressed on December 11: a lunch ‘n learn program on the **Affordable Care Act**. Presented by the SCBA Health and Hospital Law Committee, the program is

titled: “*How Can the Affordable Care Act and the Health Exchanges Benefit the Small and Medium Size Law Firm and the Clients They Represent?*” While the answer to the question seems to be elusive of late, the skilled faculty is keeping current and will bring practitioners up to date on what they need to know. The panel features an attorney, a nationally recognized health plan representative, and a health exchange “navigator”: Craig Greenfield, Esq. (General Counsel at MagnaCare); Desmond Hussey (Vice President for Products and Innovation at United Health Care); and Kelly Murray, Esq. (Director of the Access Program at the Health and Welfare Council of Long Island). The panel, led by a Health and Hospital Law Committee member, will discuss the legal framework of the ACA’s small business exchange options; various choices in plans, programs, and benefits; and assorted pitfalls and traps of which the general practitioner should be aware. James Fouassier, co-chair of the SCBA committee, is the program coordinator.

Timely issues are also the focus of the **Annual School Law Conference**, co-sponsored with the Nassau Academy of Law and held this year at the Nassau Bar Association on Monday, December 9 (9:00 a.m.–3:30 p.m.). The program, developed by the Education Law Committees of the SCBA and the NCBA, delves into the latest issues concerning school law attorneys, educators, school administrators, school boards, and parent groups. This year’s topics include the New York State Regents Reform Agenda; the Affordable Care Act; Reductions in Force; the Impact of Social Media on Discipline of Students and Employees; the ADA and Section 504; Students in Nontraditional Living Arrangements; Bullying; and Surveillance Cameras in the School Setting. Complimentary lunch is included, and municipal registrants may register with vouchers or purchase orders in lieu of immediate payment.

Attorneys who handle elder law and estates matters will find two important programs on the December syllabus. Both are coordinated by Academy Curriculum Chair Eileen Coen Cacioppo.

The first features the always popular Seymour Goldberg in a treatise on **Inherited IRAs**. Scheduled for the morning of Tuesday, December 10 (9:00 a.m.–noon), the program will look at retirement plans and how “making the

(Continued on page 25)

ACADEMY

Calendar

of Meetings & Seminars

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

December

- | | | |
|----|-----------|--|
| 3 | Tuesday | Academy Strategic Planning Committee. 7:30 a.m. |
| 4 | Wednesday | Family Court Update–Part Two (Child Support & Family Offenses) . 6:00–9:00 p.m.; light supper from 5:30 p.m. |
| 5 | Thursday | Allan Sak Municipal Series: Part Two–Hot Topics in Land Use & Municipal Law , 6:00–9:00 p.m.; light supper from 5:30 p.m. |
| 6 | Friday | Meeting of Academy Officers & Volunteers. 7:30–9:00 a.m. Breakfast buffet. All SCBA members welcome |
| 9 | Monday | Annual School Law Conference . Full day at Nassau Bar Association in Mineola |
| 10 | Tuesday | Inherited IRAs (Sy Goldberg). 9:00 a.m.–Noon. Breakfast buffet. |
| 10 | Tuesday | Navigating the Traffic & Parking Violations Agency . 6:00–9:00 p.m.; light supper from 5:30 p.m. |
| 11 | Wednesday | The Affordable Care Act and the Health Exchanges . 12:30–2:10 p.m. Lunch from noon. |
| 11 | Wednesday | Medicare, Taxes, & the Sale of a Home with a Life Estate . 5:30–7:30 p.m. Light supper from 5:00 p.m. |
| 12 | Thursday | Pro Bono Foreclosure Training . 1:00–4:00 p.m. Lunch from 12:30 p.m. |

