THE SUFFOLK LAWYER

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Ringing in the Holidays SCBA-style

By Laura Lane

The entrance to the Suffolk County Bar Association was the first indication that it was time to celebrate the holidays. Festively decorated, there were red and gold Christmas balls, wreaths, and a table in the lobby surrounded by poinsettias. This year even the ceiling shimmered, with a sprinkling of tiny green and red lights that twinkled.

Inside a small area right before the entrance to the Great Hall a nativity scene was on view. It was so beautifully arranged and included nearby citizens who also must have heard that someone special had been born. The nativity is donated each year in memory of Kenneth Grabie, who had been active at the SCBA.

It was the work of the staff at the Association that created the magical holiday scene. They always work so hard to ensure that people feel the warmth of the holiday. Proof of their success? As people entered they smiled and commented on how nice everything appeared.

And Santa Claus stopped by too. Busy handing out candy canes he wished everyone a happy holiday. Santa is a big fan of the SCBA. "The SCBA is one of the best bar associations in the state," he said, "maybe even the country."

Throughout the evening, everyone enjoyed an array of hot food, festive holiday desserts and just catching up with colleagues and friends. The SCBA provides so many opportunities for joy, but its holiday party each year is perhaps one of its best achievements.

New phone system at the courts

The Suffolk County Courts are converting to a new I.P. phone system, which is being implemented in various phases. Phase one will result in new phone numbers for all judicial and non-judicial personnel in the Central Islip Cohalan Court Complex effective January 3, 2018. Prior to this date, a new telephone listing for all judges and other personnel will be provided via an e-blast from the SCBA. – LaCova

Retirement party for a dear friend of the SCBA

Photo by Barry Smolowitz

The Appellate Practice, the Supreme Court and the SCBA Board of Directors hosted a retirement party for the Honorable Randall T. Eng, New York State Supreme Court, Appellate Division, Second Judicial Department on Nov. 9. SCBA President Patricia Meisenheimer, left, and SCBA Executive Director Jane LaCova thanked Justice Eng for his service. See story on page 3 and see photos on page 18.

PRESIDENT'S MESSAGE

The Spirit of the Holidays

By Patricia Meisenheimer

Patricia Meisenheimer

The holiday spirit is a tangible part of who we are, bringing out the best in all of us and reminding us of our blessings and friendships. While we count our blessings, rather than our differences, we share the spirit of the holidays, deepening our understanding of the values embodied in the spirit of this holiday season.

This spirit is particularly evident in our interactions with others and when we go the extra mile to assist and to share with others who live in need. The holiday season can humanize us like no other time of the year.

True holiday spirit urges us to do good, motivating us to spread the joy of the season to those around us. Why not stretch yourself beyond your comfort zone to share the spirit of the season with those in need of legal assistance. Let this holiday season be a starting point for renewed commitment to help those less fortunate. Keep the holiday spirit alive throughout the year by volunteering with the Suffolk County Bar Association's Pro Bono Project.

At the SCBA we embrace a rich and dynamic culture of diversity, inclusion and of reaching out to help others in the community. The challenge is to do more, to acknowledge and celebrate the spirit of the holidays by fostering awareness of the exceptional work that our Pro Bono lawyers do for the legal com-

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BAR EVENTS

Swearing in & Robing Ceremony

Monday, Jan. 8 at 9 a.m.
Touro Law Center
225 Eastview Drive, Central Islip

Join us to honor our distinguished members of the Judiciary at their Swearing-in ceremony.

SCBA Wishes Everyone a Happy Holiday!

Suffolk County Bar Association President Patricia Meisenheimer, the Executive Board, Executive Director Jane LaCova and the staff at the Association wish our members and their families a safe and happy holiday season.

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Suffolk County Bar Association

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

Board of Directors 2018-2018

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 2017

18 Monday Board of Directors, 5:30 p.m., Board Room.
19 Tuesday Professional Ethics & Civility, 6:00 p.m., Board Room.
LGBT Law, 6:00 p.m., E.B.T. Room.
21 Thursday Matrimonial Bar – Holiday Party. Location to be determined.

JANUARY 2018

2 Tuesday Appellate Practice, 5:30 p.m., Board Room.
4 Thursday Surrogate Court, 6:00 p.m., Board Room.
8 Monday Annual Judicial Robing & Swearing In Ceremony, 9:00 a.m., Touro.
Executive Committee, 5:30 p.m., Board Room.
10 Wednesday Education Law, 12:30 p.m., Board Room.
Real Property, 6:00 p.m., Board Room.
16 Monday Professional Ethics & Civility, 6:00 p.m., Board Room.
17 Wednesday Elder Law & Estate Planning, 12:15 p.m., Great Hall.
18 Thursday Matrimonial Bar, 6:00 p.m., Bonwit Inn, Commack.
22 Monday Board of Directors, 5:30 p.m., Boar4d Room.
23 Tuesday LGBT Law, 6:00 p.m., E.B.T. Room.
ADR, 6:00 pm., Board Room.

FEBRUARY 2018

5 Monday Executive Committee, 5:30 p.m., Board Room.
6 Tuesday Appellate Practice, 5:30 p.m., Board Room.
7 Wednesday Elder Law & Estate Planning, 12:15 p.m., Great Hall.
8 Thursday Surrogate's Court, 6:00 p.m., Board Room.
14 Wednesday Education Law, 12:30 p.m., Board Room.

Our Mission

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

Join our Leadership for 2018-2019

Are you interested in a leadership position? Each year the Nominating Committee of the Suffolk County Bar Association recommends for election positions of leadership.

The Nominating Committee, chaired by past president William T. Ferris, is now seeking candidates for leadership positions, i.e., President, President Elect, First and Second Vice Presidents; Treasurer, Secretary and four Directors with terms expiring in 2021. All applications will be considered and eligibility (Article V Board of Directors Sec. 2 Eligibility of the Association's Bylaws) "…No member shall be eligible for election to the Board of Directors who has not been an 'Active Member' of the Association for at least five years and a member of a committee, task force, recognized foundation of the association, an officer of the Suffolk Academy of Law, or any combination thereof, for at least four years during such period."

If you are interested and willing to assume an active role in your professional association and its activities, send your resume, addressed to the Nominating Committee at bar headquarters, or to any member of the Nominating Committee: William T. Ferris, Chair; members: Thomas J. Stock; Glenn P. Warmuth; Leonard Badia; Donna England; Jeanette Grabie; John R. Calcagni; Cheryl F. Mintz; Richard L. Stern.

—LaCova

THE SUFFOLK LAWYER

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Frequent Contributors

Publisher
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Send letters and editorial copy to:
THE SUFFOLK LAWYER
560 Wheeler Road
Hauppauge, NY 11788-4357
Fax: 631-234-5899
Website: www.scba.org

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Photo by Barry Smolowitz

SCBA President Patricia Meisenheimer congratulated retiring Justice Randall T. Eng at a retirement party given in his honor hosted in part by the SCBA on Nov. 9. See more photos, page 18.

Farewell, but not Goodbye – A Special Tribute to Presiding Justice Randall T. Eng

By Jane LaCova

On November 9, the Appellate Practice, the Supreme Court and the SCBA Board of Directors hosted a retirement party for a very dear friend of the SCBA, the Honorable Randall T. Eng**,** New York State Supreme Court, Appellate Division, Second Judicial Department, at our Bar Center in Hauppauge, Long Island.

Justice Eng, New York's first Asian-American Presiding Justice, who leads one of the busiest appellate courts in the country, is a true-blue trailblazer. Born in Canton, China and raised in New York City where he attended public school before going off to college at SUNY Buffalo and onto law school at St. John's, he served his country as a member of the New York Army National Guard, retiring as State Judge Advocate with the rank of colonel.

Justice Eng served on the Appellate Division since 2008. Prior, from 1983-1999, he served on the Criminal Court of the City of New York. Justice Eng was a Justice of the Supreme Court in Queens County from 1991-2007, and was Administrative Judge in the Criminal Term of the Supreme Court in Queens County from 2007-2008. Before serving on the bench, Justice Eng was the Assistant District Attorney in the Queens County Attorney's Office from 1973 to 1980. He was the Deputy Inspector General of the New York City Correction Department from 1980-1981, and then became the Department's Inspector General from 1981-1983.

There is no doubt that Justice Randal T. Eng has had an illustrious career and now will be looking forward to a new journey. The many fine tributes Justice Eng will be receiving is an inspiring manifestation of the high esteem in which he is held. His unfailing courtesy, the high fidelity with which he performed his duties more than justify all the nice things which have and which will be said about him. He is a true selfless citizen, and a loyal public officer. His sense of honor and integrity are qualities we should all try to emulate.

Justice Eng, you will be missed on the bench. May you continue to enjoy life at its best, with your wonderful wife, Dr. Pauline Leon Eng, your daughters and your lovely family.

Note: Jane LaCova is the executive director of the Suffolk County Bar Association.

Meet Your SCBA Colleague

Tarsha Smith, a general practitioner, says she does it all. For over 20 years she's enjoyed handling different kinds of cases, also helping people in her community.

By Laura Lane

What areas of law do you handle? Several areas, including civil litigation, elder and estate planning, adoptions, bankruptcy, personal injury, family, criminal defense, real estate, and landlord/tenant. I also represent and advise religious organizations and non-profit organizations. Being a general practitioner is not a stigma. I think it's great being exposed to so many different things.