January

- | | | |
|----|----------|---|
| 6 | Monday | 18B Training: Criminal . 6:00 p.m. at Touro Law Center. |
| 9 | Thursday | View from Olympus Series: Perspectives of Law Secretaries–Commercial & Civil . 6:00–9:00 p.m.; light supper from 5:30 p.m. |
| 10 | Friday | Meeting of Academy Officers & Volunteers. 7:30–9:00 a.m. Breakfast buffet. All SCBA members welcome |
| 16 | Thursday | View from Olympus Series: Perspectives of Law Secretaries–Matrimonial & Criminal . 6:00–9:00 p.m.; light supper from 5:30 p.m. |
| 23 | Thursday | View from Olympus Series: Perspectives of Law Secretaries–Surrogate’s Court & Article 81 . 6:00–9:00 p.m.; light supper from 5:30 p.m. |
| 30 | Thursday | View from Olympus Series: Perspectives of Law Secretaries–Civil Motion Practice . 6:00–9:00 p.m.; light supper from 5:30 p.m. |

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

ACADEMY OF LAW OFFICERS

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Home for the Holidays (continued from page 24)

right move at the right time” can have important financial benefits for the taxpayer and, conversely, how not doing so can be financially hazardous. Specific topics include: common errors in distribution planning; why many IRA beneficiary forms are defective; how the inherited IRA and spousal IRA rules work; using irrevocable spendthrift trusts as IRA beneficiaries; who should pay the estate tax on retirement accounts; tying estate plans in with retirement accounts, and much more. Attendees receive Mr. Goldberg’s 124-page manual containing 120 examples as part of the course materials. The program is also available as a live webcast, which must be taken during the real time of the program as it will not be archived as an on-line replay. (Enrollment in the webcast may be achieved through the SCBA website (www.scba.org) by clicking “MCLE” in the left-side pull-down menu, choosing “Video Replays and Live Webcasts,” and following instructions for the specific program.)

The second December program of interest to elder law and estate planning lawyers is scheduled for the evening of Wednesday, December 11 (5:30–7:30 p.m.), and deals with “**Medicaid, Taxes, and the Sale of a Home with a Life Estate.**” The presenter, the always well

received David DePinto, will address, among other things, IRS requirements for allocation of proceeds for tax; cost basis allocations among life tenant and remainders; applying the Sec 121 \$250k exclusions to a bifurcated deed; how to allocate proceeds for Medicaid and the related issues; compliance and tax filings; and gift tax requirements.

With so much happening on the December educational front, the Academy hopes attorneys will pause in the midst of holiday parties and preparations to come home to the SCBA for CLE that will enhance skills and help to prepare for a new year of professional obligations. And, it should be noted, CLE can also be transformed into seasonal gifts for colleagues. A CLE pass, DVD recording, or gift certificate for an upcoming program are all ways to convey appreciation or good wishes. More information about these options is available through the Academy office (631-234-5588).

The Academy officers, volunteers, and staff join in wishing constituents a happy holiday season and a new year of ongoing learning.

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



CLE:

A HOLIDAY GIFT THAT KEEPS ON GIVING!

Show your appreciation for or send good wishes to a colleague with a CLE gift

Season or Session Passes
DVD Recordings
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We'll send it to you or for you. Call the Academy to order:

631-234-5588

Learn New Skills... Handle New Matters... Give New Hope

Free Foreclosure Settlement Training Program on December 12

The threat of mortgage foreclosure is still a very real issue for Suffolk County residents. And, consequently, the need for volunteer attorneys to handle foreclosure settlement conferences also continues.

On the afternoon of Thursday, December 12, the Academy, in conjunction with the SCBA Pro Bono Foundation and Nassau Suffolk Law Services, will offer a free foreclosure settlement training program. The training is mandatory for those who currently volunteer with the SCBA Foreclosure Settlement Project and wish to maintain their involvement. New recruits may also attend tuition-free and will be awarded MCLE credit for the program after the completion of four appearance dates for the project.

With complimentary lunch from 12:30 p.m., the program runs from

1:00 to 4:00 p.m. and provides three MCLE credits.

The program agenda covers foreclosure developments in Suffolk County, the settlement process, how the SCBA's Foreclosure Settlement Project works, and foreclosure litigation trends. The invited presenters are highly experienced foreclosure lawyers: Michael Wigutow, Barry Lites, Ray Lang, Eric Sackstein, and Glenn Warmuth. Barry Smolowitz, the program coordinator, will discuss the rewards and responsibilities of participation in the Settlement Project, and Nassau-Suffolk's Maria Dosso will be on hand to sign up new volunteers.

Attorneys may enroll in the program on-line through the SCBA website (www.scba.org) or by calling the Academy at 631-234-5588.

—DPC

Training Program For 18B Lawyers Announced

A new mandatory training program for attorneys who handle 18B cases will be implemented in 2014. Two family court and two criminal practice programs will be offered. Each of the seminars will feature an outstanding faculty of skilled practitioners in the field.

Program details will be announced shortly. In the meantime, however, the following dates – each program from 6:00 to 9:00 p.m. – may be calendared:

- Criminal Law on Monday, January 6, at Touro Law Center
- Family Court on Thursday, March 20, at the SCBA Center
- Criminal Law on Monday, May 19, at Touro Law Center

The date of the second Family Court training will be announced shortly.

The program is funded by a New York State grant and is offered free to attorneys serving on 18B panels. Other interested lawyers may enroll on a tuition basis as space permits. Three MCLE credits will be awarded for each program.

18B Administrator David Besso is charged with developing the content and recruiting the faculties for the programs. Program administration will be handled by the Academy of Law.

—Ceparano

Pro Bono Attorney of the Month (Continued from page 12)

also take pro bono assignments.

“Stuart can always be counted on to take one or two cases after every clinic, in each county!” said Maria Dosso, Law Services’ Director of Communications and Volunteer Services. “He goes over and above in his pro bono contribution and makes it easier for us to meet the great demand for pro bono representation in these cases.”

When asked what motivates him to do pro bono work, Gelberg commented, “Doing pro bono is not mandatory, but for me, it’s a given. I just do it and don’t consider it extraordinary. I’ve found myself doing more pro bono cases since bankruptcy filings are down and I can manage it without it being too burdensome.”

Gelberg has represented numerous bankruptcy petitioners over the years. In a recent bankruptcy case he represented a same-sex couple, the first filed in the Eastern District, as far as he knows. The couple had been legally married in New York and Gelberg was able to file a joint bankruptcy petition on their behalf. Before gay marriage became legal in New York, joint petitions filed on behalf of same sex couples were repeatedly dismissed because the cases were not deemed to be filed by an eligible married couple.

Over the years, his pro bono clients have expressed their gratitude in various ways, including with the gift of an original painting.

Stuart Gelberg and his wife Vicki, an optometrist, have three children. His

oldest, Danielle, graduated with a Masters in Education from Columbia, and is currently teaching ESL in Washington, D.C. Last year, Jeannie traveled to Israel on the BirthRight Israel cultural heritage program, where she was bat mitvahed at the age of 26. He is also proud that she is a recent first-time homebuyer, having purchased a home on Long Island. His youngest child, Sam was bar mitvahed this past February, despite the great blizzard that buried Long Island. Remarkably, the event was very well attended despite the weather, a true testament to his family and friends. Vicki, his wife, is very supportive of Stuart’s professional accomplishments. She says with an ironic smile, “He is my Attorney of the Year,

every year!”

The Pro Bono Project is proud to add to the previous, well-deserved accolades by naming Stuart P. Gelberg Pro Bono Attorney of the Month for his exceptional pro bono contribution in Suffolk County.

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

New York State and MMA (Continued from page 19)

to pass would be a simple matter, since only a few more votes are needed to get a majority of the members. He contends that the opposition emanates principally from two sources. One is the Culinary Union of Las Vegas, which has been at odds with Fertitta and his brother over labor practices issues and the union has been using its influence in New York State to prevent the legalization of MMA.