What brought you to the profession? I saw troubling things in the media and the community — women weren't treated fairly and neither were black people. I wanted to help my community and my family to be able to effect change. I wanted to be in a position to give people the law to help them in situations. I decided I wanted to be a lawyer when I was in elementary school.

Was there family support for your plan? I'm a first generation attorney raised by a single mom who had several jobs, who was always tired. I am also the first to graduate from college in my family. They supported me. And they thought this was a perfect career for me because I was always questioning things, always advocating for the underdog. I did at one time want to be a chef and a choreographer — to this day I love dancing.

You cover many areas of law. How did that come about? I always wanted to work for myself to help people. That's how I got experience in the different areas. I wanted to help someone so I'd learn how to do it.

What do you enjoy most about being an attorney? I enjoy helping people overcome obstacles. The way you help people is to give them the information they need, the knowledge and the hope.

You've done quite a bit of pro bono work too for the Pro Bono Project and Nassau/Suffolk Law Services. You were even the Attorney of the Month for them in 2011. When did you get involved and why? I'd say early 2000. I wanted to get into bankruptcy and people utilizing Pro Bono were not able to afford an attorney. I had heard the Suffolk County Bar Association talk about the Pro Bono Project so I offered to help. I helped veterans, which was very rewarding and learned about the different areas of law at the same time.

Your first job was as an assistant attorney for the Town of Babylon's attorney office. What did you learn there? I learned about litigation — how to try a case, to negotiate pleas. I learned a great deal there and it helped to demystify trial work.

You are on the board of directors for the Bellport Hagerman East Patchogue Alliance. What type of work are you doing there? I help low income people to help to realize their dream of owning a home. I help to make policy there.

You are a public defender on the Criminal and Family courts panels. Why did you decide to take this on? It was a natural transition from all of the trial and court work I was doing to go on a panel. I applied and was accepted. I'm a court appointed 18B attorney. I find it rewarding because I'm able to utilize the skills I have to help people and sometimes the court as well.

Have there been any changes there? It hasn't changed in Family Court. It's troubling the way people interact with each other. They need help from someone because they are so disrespectful of their families. Criminal clients are more civil. I do find it rewarding to help those who are being victimized.

You are involved with children too, right? I mentor kids. I hear some lawyers say they wish they weren't an attorney. I find it so rewarding. Even being a mentor for a kid, you can achieve your dream. No one has to settle.

You are a court evaluator too. Yes, I was appointed. It's nice to help the elderly. I make recommendations to the Guardianship Court, whether someone needs a guardian. I've met segments of the community living in nursing homes, which has been very interesting.

Tarsha Smith

When did you join the SCBA? I think it was early 1996. As a new attorney, I wanted to get acclimated to what is required.

What have you enjoyed about being a member? I like meeting people who are willing to mentor and share their ideas to help a fellow attorney. I like the CLE programs that are offered. I've also made some friends with colleagues at the Association.

Are you involved at the SCBA? I'm starting to realize what a resource the bar is and am trying to get more involved. There's no Adoption Law Committee right now. Maybe that's something we can add. I'd like to give back.

BENCH BRIEFS

By Elaine Colavito

Suffolk County Supreme Court

Honorable Paul J. Baisley, Jr.

Motion for preliminary injunction granted; where the easement over the defendant's property is defined by metes and bounds, the defendant did not have the right to unilaterally restrict, relocate or alter the easement.

In *Deirdre S. Venables, Marianne M. Farrell, A. Edward Patmos III, Edith Greenlaw, David Mambrino, Tara Hakimi Mambrino, Gregg Lubonty and John G. Himmer v. Maria E. Rovegno,* Index No.: 24178/2014, decided on July 25, 2017, the court granted the motion of plaintiffs for a preliminary injunction enjoining defendant, her agents, servants, employees and others acting in concert with them, from continuing to obstruct the right of way of which defendant's property is burdened and by which plaintiffs benefit; and immediately cease and desist, and be enjoined from, installing any plantings within the right or way or cutting any vegetation along plaintiffs' side of the right of way without further court order.

Defendant conceded the existence of an ingress and egress easement. She alleged however, that the purpose of the easement was to allow plaintiffs' access to their properties and pedestrian access only over the burdened property to Middle Pond. She further contended that she need only maintain a minimum 14-foot-wide driveway as required by Southampton Town Code and alleged that she did that. In granting the preliminary injunction, the court noted that here, the plaintiffs' deeds and surveys established the 20-foot-wide easement by express grant in a fixed location over a portion of the defendant's property, set forth in metes and bounds, for access to their property and Middle Pond "for beach and bathing purposes."

Elaine Colavito

Consequently, the court stated that where, as here, the easement over the defendant's property was defined by metes and bounds, the defendant did not have the right to unilaterally restrict, relocate or alter the easement. Thus, the submissions were sufficient to establish plaintiffs' prima facie entitlement to a preliminary injunction.

Honorable Martha L. Luft

Motion to dismiss Article 78 petition granted; petition did not set forth a cognizable legal theory; Suffolk County not served pursuant to CPLR §311; affidavits of service were improper.

In *Roseanne Benisatto v. John F. O'Neill, Suff. Co. Commissioner of Social Services, Mike brown, Suff Co Dept. Econ. Devel/Real Prop Acq*., Index No.: 880/2017, decided on July 13, 2017, the court granted the respondents' motion to dismiss the petitioners' Article 78 petition. The court noted that in considering a motion pursuant to CPLR §3211[a][7], pleadings are liberally construed, the facts accepted as true, and every possible favorable inference given to the moving party.

The court is limited to examining the pleading to determine whether it states a cause of action. The court noted that they may also consider affidavits submitted on the motion to remedy defects in the pleadings. Here, the court found that even with the most liberal interpretation, the petition did not set forth a cognizable legal theory. The court further stated that the petitioner failed to properly serve the County of Suffolk pursuant to CPLR §311. The two affidavits of service filed with the court were also improper because neither indicated the name of the party upon whom service was purportedly made, nor was there an indication that any attempt at personal service was made before a copy of the papers were mailed. Thus, CPLR §308 was not complied with.

Motion for an order of service by publication upon the unknown heirs denied; unclear from the papers submitted whether plaintiff waived its right to seek a deficiency judgment against Christy Ann Plock, and whether Ms. Plock died testate or intestate; factors critical to establishing whether plaintiff may proceed against the distributes of the decedent or most serve the personal representative.

In *Federal National Mortgage Association v. Christy Ann Plock a/k/a Christy A. Plock; Washington Mutual Bank,* Index No.: 10908/2010, decided on June 23, 2017, the court denied the motion for an order of service by publication upon the unknown heirs of the Estate of Christy Plock, for the appointment of a guardian ad litem and for an order ratifying the prior judgment of foreclosure and sale, without prejudice.

In denying the application, the court noted that where the deceased mortgagor died testate or where he or she was personally liable on the mortgage note or bond and plaintiff sought a deficiency judgment against him or her in its mortgage foreclosure complaint, plaintiff could not proceed against the distributees of the deceased mortgagor, but instead, must proceed against the personal representative of the estate of the deceased mortgagor.

(Continued on page 26)

COURT NOTES

By Ilene Sherwyn Cooper

Appellate Division-Second Department

Attorney resignations

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

Malcolm MacKay

Attorney reinstatements granted

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

Peter L. Vitelli

Attorneys suspended:

Alan R. Bianco: In a proceeding pursuant to Family Court Act, article 4, pending in the Nassau County Family Court, the respondent was ordered to pay child support. The record reflected that the respondent had accumulated unpaid child support arrears equivalent to or in excess of the amount of the current support due for a period of four months, and the matter was referred to the Appellate Division pursuant to Family Court Act §458-b. The matter was referred to the Grievance Committee for the purpose of its conducting a hearing to determine whether the full payment of child support arrears established by order of the Family Court had been made. The respondent filed an affirmation in opposition, indicating that he had no assets or savings with which to pay the arrears, and indicating that he would not be appearing at the hearing. The Grievance Committee informed the respondent that the hearing would not be adjourned; nevertheless, he failed to appear, and present the requisite proof that the arrears had been satisfied. Accordingly, pursuant to the provisions of Judiciary Law §90(2-a)(d), the respondent was suspended from the practice of law for an indefinite period, which suspension would not be lifted unless the Family Court issued notice to the Appellate Division that full payment of the child support arrears had been made.

Ilene S. Cooper

Keirsten Klatch: By order to show cause, the court, *inter alia,* directed the respondent to show cause why discipline should not be imposed upon her based on the misconduct underlying her discipline by the Supreme Court of Florida. By order, dated May 17, 2016, the Supreme Court of Florida granted the Florida Bar's petition, held the respondent in contempt, and suspended the respondent from the practice of law in that state, continuing until the respondent fully responded in writing to a subpoena and official inquiry issued by the Florida Bar.