The other source of opposition is more generic and not directly related to the senior management of the UFC. Namely this opposition is voiced from several women's groups who make the claim that the MMA is misogynistic. In fact, the president of the New York State National Organization for Women wrote an open letter to Governor Andrew Cuomo in the summer of 2013 wherein she suggested that it would be hypocritical for Cuomo to support allowing mixed martial arts while simultaneously supporting a "Women's Equality Agenda," as this was one of the pillars of his January 2013 State of the State address.

As expected, Fertitta completely disagreed with the arguments put forth by the NOW New Chapter stating, "This year's new, absurd, offensive and completely erroneous charge used to justify the defeat of MMA legislation was that MMA is anti-woman and leads to domestic violence. This is a deception fabricated by a Las Vegas union that is recklessly and callously trying to use an important societal issue to try and punish the UFC. It isn't honest and doesn't work."

The fact that out of the 64 sponsors of the Bill mentioned earlier, nine are women is also important to note in that, the proponents argue there is no evidence that women as a group oppose MMA. There are highly visible female celebrities that actually advocate for MMA in New York. Among the most active and outspoken is Ottavia Bourdain, wife of celebrity chef Anthony Bourdain, who believes critics of the sport — which largely point to its violent nature and penchant for blood — are missing the point. Bourdain is a UFC enthusiast and trains in mixed-martial arts. She said, "MMA is such an empowering sport for me. It teaches discipline, respect, sportsmanship, bravery, control."

Jennifer Bonjean is a lawyer and mixed martial arts supporter. Her children participate in MMA, and she thinks that the critics are off base. She added that "Making

MMA out to be negative for women is nothing more than a farce. As an athlete and as a mother, I know that MMA training is good for my health and is good for my daughter's self-confidence."

No right or wrong answer but Constitutional Foundations validated

The arguments presented above clearly reside within the political arena but that does not make them less meritorious or worthy of consideration, be that they support or oppose legalizing MMA.

However there is a more philosophical aspect rooted in American Federalism and the Constitution that enshrined it. The U.S. Constitution is premised on being a-moral thus leaving matters deemed by the framers as dwelling in that realm to the entities that most directly represented the people, the states. Those so-called "moral areas" essentially and broadly speaking encompass "gambling" and "prostitution, which every state is free to legalize and regulate as it so wishes. While MMA does not fall into either cited category, New York State is entirely within its rights to protect its citizens in any manner it deems most suitable. In the case at issue the question, at least in so much as it is represented by the New York State Assembly's opposition to MMA, is whether the role of the legislature to protect its citizens against an activity that it considers to be in bad taste, be a bad influence on its citizenry, or perhaps debasing - even if the latter could be considered rather harsh and unwarranted — is justified?

In expressing its opposition to legislation authorizing MMA events in New York State, the New York State Assembly, as one of the state's two legislative chambers, demonstrates how American Federalism functions and, for that matter, how it was intended to function by the Constitution's framers.

"Police powers", as interpreted under the U.S. Constitution and Federalism, have consistently and historically been the states' responsibility. Thus whether one agrees with it or not, the New York State Assembly's decision to oppose legalizing MMA, be it on safety, health, moral or any related grounds, is entirely justifiable.

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

Cell Phone and Portable Electronic Device Violations (Continued from page 18)

side of the road. Justice Morris has adopted the CDL standard. *People v. Dakota Winterhawk*, NYLJ 1202591122285 decided Feb.20, 2013.

Justice Morris also found a defendant not guilty of engaging in a call by activating the "Siri" function on an iPhone citing talking to or listening,

but not to include holding a mobile telephone to activate, deactivate or initiate a function of such telephone. The court found that the defendant had successfully rebutted the presumption of using the mobile telephone. *People v. Andrew Welch*, NYLJ1202591122251 Decided March 5, 2013.