On May 19, 2016, the bar filed a complaint against the respondent. Thereafter the bar moved for default, an order deeming matters admitted and summary judgment. The Supreme Court granted the bar's motions and found the bar guilty as charged in the complaint. On January 4, 2017, the respondent entered a conditional plea for consent judgment wherein she consented to a three-year suspension. The respondent admitted, *inter alia,* that she failed to abide by a client's decisions, failure to inform the client of the status of representation, and failure to maintain funds entrusted to her charge. The referee recommended the respondent's suspension for a period of three years, and the Supreme Court affirmed, with an award of costs. By order to show cause, the respondent was directed to show cause why reciprocal discipline should not be imposed in New York. The respondent filed an affidavit indicating that she did not oppose reciprocal discipline, but requested a one year suspension based on mental health problems that she experienced in Florida that she claimed caused her disciplinary issues. Nevertheless, based on the foregoing, the court determined that reciprocal discipline was warranted, and she was suspended from the practice of law in the state of New York for a period of three years.

Joseph A. Morrone: Motion by the Grievance Committee to suspend the respondent from the practice of law pending the consideration of charges of professional misconduct against him, upon a finding that he was guilty of professional misconduct immediately threatening the public interest based upon his failure to cooperate with the lawful demands of the Grievance Committee, willful failure and refusal to return funds owed to a client and uncontroverted evidence of professional misconduct, granted, without opposition, and the matter was referred to a Special Referee to hear and report.

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.

Turning Your Life Around — Suffolk County Drug Treatment Court

By Judge Derrick J. Robinson

The Suffolk County Drug Treatment Court is a specialized part of the Suffolk County District and County Criminal Courts. The Suffolk County Drug Court opened in September 1996 as an alternative to incarceration for adults charged with drug possession or drug-addiction driven offenses in Suffolk County. It is a court supervised program for those who have a drug and/or alcohol addiction and are arrested in Suffolk County on Misdemeanor or Felony charges. Drug Court combines the resources of the court, law enforcement, substance abuse and mental health service providers to bring effective intervention to individuals caught in the cycle of substance abuse and crime. Drug Treatment Court requires the defendant to make regular court appearances before the judge.

The Drug Treatment Court seeks to address the devastating rise in heroin and other opiate overdoses as well as the increase in criminal activity related to the use of these substances. Suffolk County led the state in heroin-related overdose deaths from 2009 through 2013 and reported the highest number of naloxone administrations in the state during 2015[1]. In order to participate the Drug Court the District Attorney's Office acts as a gatekeeper and evaluates each defendant's eligibility and their prior criminal history. The District Attorney decides whether or not a defendant may enter the program. Reasons for ineligibility may include insufficient charges, drug sales, violent history, sex offenses, no discernible drug addiction, mental or physical health history, and bench warrant before contract. The Suffolk County Division of Community Mental Hygiene staff determines clinical eligibility through a screening process based on the defendant's substance abuse history and appropriateness for treatment. The treatment team will recommend substance abuse programs ranging from outpatient through residential treatment.

Derrick J. Robinson

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When the defendant agrees to participate and is found eligible for treatment he or she must voluntarily enter a guilty plea to their charges and sign a contract detailing participation requirements. The judge will defer sentencing until the Treatment Program is completed. The Drug Court Contract provides a description of their proposed disposition upon successful completion or their alternative sentence (time in jail/prison) upon voluntary termination or unsuccessful completion of the Drug Treatment Court program. The Suffolk County Drug Court partnership includes the judge, the District Attorney's Office, the Legal Aid Society and Defense Bar, Probation Department, the Suffolk County Division of Mental Hygiene, and E.A.C. Suffolk T.A.S.C. The defendants understand and acknowledge that they shall be at all times under the supervision of Probation, subject to periodic drug and alcohol testing. They shall enter and participate in the Treatment Program as directed by Probation and those specifically designated for his/her Treatment Program and comply with the requirements and conditions of the Drug Court Contract.

Ordinarily the defendant must agree to stay in Drug Court for a least one year on a misdemeanor or 18 months if pleading to a felony. If the defendant successfully completes treatment, the charges may be reduced or dismissed depending upon the agreement between the District Attorney's Office, the defense attorney and the judge. However, in order to expand the number of offenders with substance abuse disorders (SUD) the Suffolk County Drug Court Expansion Project (SCDCEP) was established through an agreement with the Suffolk County District Attorney's Office to create a specialized track for opiate users.[2] For those eligible, the district attorney would dismiss misdemeanor charges against first time offenders who are addicted to opiates if they successfully complete the Drug Court program. Along with a reduced mandated participation time (six months of successful participation), this was to give an additional motivation to first time offenders who might have declined Drug Treatment Court because their attorneys believe they could get a better disposition through regular court case processing[3]. In all cases the defendant will be aware of their particular disposition prior to entering the Drug Treatment Court Program. If the defendant fails to successfully complete the Drug Court Program by his/her own wishes or is asked to leave for noncompliance then the court

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Human Trafficking Intervention, the Misunderstood and Underused Treatment Court

By Judge Janine Barbera-Dalli

In 2013, the New York Court State court system established a new treatment court called the Human Trafficking Initiative. Embracing a newly emerging criminal justice approach, the Human Trafficking Intervention Initiative seeks to promote a just and compassionate resolution to cases involving those charged with prostitution or related offenses, treating these defendants as trafficking victims, likely to be in dire need of medical treatment and other critical services.

With the collaborative efforts of the court system's criminal justice partners, service providers across the state and other stakeholders, this unprecedented system of dedicated courts will work to identify eligible defendants facing prostitution charges in urban, suburban and rural areas throughout the state, providing these individuals with meaningful intervention and linking them to resources aimed at breaking the cycle of exploitation and arrest. In conjunction with linking trafficking victims to services, district attorneys across the state have also affirmed their commitment to investigating and bringing charges against traffickers and those who patronize prostitutes and feed the demand. All cases charging prostitution or related offenses that continue past arraignment will be transferred to the Human Trafficking Court, where they will be evaluated by the judge, defense attorney and prosecutor. If there is a consensus that the case involves a victim in need of resources, the court will connect the defendant to tailored services, which may range from shelter and healthcare to immigration assistance and drug treatment. Human Trafficking Courts will also link participants to education and job training programs to help prevent their return to the commercial sex industry. A defendant's charges may be dismissed or reduced contingent upon compliance with court-mandated services and program.

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Janine Barbera-Dalli

The key statement here is prostitution *or related offenses*. Any one in danger of falling prey to or in *danger* of being exploited *is* a candidate *for* the Human *Trafficking* Treatment Court. Many of the eligible defendants are put off by the term Human Trafficking because they do not consider themselves prostitutes. Many times, sex is only one of the ways these women, men and children are exploited by others often using their bodies to obtain drugs for themselves or others or resorting to petty thefts to sustain a certain lifestyle. These defendants are sometimes put off by the label of Prostitution or Human Trafficking without understanding the broader term.

Prostitution and Human Trafficking can take other forms. Using or exploiting an individual to obtain drugs or using them to steal or strip for another is prostitution and human trafficking. These defendants find themselves accused of crimes to help others and in most cases, are poor, young and homeless. Our court helps them to regain their self-worth by providing them with an advocate who will evaluate their situation. Many of these defendants have drug addictions and mental health issues. Almost all of them are homeless or living with individuals who exploit them and a fair number also find themselves pregnant. Although most of these defendants are women, the court will not preclude anyone we deem to be exploited, therefore male defendants may also be eligible for entrance into this court. Services are provided to these defendants to get them shelter and permanent housing, and a treatment plan is developed. They are provided with in patient or outpatient care and before leaving the program set up with career counselling and job training to send them out into society with the tools they need to live a productive and law abiding life.

Most times these defendants leave without a permanent record and enter society without heading back to the life they left behind. Many defendants however, present with some form of mental illness. These are the cases that are more difficult to deal with in that many service providers are not equipped to deal with mental illness, and if they do it becomes difficult to handle the addiction problems and find the correct medication to handle the mental health issues these defendants face.

As the program develops however, our web of providers increases and it is

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Court Committed to Helping Our Veterans

By Judge John J. Toomey

The Suffolk County Veterans Court is a specialized part of the Suffolk County District and County courts which seeks to help veterans succeed by diverting them from the traditional criminal justice system, while at the same time providing them with the tools they need to live productive and law-abiding lives. This goal is achieved through a combination of treatment for any underlying problem, rehabilitative programming, reinforcement and judicial monitoring.

The Veterans Court presently sits in the District Court in Central Islip in courtroom D35 on alternate Tuesdays.

In order to be eligible to enter the Veterans Court, a defendant must have been honorably discharged from military service. A defendant will need to produce his or her DD 214 to establish this fact. The District Attorney's Office is the gatekeeper to the Veterans Court so its consent to entry must also be obtained. Finally, an otherwise eligible defendant must meet with the representative of the Northport Veterans Hospital to determine a course of treatment.

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Upon entering the program, a veteran pleads guilty to the charges or to reduced charges and a contract is signed by the veteran, the assistant district attorney and the court. When the charges are misdemeanors, the contract is for a one year supervised treatment plan. With felonies, the contract us for 18 months. The contract provides for an agreed upon sentence if the veteran successfully completes the program and for a different, harsher sentence if he or she does not.

John J. Toomey

Once the plea is entered and the contract signed, the veteran begins the treatment program as developed by the Veterans Administration representative. The veteran is also assigned a mentor, most often a member of the Long Island Chapter of the Vietnam Veterans of America. These mentors, who are an integral part of the success of the Veterans Court, work closely with the veteran and the court to ensure successful completion of the program. In addition to complying with the treatment program, a veteran must appear regularly in court. Counsel need not appear at these times unless there is an issue that arises. These meetings are informal and occur at the bench between the court, the veteran, the Veterans Administration representative and the mentor. Those veterans who are doing well and are in full compliance with their plan need not appear as often as those who might be struggling. While veterans regularly undergo drug and alcohol testing at these court appearances, a positive test result does not mean that the veteran is out of the program but may signal the need for different and sometimes more intense treatment.

Treatment while in the program can include counseling and rehabilitation, both on an in and outpatient basis. Housing can be arranged through the Veterans Administration and if transportation is an issue, that can be arranged as well. The VA can also assist with job placement if needed.

Upon successful completion of the program, the veteran will be permitted to withdraw his or her previously entered plea of not guilty, and instead plea guilty to the agreed upon lesser charge. Counsel must appear at this time. The veteran will then be given the agreed upon sentence. Although the vast majority of participants successfully complete the program, when a veteran is unsuccessful, the break out sentence must be imposed.

Note: Judge John J. Toomey was elected to the District Court in 2002 and to the County Court in 2011. He is an Acting Supreme Court Justice and Acting Surrogate. He was selected as the judge of the newly formed Veteran's Court in 2011 based upon his legal experience and military service as a solider in Vietnam, where he earned two Bronze Stars and was decorated for valor. He considers this appointment to be the highlight of his judicial career.

The Suffolk Lawyer wishes to thank Helping Courts Special Section Editor John Calcagni for contributing his time, effort and expertise to our December issue.

Bar Association to Host Installation of Justices and Judges

The SCBA sponsored judicial swearing-in and robing ceremony will be held on Monday, January 8, 2018 at Touro Law Center, 225 Eastview Drive, Central Islip, N.Y. commencing at 9 a.m.

The newly elected and re-elected justices and judges will serve on the New York State Supreme Court, County, Family and District Court benches. The justices and judges slated to be sworn in are as follows:

Elected to Supreme Court the Honorable Linda Kevins; re-elected to Supreme Court the Honorable William B. Rebolini. Elected to County Court the Honorable David A. Morris; re-elected to Family Court the Honorable Theresa Whelan; newly elected to District Court Honorable Alfred C. Graf and James W. Malone and re-elected to District Court the Honorable Vincent J. Martorana. Acting Supreme Court Justice Sanford N. Berland, who was appointed Court of Claims Judge by Governor Andrew Cuomo in June of 2017, will be receiving his judicial robe at this ceremony.

District Attorney Elect Timothy D. Sini has been invited and has agreed to participate in the Swearing-in ceremony. Suffolk County's Administrative Judge the Honorable C. Randall Hinrichs will preside over the ceremony. All members of the Judiciary, members of the bar, law students and families are invited to attend what has become, in recent years, the highlight of Suffolk's legal community. – LaCova

SIDNEY SIBEN'S AMONG US

Announcements, Achievements, & Accolades…


Jacqueline Siben

James F. Gesualdi, an attorney in Islip, New York participated, via Skype on Oct. 3, 2017, in a Current Events Panel Discussion, "We Just Dropped in to Share What Condition Your Condition is in." The panel discussion was scheduled as part of the International Marine Animal Trainers' Association 2017 Conference being held in Riviera Maya, Mexico. Additionally, he had his article, *Animal Welfare Act: Good Practices to Advance Animal Interests and Well-Being*, published in the Fall 2017 edition of the American Bar Association, Tort Trial and Insurance Practice, Animal Law Committee Newsletter. The article is available at www.americanbar.org/content/dam/aba/publications/tort_trial_insurance_practice_newsletters/animal_law_committee/animal_law_fall_2017.authcheckdam.pdfat p.20.

Jennifer Ann Wynne and **Hana Boruchov,** of Tenenbaum Law, P.C. spoke at the NYSSCPA, Nassau Chapter 65th Annual All Day Tax and Estate Conference on NYS Tax Collections and Controversies.

Karen Tenenbaum, Jennifer Ann Wynne, Lance E. Rothenberg, and **Hana Boruchov,** have been asked to present "Don't Lose Your Restaurant Because of Unpaid Taxes: What You Need to Know" at the International Restaurant and Foodservice Show of New York. The Melville-based firm Tenenbaum Law, P.C. represents taxpayers in IRS and NYS tax matters.

Congratulations…

SCBA President **Patricia Meisenheimer** and the SCBA would like to congratulate our members who are the recipients of the 2017 Long Island Business News's Leadership in Law Award, which is bestowed upon individuals who possess the experience, knowledge and commitment to the legal profession and the Long Island community. Those honored include: **Leslie Tayne, Kim Ciesinski, Lisa Renee Pomerantz, Elaine Colavito, Christopher J. Chimeri, Samuel J. Ferrara, Patricia Galteri, Neil D. Katz, Christine Malafi, Michael Meyers and Alissa Van Horn.**

Congratulations to **Annamarie Donovan** and her husband Walter on the birth of their first grandchild, Walter Carlyle Donovan IV. Parents Walter III and Jennifer and their new son, born on October 11th, are doing well.

New Members…

The Suffolk County Bar extends a warm welcome to its newest members: **Lisa L. Albert, Deborah An, Jamie P. Alpern, Gina Ann Burke, Kevin P. Cadden, Anthony Disanti, Uktu Victor Kutmer, Dawn A. Lott, Albert E. Norato, Regina A. Ritcey, Diana P. Szabo, and Christopher L. Van De Water.**

The SCBA also welcomes its newest student members and wishes them success in their progress towards a career in the law: **Carrie Arias, Christopher Ciccone, Nicholas B. Krebs, Jorge Macias, Omar Russo, Robert A. Torres.**

FAMILY

A View from the Pews

By Vesselin Mitev

Sitting in the pews waiting for the judge to take the bench recently, while the attorneys on the case on trial perched at the tables, a fellow attorney struck up a conversation with me. We did not know each other, so in place of mundane pleasantries, s/he decided to run me (I don't know why) through a small test regarding my knowledge of matrimonial and trial law. Again – without any put-on – I don't know why I was chosen for this particular exercise (I suspect mostly to waste time) but I decided to play along.

S/he started out easy, with an air of benevolent indulgence: What's a note of issue? The document that cuts off discovery and, annexed to the certificate of readiness, declares the matter ready for trial. I anticipated the next question: How long do you have to set it aside? Twenty days, unless good cause is shown. The queries became harder (or so s/he thought), and I shall not bore the reader any more, but then the topics turned to trial mechanics and our respective views on same.

First, my learned colleague declared, in any matrimonial trial, it was his/her practice to always call the other spouse. In a tone that left no room for argument, it was decreed that this was a superior practice since you got to lead the witness. I replied that the authority on this issue was at best, split, and that while there may be a presumption that the adverse party is hostile (*Jordan v. Parrinello*, 144 A.D.2d 540, 534 N.Y.S.2d 686 (2d Dept.1988)), that does not automatically mean you can cross-examine them at will, or ask leading questions as to any topic.

Vesselin Mitev

Rather, there is a whole host of case law that says that a witness that demonstrates him/herself to be obstreperous, or sneering, or combative with the examiner, may (and probably should) be declared hostile, but the obverse is also true: Any presumption that the adverse party is hostile may (and can) be rebutted by a pleasant, even-toned, and responsive witness (*Ostrander v. Ostrander*, 280 A.D.2d 793, 720 N.Y.S.2d 635 (3rd Dept. 2001)), where the trial court sustained objected-to leading questions of an adverse witness, who answered the questions fully and openly. Moreover, I posited, calling the other party first means you are bound by their testimony and cannot thereafter seek to impeach, since you are limited by CPLR 4514, which provides for impeachment of a witness to prior inconsistent statements "made in a writing subscribed by him or was made under oath."

Also, while in a typical civil case a prior inconsistent statement would be admissible not only to impeach the witness but as to the facts contained within the statement itself, when one is seeking to impeach their own witness the inconsistent statements are only limited to credibility (in other words, the facts sought to be proven via the inconsistent statement are to be disregarded) and if the statement is admitted, it is only for the purpose of showing that on a particular occasion the witness made a different statement than the one they had just made on the stand.

What about, my colleague countered, when one exceeds the scope of direct examination on cross? Does one make the witness their own with each such query? I posited that since bias, credibility and motive are always relevant areas of inquiry no matter what was asked on direct examination, even if (absurdly) it was limited solely to the witness' name and age, then any other questions beyond the scope of direct and beyond credibility, motive and bias, would so make the witness, at the court's discretion, *Tarulli v. Salanitri*, 34 A.D.2d 962, 312 N.Y.S.2d 55 (2d Dept. 1970).

Having woven our way through and out of this thicket, my colleague then declared his/her usual approach: "I sit them in the box and ask them five things — did they see it happen; did they hear it happen; did they smell it happen; did they taste it happen; did they touch the thing. If the answer to these (or most of these is no), they're out of the box."

I appreciated this rather straightforward approach of focusing on the five senses, but noted it seemed a bit rudimental when delving into matters such as expert testimony or detailing the effects of financial transactions and/or financial decisions that were made in a joint household (such as applying for a second mortgage, or renting an illegal apartment for an income stream). When I spoke of these to my new friend, s/he seemed oddly pleased. "By the time you get through with the first five, the court or the jury has usually made up their mind" s/he said, which in turn made me equal parts happy and equal parts sad, because of its profound, yet unintended truth. In a system of carefully designed rules, exceptions to rules, and hook-and-ladder addendums to rules, it comes down (mostly) to an innate, unteachable, mostly subconscious reaction from the trier of fact as to how you or your client look, act, appear, and behave — in other words, what's the view from the pews.