The use of portable electronic devices law has also been changed §1225-d with additional restrictions on operators of commercial vehicles effective Oct. 28, 2013.

Portable electronic devices and any hand held telephones are defined by Subdivision 1 of §1225-c as a personal digital assistant, PDA handheld device with mobile data access, laptop computer, pager, broadband, personal communica-

tion device, two way messaging device, electronic game, portable computing device and any other electronic device when used to input write, send or read text for present or future communication.

Using a portable electronic device is defined as taking or transmitting images, playing games or for the purpose of present or future communication performing a command or request to access a worldwide web page, composing, sending, reading, viewing, access and browsing, transmitting, saving or retrieving email, text messages, instant messages or other electronic data.

Subdivision 4 has enhanced restrictions on operators of commercial motor vehicles in that it is no longer permissible to use such devices while momentarily stopped in traffic or at a traffic signal or control device.

The presumption is rebuttable.

A defendant was acquitted on a texting charge in *People v. Seth Goldstein*, New York Law Journal, as reported on March 12, 2013.

Anti-Assignment Clause (Continued from page 10)

the State University of New York or the State of New York. james.fouassier@stony-brookmedicine.edu

1. "Covered Services" are set out and defined in detail in the insurance policy or health plan benefit design, which also establish the criteria for eligibility for coverage on the date the Covered Service is rendered.

2. Keep in mind that while we speak of a determination of no medical need almost as if the plan or payor were making a clinical determination, the more correct verbiage would be "a failure to meet the payer's criteria for payment". As I have discussed before, plans and payers cannot "practice medicine" and consequently cannot make medical decisions; they only make "eligibility" and "payment" decisions.

3. The terms of assignments vary. Some, as with the case discussed here, simply are assignments of the benefit of "payment". Many more allow the provider to raise any argument that would be available to the member-patient in pursuing the claim, including the right to appeal on the member's behalf. Often the assignment form states that if the claim ultimately is denied the provider may come back against the member, but this writer questions the validity of such a reservation of

rights. If the assignee "steps into the shoes" of the assignor it assumes not only the benefits but also the burdens of the assignor, including satisfying all of the clinical and administrative requirements of the member's contract with the insurer or plan. Having performed them poorly, or not at all, to the obvious prejudice of the member-patient, the provider should not then be allowed to "cover its bet" by going back against a now remediless patient.

4. Because of ERISA's limited jurisdictional grant in section 502(a), suits for benefits may be brought only by "participants" and "beneficiaries". 29 USC 1132(a)(1)(B). The Third Circuit has not addressed the question of whether a health care provider may bring suit by assignment from a "participant" or "beneficiary" but held that almost every other circuit addressing the issue has allowed such suit.

5. Some sixty percent of all insured persons are covered by health insurance or a health plan subject to ERISA.

6. We already see a number of financial institutions and businesses soliciting providers to inform their patients that "financing" is available for their anticipated uncovered or under-insured medical needs, or offering a variety of other alternatives to what otherwise would be the unsecured debt of the patient.

The Slayer Rule (Continued from page 16)

less of her criminal culpability, Leatrice admitted at her criminal plea allocution that she "intended to cause her children's deaths." Accordingly, as per Surrogate McCarty's determination, equity prohibited Leatrice from receiving any of the wrongful death proceeds.

While (hopefully) few, if any, practitioners will have to address the issue in *Brewer* in their own practices, Surrogate McCarty's holding in *Brewer* certainly raises a number of interesting, somewhat novel issues. It will be interesting to see whether other courts adopt the *Brewer* rule or whether it sparks legislative action.

Note: Robert M. Harper is an associate at Farrell Fritz, P.C., concentrating in the field of trusts and estates litigation. In addition to his work at Farrell Fritz, Mr. Harper serves as a Special Professor of Law at Hofstra University; an Officer of the Suffolk Academy of Law; and a Co-

Chair of the Legislation and Governmental Relations Committee of the New York State Bar Association's Trusts and Estates Law Section.