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

COMMERCIAL LITIGATION

When Commercial Principles Surface in a Wrongful Death Action

By Leo K. Barnes Jr.

In a must-read decision centered upon the tragic death of two individuals during the May 2008 crane collapse in New York City, the First Department's opinion in *Matter of 91st St. Crane Collapse Litigation*, 154 A.D.3d 139 (1st Dep't 2017) analyzes not only the liability and damages aspects of two consolidated wrongful death actions, but also factors supporting the First Department's affirmance of the jury's determination that both punitive damages and personal liability (premised upon piercing the corporate veil) were warranted.

The underlying facts

The case involved the construction of a 34-story building complex on East 91st Street. The concrete subcontractor for the project leased a crane from defendant New York Crane & Equipment Corp. ("NY Crane"), an entity owned by defendant James F. Lomma ("Lomma"). The crane consisted of four principal components: a tower, a cab for the operator of the crane, a 160-foot boom (or arm) that lifted materials; and a counterweight arm extending in the opposite direction from the boom. Each of the components rested upon a turntable assembly that permitted the crane to rotate, the critical piece being a large bearing ring that ultimately became the focal point of the litigation.

Leo K. Barnes

Before it was used on the subject project, the bearing ring developed a crack and required replacement. NY Crane attempted to obtain a replacement from the manufacturer of the original turntable, and was informed that it would cost $34,000 and take one year, unless NY Crane paid an additional $120,127 to expedite its manufacture within 28 weeks. At that time, there was a waiting list for the company's cranes. Lomma then instructed one of his employees to find an alternative potential source for the replacement; notably, the employee was a mechanic who had no relevant technical expertise and resorted to a Google search of potential manufacturers to locate the replacement. Ultimately, the employee located a company from China called RTR Bearing Company Limited ("RTR") who committed to manufacture the bearing ring for $20,000.

Lomma's testimony revealed that he had no direct contact with RTR and that all contact with RTR was through his employees. The court explained that RTR was merely a broker/distributor that subcontracted the work to Chinese factories and that no one at RTR was an engineer. After drawings of a different bearing ring were sent to RTR because neither NY Crane nor Lomma had drawings for the original bearing ring, RTR told NY Crane, *inter alia*, that the welding technique RTR utilized for bearing was "not good" and that RTR did not "have confidence" with respect to the welding. As such, RTR suggested that NY Crane weld it. In response, Lomma's employee sent RTR a drawing with some general information from the manufacturer regarding welds; with that in hand, RTR changed course, indicating it could do the welding for a nominal price increase.

While RTR was producing the bearing, Lomma contacted engineers to "get their take" on the bearing, as well as to see whether they would sign off on it for the NYC Department of Buildings certification. None of the engineers contacted would agree to certify the new bearing. Lomma admitted that despite the fact that he was not an engineer, welder or other specialist, he personally certified its compliance. Even worse, Lomma engaged one of his former employees who then worked at the DOB to visually inspect the crane instead of the regularly-assigned NYC Department of Buildings employee.

As noted by the court, Lomma made a series of calculated decisions to put "profit over the safety of construction workers and the public, despite having multiple opportunities to change course."

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BANKRUPTCY

The Effect of 'Cancellation of Indebtedness' Prior to a Bankruptcy Filing

By Robert L. Pryor

One of the unheralded but nevertheless significant benefits of the successful filing of a bankruptcy petition by an individual is that there is no income tax consequence from the discharge of existing obligations. When a creditor discharges an obligation outside of the bankruptcy context, the creditor is generally required to issue a "Form 1099-C, Cancellation of Debt" to the debtor and to the Internal Revenue Service, and the amount of the debt forgiven must then be reported by the debtor as income.[1] Those debtors beleaguered by creditor pressure, who are encouraged by credit counseling agencies to restructure and reduce debt by significant percentages are chagrined to discover, that even if successful, a major portion of any promised savings has now been converted into non-dischargeable tax debt arising as a result of the cancellation of a portion of their indebtedness.

Thus, a debtor properly counseled, is confronted with the stark reality that the cancellation of debt outside of bankruptcy may in a significant respect actually put him in a worse position insofar as it trades garden variety credit obligations, often only halfheartedly pursued in collection, for a non-dischargeable tax obligation to the governmental authorities, which obligation is often pursued with greater zeal by entities which have much greater powers to enforce collection.[2]

In the current financial climate it is becoming somewhat common for creditors which have reached a determination that a debt is uncollectible to simply notify the debtor that it has "charged off" the obligation. The receipt of this information is usually met by short term exhilaration. However, as the debtor receives a Form 1099-C and is then apprised by his tax professional that same may give rise to substantial tax liability, the exhilaration is short lived.

Internal Revenue Service Publication 4681, "Cancelled Debts, Foreclosures, Repossessions, and Abandonments (for Individuals)", sets forth the general proposition that if a taxpayer's debt is forgiven, the forgiveness creates taxable income:

> Generally, if a debt for which you are personally liable is forgiven or discharged for less than the full amount owed, the debt is considered cancelled in whatever amount it remained unpaid. ... Generally, you must include the cancelled debt in your income.

Further reading of Publication 4681 indicates there are several exceptions and exclusions to this rule. The principal exceptions are the "Bankruptcy Exclusion" and the "Insolvency Exclusion." Under these, if debt is forgiven as a consequence of a bankruptcy proceeding, the cancellation of indebtedness income is excluded from income and the individual taxpayer is not required to pay taxes on it. Similarly, if the taxpayer can prove that he or she is insolvent, *i.e.*, (that the total of his or her liabilities is greater than his or her remaining assets), then by the submission of a Form 982, the taxpayer is able to exclude the cancelled debt income and the forgiveness does not create a taxable event.

Robert L. Pryor

So then, if a debtor receives a 1099-C in connection with a non-bankruptcy debt settlement, has he automatically lost the opportunity to file a bankruptcy petition, and with respect to such debt benefit from bankruptcy debt forgiveness?

An ever-growing body of case law may provide a legal justification for the

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REAL ESTATE

Backyard Videos Cause Lawsuits

By Andrew Lieb

Effective September 15, 2017, Civil Rights Law §52-a establishes a new private right of action for unwarranted video imaging of residential premises.

The statute reads as follows:

1. Any owner or tenant of residential real property shall have a private right of action for damages against any person who installs or affixes a video imaging device on property adjoining such residential real property for the purpose of video taping or taking moving digital images of the recreational activities which occur in the backyard of the residential real property without the written consent thereto of such owner and/or tenant with intent to harass, annoy or alarm another person, or with intent to threaten the person or property of another person. The provisions of this section shall not apply to any law enforcement personnel engaged in the conduct of their authorized duties.

2. For the purposes of this section, "Backyard" shall mean that portion of the parcel on which residential real property is located which extends beyond the rear footprint of the residential dwelling situated thereon, and to the side and rear boundaries of such parcel extending beyond the rear footprint of such residential dwelling.

Andrew Lieb

As such, the following elements must be pled in order to set forth a cognizable cause of action pursuant to Civil Rights Law §52-a: (a) Plaintiff is the owner or tenant of residential real property (hereinafter "Plaintiff's Property"); (b) Defendant installed or affixed a video imaging device on property adjoining Plaintiff's Property (hereinafter "Act"); (c) Defendant's Act was for the purpose of videotaping and/or taking moving digital images of recreational activities which occur in the backyard of Plaintiff's Property; (d) Plaintiff did not provide written consent to Defendant for such Act; (e) Defendant's Act was undertaken with the intent to harass, annoy and/or alarm another person, and/or with intent to threaten the person or property of another person; and (f) Plaintiff was damaged as a result thereof.

As can easily be discerned, pleading such a cause of action is an exciting new tool in counsel's arsenal for neighbor disputes. However, the damages element renders the use of such a cause of action functionally problematic. Specifically, it's hard to imagine a situation where a cost / benefit analysis would provide suitable damages to justify the cost of prosecuting this new cause of action. Key to this analysis is the fact that this statutory cause of action provides no statutory damages nor does it offer attorneys' fees incident to prosecution. Therefore, only actual damages or nominal damages can be recovered in a lawsuit. As such, it is anticipated that this new cause of action will not be readily utilized by plaintiff's counsel. Nonetheless defense counsel may find a viable use for this new statutory cause of action because a defendant's cost-benefit analysis in bringing a counterclaim enjoys a much lower cost than that realized by a plaintiff who must determine if it's viable to commence an action in the first instance. As such, a §52-a cause of action is anticipated to serve as a useful offset to a neighbor dispute when considering the adage, "the best defense is a good offense."

Setting aside the anticipated utilization of §52-a in an actual lawsuit, all real estate practitioners must be conscious of this new legislation when advising clients with respect to establishing claims for trespass, conversion of property, nuisance and the like, because §52-a creates exposure to the unknowing client who installs a video camera, at the beckoning of his attorney or otherwise, when asked for proof of these claims. As such, all real estate practitioners, who advise clients concerning the requisite evidence to establish claims of trespass, conversion of proper, or nuisance, should provide an informed consent letter about §52-a at the time of advising such clients concerning videoing their property. While it is acknowledged that the intent element, delineated at "c" *supra*, would fail in this scenario, trained litigation counsel should always be mindful of the evidentiary threshold necessary to prove a want of intent and the cost that their client will realize in defending such a lawsuit before it could be dismissed on such grounds. As a result, an informed consent letter is the best practice.

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

CORPORATE

Is a Contract Repudiated When a Party Brings Suit for Rescission and Reformation?

By Gisella Rivera

"No," holds the New York Court of Appeals under *Princes Point LLC v Muss Development LLC*., 2017 NY Slip Op 07298 (N.Y. Oct. 19, 2017), reversing the New York Appellate Division, First Department in *Princes Point LLC v Muss Development LLC*, 138 AD3d 112, (1st Dept, 2016).

In 2004, Princes Point agreed to buy from Muss Development a 23-acre site of waterfront land in Staten Island, subject to the delivery by Muss Development of all municipal approvals for land development. The property was previously listed as a hazardous waste site by the New York State Department of Environmental Conservation ("DEC"). Muss Development had successfully delisted the property in 2001 after performing work at the property, which included building a revetment seawall along the shoreline. If municipal approvals were not obtained by a certain date, either party can terminate the contract and the deposit of $1.9 million would be returned to Princes Point. However, if Muss elected to terminate the contract, Princes Point could waive the municipal approval and close with a reduced purchase price, or Princes Point could choose to extend the closing date, provided that it pays an additional deposit.

Gisella Rivera

In 2005, Muss Development informed Princes Point that it was unable to obtain the municipal approvals since the DEC required additional work on the revetment walls, and that it could terminate the contract or extend the closing date if Princes Point was willing to increase the purchase price, increase the deposit, reimburse Muss Development for half of the costs to obtain the municipal approval and waive any legal action if Muss Development was not able to obtain the municipal approval or the work required to obtain the municipal approval were not completed by the extended closing date. Princes Point agreed and the purchase agreement was amended on 2006.

The revetment walls required more work than was anticipated and the closing date was extended several more times. Prior to the most recent extended closing date, Princes Point brought a claim for fraud and misrepresentation against Muss Development and requested the court for rescission of the 2006 amendment and specific performance on the 2004 contract.

The Supreme Court, New York County ruled that, by seeking rescission of the 2006 amendment, Princes Point "anticipatorily breached" the contract, thus allowing Muss Development to terminate the contract and be entitled to a return of the full amount of the deposit plus the payment of fees. The court's ruling was appealed to the Appellate Division, 1st Department, who affirmed the Supreme Court's decision, but gave leave to Princes Point to appeal to the N.Y. Court of Appeals, certifying the question "whether the mere commencement of an action seeking "rescission and/or reformation" of a contract constitutes an anticipatory breach of such agreement." On the facts of the case, the N.Y. Court of Appeals held that "*it does not.*"

In an action for non-performance of a contract, courts traditionally look to protect the injured party's expectations of performance by the other party of its obligations and promises. "When parties make a bilateral contract, they exchange promises in the expectation of a subsequent exchange of performances." (*see* E. Allan Farnsworth, Contracts). One of the court-developed remedies available to an injured party is the right of such injured party to suspend its performance and ultimately refuse to perform if the other party fails to perform. The foregoing right, however, is generally exercised only upon the occurrence of a material or total breach by the breaching party (i.e. the breaching party's failure to perform a material obligation under the contract).

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ADR

Attorney's Duty to Discuss Alternative Dispute Resolution Options with Clients

By Lisa Renee Pomerantz

The New York Rules of Professional Conduct require that the attorney consult with the client regarding both the objectives of the representation and the specific means of achieving those objectives. Moreover, the attorney must provide sufficient information to the client to permit informed decisions.


Lisa Pomerantz

Thus, under Rule 1.2(a), "a lawyer shall abide by a client's decisions concerning the objectives of representation and . . . shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to settle a matter."

Under Rule 1.4(a)(2), the lawyer shall "reasonably consult with the client about the means by which the client's objectives are to be accomplished."

Rule 1.4(b) obligates the attorney to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

These rules would seem to require the attorney to consult with the client regarding alternative dispute resolution mechanisms, including negotiation, mediation and arbitration, prior to and during the pendency of litigation. This was the position advanced by Paul Lurie and Sharon Press in "The Lawyer's Obligation to Advise Clients of Dispute Settlement Options" in "Dispute Resolution Magazine," summer 2014 issue, pp. 34-35 (published by the ABA Section on Dispute Resolution). However, to date there has been substantial resistance by some attorneys to this position.

This question has now been definitely resolved with respect to attorneys representing clients in Commercial Division cases. The Chief Administrative Judge of the courts has amended the Commercial Division rules, effective January 2018, to require attorneys to file certifications that "counsel has discussed with the party the availability of alternative dispute resolution mechanisms provided by the Commercial Division and/or private ADR providers, and stating whether the party is presently willing to pursue mediation at some point during the litigation."

The choice of the applicable mode of dispute resolution in commercial matters, however, is often effectively made when the relevant business contract is drafted. For this reason, transactional attorneys also should be obligated to discuss the availability of ADR options, including mediation and arbitration, at the contract drafting and negotiation stage.

Note: Lisa Renee Pomerantz is a business and employment attorney in Suffolk County, New York. She is a mediator and arbitrator on the AAA Commercial Panel, represents clients in settlement discussions, mediations and arbitrations, and serves on the Advisory Council of the Commercial Section of the Association for Conflict Resolution. She can be reached at lisa@lisapom.com or (631) 244-1482.

FAMILY LAW

The Evolving Exclusive Use and Occupancy Standard

By Michael F. LoFrumento

DRL §234 empowers courts to grant one spouse temporary exclusive use and occupancy of the marital residence during the pendency of divorce proceedings. However, as Monroe County Supreme Court Justice Richard A. Dollinger recently emphasized in *L.M.L. v. H.T.N.*, 17/7645, NYLJ 1202800811034, the statute provides little to no guidance regarding precisely when to exercise that power. In his groundbreaking decision, Justice Dollinger held that DRL §234 should be invoked sooner rather than later in the best interests of innocent children who would otherwise have to suffer through their parents' disrespectful treatment of one another.

As a general proposition, to succeed on an exclusive use and occupancy application, the movant must demonstrate that an order is necessary to "protect the safety of persons or property, or one spouse has voluntarily established an alternative residence and a return would cause domestic strife." See *Taub v. Taub*, 822 N.Y.S.2d 154 (2nd Dept. 2006); *Kenner v Kenner*, 786 N.Y.S.2d 157(1st Dept. 2004); *Mitzner v Mitzner*, 643 N.Y.S.2d 674 (2nd Dept. 1996); and *Annexstein v Annexstein*, 609 N.Y.S.2d 132 (4th Dept. 1994). In many respects, this was interpreted to mean that a spouse must suffer from physical abuse to warrant excluding a party from their home.


Michael F. LoFrumento

As was the case in *L.M.L. v. H.T.N.*, the more problematic scenario the judiciary confronts is where both spouses continue to reside together and are seeking to exclude the other from the marital residence based primarily on marital strife rather than outright physical abuse. In *L.M.*L, Justice Dollinger had to decide the wife's exclusive use application based on conflicting affidavits that painted far different portraits of the parties' home life. The attorney for the children supported the wife's application based upon the children's description that the home was "very stressful," the situation was "unhealthy," that they have witnessed arguments between their parents and have locked their bedroom doors to protect themselves. Additionally, the children indicated that they wanted to spend equal time with both parents.

While Justice Dollinger considered both parties' accounts, he emphasized throughout his well-reasoned decision that his main concern was for the emotional well-being of the children. Specifically, his decision reads:

"The affidavits submitted by both parents reveal substantial friction in the household: verbal abuse, name-calling, threats, fights, doors locked to insure safety, damage to property and other conduct. The situation, according to the attorney for the children, has reached a boiling point. Verbal abuse, put downs, name calling, anxiety-producing turmoil and humiliation between the spouses in this case is well-established and although this court cannot, at this stage, pinpoint the perpetrator, this court must focus on the potential consequences to the children, as emotional damage — documented in countless studies — is likely to have already taken firm root in these two boys."

In applying the "marital strife" test, which was applicable in the past to only those situations where a parent sought to return to live at the marital residence after relocating, to a circumstance where both parties were residing together with their children, Judge Dollinger shifted his focus away from how that strife affected the litigants to squarely onto how that strife impacted the parties' children and the family unit. He opined:

> "Whether the parents can tolerate strife or 'petty harassments' ignores the more significant factor: whether the children, often without mature understandings of adult interactions and looking to their parents for examples of mature behavior, can tolerate the same level of 'strife…'" "Without court intervention, the parents may assume that their behavior is permissible to the court: the children may assume that such behavior is acceptable within a family. Neither conclusion is in the best interests of the family unit."

Because of his concerns for the emotional well-being of the children, Judge Dollinger excluded the father from the home and granted the mother temporary custody and exclusive use without a hearing. Usually when confronted with differing stories regarding who was the instigator of the marital strife, courts order a hearing to assess the credibility

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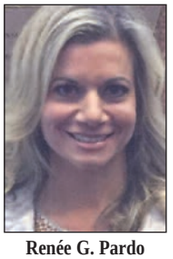
CRIMINAL AND FAMILY LAW

Raise Your Hand if you want to Understand Raise the Age!