1. *Riggs v. Palmer*, 115 N.Y. 506 (1889).

2. Ian W. MacLean & Robert M. Harper, "2011 Legislation Update", N.Y.S.B.A. *Trusts & Estates Law Section Newsletter* at 17 (Summer 2011).

3. *Matter of Savage*, 175 Misc.2d 880 (Sur. Ct., Rockland County 1998); *Matter of Wirth*, 59 Misc.2d 300 (Sur. Ct., Erie County 1969).

4. *Matter of Brewer*, Nov. 7, 2013 (which Surrogate McCarty apparently read into the Surrogate's Court record, but which has not been formally published as a decision), available at: www.newyorklawjournal.com (last viewed on November 13, 2013).

5. Tania Karas, "Mother Can't Share Estate of Kids She Killed, Judge Says", NYLJ, Nov. 7, 2013, available at: www.newyorklaw-journal.com (last viewed on November 13, 2013).

and drive and use your cellphone in only hands free mode only as absolutely necessary.

You should avoid five point or higher convictions wherever possible.

When representing anyone charged with one of these offenses it is imperative to inquire if there is 3 or more alcohol or drug related driving offenses in their background, or if they are in a probationary license status, class DJ or class MJ or possess a learner's permit. Was your client operating a commercial motor vehicle and was the offense allegedly committed on or after Oct. 28, 2013? Does your client have a legal defense to the charge? What was the nature and extent of the conversation with the officer who issued the violation? What documentary evidence such as phone bills can be introduced into evidence? The defense of these charges requires an in depth review of the case.

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

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Animal Law Update (Continued from page 12)

negligence in permitting the animal from wandering off the property where it was kept." See, *Id.*, citing, *Hastings v. Sauve*, 21 NY3d 122, 125. The court in *Doerr v. Goldsmith*, explained that the case of *Doerr*, was "of an entirely different ilk than *Hastings*, *Bard and Petrone*." See, *Doerr v. Goldsmith*, 110 A.D.3d 453. The court reasoned that, "[i]t is not about the particular actions of an animal that led to a person's injury. Rather, it is about the actions of a person that turned an animal into an 'instrumentality of harm'." *Id.*, [emphasis added]. The court explained that,

Defendants' actions can be likened to those of two people who decide to toss a ball back and forth over a trafficked road without regard to a bicyclist who is about to ride into the ball's path. If the cyclist collided with the ball and was injured, certainly the people tossing the ball would be liable in negligence. Simply put, this case is different from the cases addressing the issue of injury claims arising out of animal behavior, because it was defendants' actions, and not the dogs own instinctive, volitional behavior, that most proximately caused the accident. *Id.*

Therefore, the First Department went further than the Court of Appeals by allowing a negligence claim to stand against the owner of a dog, where the action of the owner, not the dog's own behavior, caused the plaintiff's injuries.

What does all this mean?

Well, for now it means that, in New York, an owner of a "farm animal" can be held liable on a negligence claim for their own negligent actions where the "farm animal" is allowed to stray from the property where it is kept." See, *Hastings v. Sauve*, 21 NY3d 122, 125. If you happen to be in the First Department, the new rule has been expanded to open up dog owners to the same liability when through the negligent behavior of the owner, not the behavior of the dog, the owner allows the dog to become an "instrumentality of harm." It is important to note that the courts in both *Hastings* and *Doerr*, made it very clear that, "an accident caused by an animal's 'aggressive or threatening behavior' is 'fundamentally distinct' from one caused by an 'animal owner's own negligence'." See, *Hastings v. Sauve*, 21 NY3d 122, 125; *Doerr v. Goldsmith*, 110 A.D.3d 453. Therefore, the "vicious propensity" of an animal and the prior knowledge of the owner must still be proven when the behavior of the animal itself is at issue. For now at least, the Second Department, as well as, the Third & Fourth Department, have thankfully not expanded the *Hastings* ruling to dogs and the "instrumentality of harm" theory utilized by the First Department. Hopefully, at least in this author's opinion, the Second Department will not follow the First Department's lead but will continue to provide dog owners in their jurisdiction

with needed protection from an onslaught of litigious plaintiffs.