By Renée G. Pardo

The new year will bring new rules and new laws with respect to the prosecution, sentencing and detention of older teens in New York. While the new legislation passed in Albany in April of 2017 with fanfare and celebration by various political groups claiming it as their victory, there are many representatives from various county agencies all over New York who have more questions than answers about how the new processes and related laws will apply in their counties. From the various presentment agencies, the departments of probation all the way to the defense bars at large and the AFC (Attorney for the Child) panels, and the sheriffs: The effective date of October 1, 2018 for persons who are 16 and October 1, 2019 for 17-year-olds is rapidly approaching.

This article and two more to follow will outline briefly the foundational concepts and history of "Raise the Age"in the State of New York and then focus on the new offender categories and changes to court processing; changes to confinement (including presentence and pre-adjudication confinement) and finally changes that go beyond the age of juvenile jurisdiction to the sealing of past criminal convictions, and provisions regarding local costs and funding.


Renée G. Pardo

For decades in New York, all types of youth advocacy groups and criminal law reformers had pushed for New York to raise the age at which juveniles are automatically tried as adults from 16 to 18. Many headlines would erroneously claim (and still do) that New York "remains one of only two states in the nation"that prosecutes 16 and 17 year olds as adults. It is true that New York and North Carolina are the only states that regularly still route 16 year olds into adult courts, and ultimately incarceration with adults if that is the sentence; there are however, actually a total of seven states that still try 17 year olds as adults and in some cases, incarcerate them alongside adult inmates.

High profile stories of injustice,such as that of Kalief Browder, were part of the catalyst for the Raise the Age initiative. Browder was a 16 year old who committed suicide in 2015 after he endured violence, sexual assault and solitary confinement in New York City's Riker's Island for allegedly stealing a backpack, in a case that was ultimately dismissed. Because of cases like Browder's, one of the law's most sweeping changes are the rules for the detention of juveniles in places such as Rikers Island. Beginning October 1, 2018, offenders both 16 and 17 years old can no longer be detained or sentenced in a county jail or in any facility with adults. For New York City, additional prohibitions now exist to prevent any youth from being held at Rikers even up to 18 years of age.

Proponents for raising the age also cited the emerging body of research that now suggests that the brains of 16 and 17 year olds are not fully developed and therefore do not have the same capacity to control impulses or to understand the consequences of their behavior. They also argued that this research demonstrates that placing these young people into adult jails only leaves them more likely to reoffend. This is in stark contrast to the political and social climate of the late 70's. At that time high crime rates and a juvenile crime spree, particularly in New York City, fueled tabloid headlines and resulted in the law that now exists whereby even 14 or 15 year olds are handled and tried as adults. These "juvenile offenders"(JOs) are prosecuted by the adult system if they are accused of a dozen specific crimes including but not limited to murder, burglary, possession of a weapon on school grounds. Additionally, 13 year olds currently can be tried as adults in New York as well, if they are accused of murder or certain sexually motivated felonies under CPL Sec. 130.91. This JO law remains relatively unchanged under the new Raise the Age law, except all of these cases will be initiated in the newly created Youth Part, subject to removal to Family Court as explained in detail to follow:

New category of offenders

The new Criminal Procedure Law Section 1.20 (44) creates a new category of offenders who are 16 at the time they commit a felony (effective October 1, 2018) and 17 (effective Oc-

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TECHNOLOGY

ADA Accessibility for Websites

By Christine Malafi

The internet has become a necessity for the marketing and promotion of businesses, services, and merchandise. An evolving legal issue is website accessibility to those with disabilities and the applicability of Title III of the Americans with Disabilities Act ("ADA"). Accessibility of public websites and compliance with the ADA in connection with public websites may cause issues for some time to come, given the lack of governmental regulations and guidance in this area. Nevertheless, it's important for businesses (and the lawyers who advise them) to know where the law currently stands.

The purpose of the ADA is to provide equal opportunity to individuals with disabilities. Title III of the ADA specifically prohibits discrimination of individuals with disabilities "in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." While the ADA is silent on the specific issue of website accessibility, case law has made it clear that the ADA applies to public websites, and businesses must accommodate individuals with disabilities and make their websites ADA accessible. However, the extent to which websites must be made accessible has not been definitively determined. Questions remain as to whether all websites fall under the ADA and whether a website must also be tied to a physical location before it falls under the ADA, among other questions.

Christine Malafi

In December 2015, the Department of Justice announced that it would not issue private sector website ADA accessibility regulations until 2018. However, a recent Presidential Executive Order cut regulatory resources, and may subsequently freeze the DOJ's public accommodations website rulemaking.

In the absence of DOJ regulations, what should businesses do? Many settlements approved by the DOJ have implemented the World Wide Web Consortium's Web Content Accessibility Guidelines 2.0 (WCAG) on how to make a website more accessible. At the most basic level, an ADA accessible website should provide these types of features:

- Text alternatives for any non-text content.
- Alternatives for time-based media.
- Content that can be presented in different ways without losing information or structure.
- Be easy to see and hear, including separating foreground from background.
- Permit all functionality from a keyboard if needed (as opposed to a cursor).
- Permit sufficient time to read and use content.
- Not be designed in a way that is known to cause seizures.
- Include ways to help users navigate, find content, and determine where they are.
- Include text content that is readable and understandable.
- Operate and appear in predictable ways.
- Help users avoid and correct mistakes.
- Compatible with current and future user agents, including assistive web technologies.

The best option to not fall victim to a successful Title III suit is to comply with these WCAG guidelines. However, it may not always be deemed "reasonable" for businesses to create a fully ADA compliant website. As stated in the ADA: "A public accommodation shall make reasonable modifications in policies, practices, or procedures, when the modifications are necessary to afford goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the public accommodation can demonstrate that making the modifications would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations. " *28 C.F.R. § 36.302 (2012).*

If making a website fully compliant with the WCAG is too costly, other options may be available. Although New York courts have yet to address this issue, others have. In *National Federation of the Blind v. Target Corp*., Target was sued because its website did not enable visually impaired persons to directly purchase products, redeem gift cards, or find stores. The court ruled against Target, as Target failed to show that the information on its website was available in another reasonable format. The court acknowledged ADA defines discrimination to include a failure to take such steps "as may be necessary to ensure that no individual with a disability

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DEANS LIST

Reasons to Present at a CLE

By Patrick McCormick

Pop quiz: Presenting at a CLE at the Suffolk Academy of Law offers which of the following benefits?

a) Fame
b) Fortune
c) Glory
d) 3x the CLE credits
e) All of the above

If you picked (e), you've probably already had the pleasure of presenting a CLE at the Academy. If multiple choice isn't your thing, here's a cheat sheet of some of the many benefits you'll get from serving as a CLE instructor.

Sharing your knowledge with the legal community

If you've put in the time and effort to master a specific practice area or practical skill, you'll find it very rewarding to share your know-how with the Suffolk County legal community. Perhaps your words will captivate a young lawyer looking for an area of law on which to focus. Maybe your lecture will help the subject matter finally click for a lawyer who could never seem to grasp the topic. No matter who is in the audience, you will have played a role in elevating the quality of lawyers in our community. In addition, teaching about the law not only helps you help other lawyers, but also yourself. That's because when you know you're presenting on a topic, no matter how well you know it, you find yourself reaching new levels of mastery.


Patrick McCormick

The chance for collaboration

Get to know your bar association colleagues better by partnering with them on joint programs. I've witnessed many lively discussions among members become thought-provoking CLEs on a variety of topics ranging from intellectual property protection to best practices for appellate brief writing. You are (I hope!) already meeting new people through committee meetings and events. Why not work together to educate your fellow members?

Extra credits

This CLE cycle, I'm determined to beat out my record from last cycle of 76 credits. There's only one way I can meet my goal – present at CLEs, where as a presenter, I'll get three times the credit attendees receive. Even if you're content with the measly 24 required credits, presenting at a CLE is a great way to get there.

Establishing yourself as an authority

Serving as a CLE instructor requires deep knowledge of a subject, not to mention public speaking ability. Take advantage of the opportunity to showcase both. Presenting at a CLE not only increases your visibility to potential clients and referral sources, but also your credibility. Chances are, many attorneys in the audience for your CLE focus on a different practice area. Others may be searching for a colleague to whom they feel comfortable referring work if they have a conflict. Guess who will be on the top of their mind when those attorneys have a matter to refer?

The opportunity to give value to your clients and referral sources while educating your fellow members

Did you know that CLE instructors need not be attorneys? Accountants, LinkedIn trainers, and appellate printer staff, among others, have all made appearances on recent CLE panels, and offer a unique perspective on the important issues lawyers face. Putting together an informative CLE program that offers your non-attorney clients, colleagues, and referral sources a chance to shine by showing off their expertise in front of an audience of lawyers is a terrific way to say thanks. (Please talk to me or a member of the Academy staff for guidelines for CLE programs featuring non-attorneys.)

If you'd like to play a role in keeping Suffolk County an exciting place to practice law, I look forward to hearing from you.

Note: Patrick McCormick is a partner at Campolo, Middleton & McCormick, LLP, a premier law firm with offices in Ronkonkoma and Bridgehampton. Email Patrick at pmccormick@cmmllp.com.