Why is the need to prove "Vicious Propensity" in "Companion Animal" cases important?

The "vicious propensity" standard and the need for the plaintiff to prove that the owner had knowledge of the companion animal's "vicious propensity" currently fosters New Yorkers (with the exception of the First Department to some extent) with much needed protection and comfort in the very "owning" of a dog or other companion animal. Why would anyone take the risk of ever even stepping out their front door to take their dog for a walk, or to the dog park, or more importantly, even owning man's best friend or other companion animal, if potential liability stood at every corner, especially in New York, where we have one of the most litigious societies? No municipal shelter or private rescue would ever adopt out a single animal, especially from a municipal shelter or other rescue, where animals are either abandoned, or are picked up as a stray and thus the shelter or rescue, has little or no behavioral information. In addition, as is already the case with many insurance companies either raising rates or denying coverage outright for the owning of certain breeds, insurance rates for companion animal owners, animal shelters, and rescue groups, would go sky high, forcing much of the public

to surrender their companion animals, and existing animal shelters and rescue groups to dissolve, as well as, be financially prohibitive to new rescues even forming. What this all means is hundreds of thousands of more animals would be euthanized in New York municipal animal shelters, because no one will take the risk and financial burden of adopting an animal, for fear of future liability.

Hopefully, the lid on future changes to animal owner liability will end here. If not, it will be disastrous to the age old, simple and much loved joy, of sharing one's life with a beloved companion animal. It will mean less people will want to take the risk of owning a companion animal, which means less companion animals adopted from shelters and rescues, which means more otherwise healthy and happy dogs and cats will be euthanized for nothing else, then for their lack of a place to call home.

Note: Amy Chaitoff is a solo practitioner with a practice in Bayport. Her practice focuses on representing individuals, organizations, municipalities, and businesses with animal related legal issues. She is Chair of the New York State Bar Association's Committee on Animals and the Law and co-founder and Co-Chair of the Suffolk County Bar Association's Animal Law Committee. Ms. Chaitoff has written numerous articles as well as lectured extensively on animal related legal issues.

Bench Briefs (Continued from page 4)

deny the party's right to have counsel, a physician or other representative at the physical examination and the defendant must establish, in support thereof that the presence of the representative will impair the validity and effectiveness of the particular examination to be conducted. Here, the court concluded that the defendants failed to meet such burden.

Motion to restore case to calendar granted; "dismissal" of case in error.

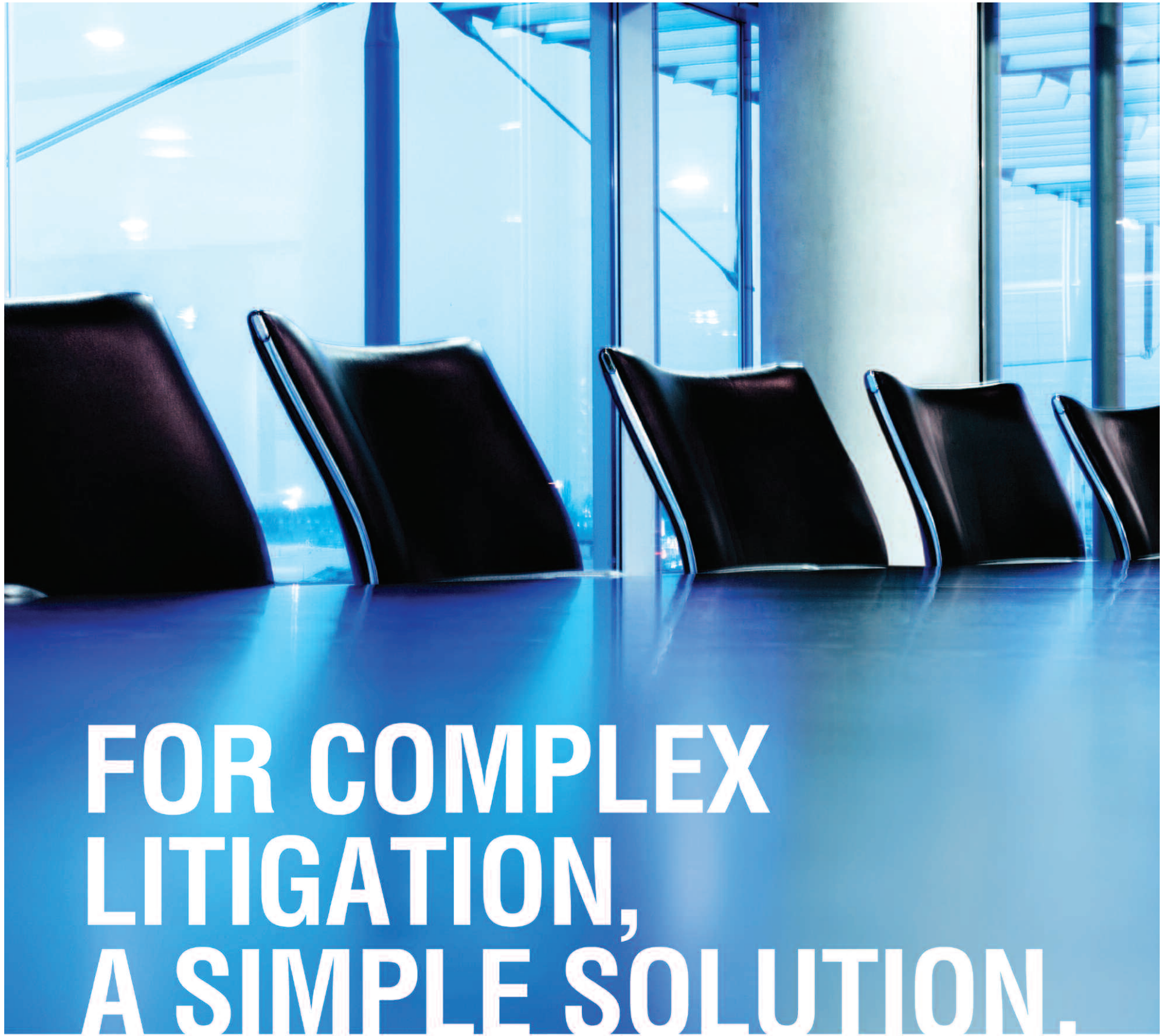
In *Jeanine M. Tiberg and Michael Tiberg v. South Bay Obgyn, P.C., Denise E. Lester, M.D., Peter A. Judge, M.D., Maria E. Lockhart, M.D., and Robert Schwartz, M.D.*,

Index No.: 21141/2006, decided on October 15, 2013, the court granted the motion for an order restoring the action to the calendar. In granting the application, the court noted that the action was commenced on August 21, 2006. A certification conference was held on November 10, 2009, and plaintiff was directed to file a note of issue which was thereafter filed on February 9, 2010. The court's computerized records indicated that the calendar was marked dismissed after a November 15, 2010 conference. Defendants' motion for summary judgment was adjourned to December, 2010 for opposition and reply papers. On April 4, 2011 a decision denying the summary judgment motions was ren-

dered. In granting the application, the court noted that it was evident from the foregoing actions of the parties and the court that the "dismissal" marking of the calendar on November 15, 2010 was in error, according the motion was granted.

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

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



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