LGBT

Spotlight on Advocacy: LGBTQ Youth in Suffolk County

By Christopher J. Chimeri

Foremost, I am not on the Attorney for Children panel, but part of my professional development is to learn and understand the role of the AFC, not just to learn how to best represent my own clients, but out of intellectual curiosity and professional appreciation for the important role these lawyers fill. Given the nature of this month's topic, I will be more "conversational" and less "scholarly" than in previous months. The purpose is to highlight a growing subset of youth that are involved in our courts and what is being done to help them.

For those reading this article that do not practice in the Domestic Relations arena, the AFC and his or her responsibilities are derived from § 7.2 of the Rules of the Chief Judge. In relevant part, it provides:

(a) As used in this part, "attorney for the child" means a[n attorney] appointed by family court pursuant to section 249 of the Family Court Act, or by the supreme court or a surrogate's court in a proceeding over which the family court might have exercised jurisdiction had such action or proceeding been commenced in family court or referred thereto.

(c) In juvenile delinquency and person in need of supervision proceedings, where the child is the respondent, the attorney for the child must zealously defend the child.

(d) In other types of proceedings, where the child is the subject, the attorney for the child must zealously advocate the child's position. (1) In ascertaining the child's position, the attorney for the child must consult with and advise the child to the extent and in a manner consistent with the child's capacities, and have a thorough knowledge of the child's circumstances. (2) If the child is capable of knowing, voluntary and considered judgment, the attorney for the child should be directed by the wishes of the child, even if the attorney for the child believes that what the child wants is not in the child's best interests. The attorney should explain fully the options available to the child, and may recommend to the child a course of action that in the attorney's view would best promote the child's interests. (3) When the attorney for the child is convinced either that the child lacks the capacity for knowing, voluntary and considered judgment, or that following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child, the attorney for the child would be justified in advocating a position that is contrary to the child's wishes. In these circumstances, the attorney for the child must inform the court of the child's articulated wishes if the child wants the attorney to do so, notwithstanding the attorney's position.


Christopher Chimeri

In sum, the AFC must zealously advocate for child virtually at all times and must consider the "child's capacities, and have a thorough knowledge of the child's circumstances." This presents as, perhaps, uncharted territory, for even the most experienced AFC, when dealing with LGBTQ youth, a growing population in our courts.

Suffolk County is fortunate that several of our AFCs recently attended Georgetown University's "The Supporting the Well-Being of System-Involved LGBTQ Youth Certificate Program," which, per Georgetown's website, boasts:

The program will focus on the particular challenges faced by LGBTQ youth in child-serving systems (including juvenile justice, child welfare, education and behavioral health) as well as strengths and protective factors common to the population, and will highlight effective policy and practice reforms that promote positive youth development and take a holistic approach to addressing their needs.

Participants will receive instruction from national experts on the terms and concepts related to sexual orientation, gender identity and expression (SOGIE), and how to shape organizational cultures and approaches to support the safety and well-being of LGBTQ youth. This includes guidance on how to develop effective policies, training, and data evaluation efforts; better identify and effectively engage LGBTQ youth and their families; build community capacity to serve this population; and develop comprehensive and multi-faceted strategies and supports that promote positive youth development. Specific attention will be paid to the prevalence of multi-system involvement and compounding issues of implicit bias and stigma, racial and ethnic disparities, homelessness and commercial sexual exploitation of LGBTQ youth.

Among the attendees was Catherine E. Miller, one of Suffolk County's more experienced AFCs, who is credited as a contributor to this article. Catherine was kind enough to share her thoughts and "takeaways" from the program. "As an attorney representing children and parents in Family Court and Matrimonial Matters, the interaction with LGBTQ youth and their families is becoming

(Continued on page 24)

TRUSTS AND ESTATES UPDATE

By Ilene Sherwyn Cooper

Ilene S. Cooper

Receipts and releases

In *Matter of Lee*, the Appellate Division, Second Department, affirmed three decrees of the Surrogate's Court, Nassau County (McCarty III, S.) which granted the motions of the Bank of New York Mellon ("BNY") and Merrill Lynch Trust Company ("Merrill Lynch") to dismiss the petitions for judicial accountings of four separate trusts, two testamentary trusts, and two inter vivos trusts, which had been created by the decedent and his post-deceased spouse. The petitioners were beneficiaries of each of the trusts. Initially, BNY served as co-trustee of the trusts until it resigned and was succeeded by Merrill Lynch. Upon its resignation, the petitioners each executed a release in favor of BNY regarding its management of the trusts. Following the death of the decedents' son, and the succession by Merrill Lynch as trustee, all four trusts terminated, whereupon the petitioners each executed releases in favor of Merrill Lynch releasing it from any claims based upon its management of the trusts.

Approximately four years later, the petitioners instituted proceedings to compel BNY and Merrill Lynch to account with respect to each of the trusts. Motions to dismiss by the respondents were granted, and the petitioners appealed. Significantly, the Appellate Division held that the Surrogate's Court should not have dismissed the petitions against BNY on the basis that the claims asserted were barred by the releases, inasmuch as BNY failed to affirmatively demonstrate that all of the petitioners, who were not represented by counsel when the instruments were signed, were fully aware of the nature and legal effect of the releases at that time. Nevertheless, the court held that the Surrogate's Court had properly found that the claims against BNY for an accounting were time-barred, inasmuch as the claims for an accounting accrued when Merrill Lynch succeeded BNY as trustee in 2001 and 2002. Further, the court held that the Surrogate's Court had properly concluded that the claims against BNY were not tolled by fraud, and that the doctrine of equitable estoppel did not apply.

With respect to Merrill Lynch, the court held that the Surrogate's Court had properly determined that the releases executed by the petitioners were valid, inasmuch as upon executing the instruments the petitioners confirmed receipt of an informal accounting, and discharged Merrill Lynch from all liability and any claim for a formal accounting upon the advice of counsel and after negotiations.

Matter of Lee, 2017 NY Slip Op 06276 (2d Dep't 2017).

Removal of fiduciary

In *In re Walsh*, the court granted the fiduciary's motion to dismiss a proceeding to remove her as administrator. The fiduciary was the decedent's former spouse. The petitioner, the decedent's brother, sought her removal pursuant to the provisions of SCPA 711(4), claiming that she failed to list the cost of the decedent's funeral as a debt of the estate. In addition, petitioner claimed that the administrator had failed to inform the court of the terms of her separation agreement with the decedent, by which each party waived the right, *inter alia*, to serve as administrator or executor of the other's estate. The court held that the administrator was appointed fiduciary by virtue of her status as guardian of the infant child of her marriage to the decedent, and not as a result of her relationship with the decedent. Thus, the court concluded that the fiduciary's appointment was not violative of the terms of her separation agreement with the decedent, which only addressed the rights of the parties based upon their spousal status, and her failure to inform the court of same did not constitute a false suggestion of a material fact warranting her removal.

In re Walsh, NYLJ, Aug. 29, 2017, at p. 31 (Sur. Ct. Albany County).

Motion to strike

In *In re Dziubkowski*, the court conditionally granted the objectant's motion to strike, finding that the petitioner had provided largely unresponsive answers to movant's pre-objection discovery demands, and that the attorney-draftsman of the will was uncooperative during the course of his SCPA 1404 examination. The court noted that while it was unclear whether proponent was willfully refusing to provide the requested documents, it granted objectant's motion to the extent of directing proponent to produce the requested documents, or risk the striking of the probate petition upon a failure to comply.

In re Dziubkowski, NYLJ, May 26, 2017, at p. 31 (Sur. Ct. Kings County).

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

Joint board meeting between SCBA and NCBA a success

On Nov. 14, the Suffolk County Bar Association and Nassau County Bar Association had a joint dinner meeting, which was a big success. The special guest for the evening was Sharon Stern Gerstman, President of the New York State Bar Association. Among the guests that attended was Scott M. Karson, past president of the SCBA and current Treasurer of the New York State Bar Association.

FUTURE LAWYERS FORUM

Helping People Through the Aftermath, Whatever it May be

By Luann Dallojacono

Long Island has seen its share of terrestrial tragedy. Five years ago, Superstorm Sandy ravaged our shorelines, decimated our communities, and flooded our homes and our hearts. Although we have made much progress, we are still in recovery mode in many respects.

I was not in law school when Sandy hit. At the time, I was the editor of a local Huntington newspaper, running around town while trying to preserve car fuel and reporting on stories of both tragedy and triumph. But lately, given the recent onslaught of hurricanes in other parts of the country, I have found myself posing several what-if scenarios. What if Superstorm Sandy had maintained its hurricane status? What if I had been a law student at the time? What if it had destroyed my school? What if it had wiped out power to our entire island? What if I had no feasible way of continuing my legal education?

This frightening and tragic scenario is unfortunately all too real for the nine displaced University of Puerto Rico students who have recently found a home at Touro Law Center. Their law school in San Juan has been shuttered since Hurricane Maria devastated Puerto Rico on Sept. 20. Unable to continue their legal education at home, the visiting students are earning legal credits in Central Islip, where Touro Law Center is offering them free tuition, meals, and transportation to and from their hotel.

Luann Dallojacono

Since their arrival, the visiting students have been a visible presence — on television, in the news, at special dinners and meet-and-greets. Every time I have seen them, they seem to radiate gratitude and resilience. I am in awe of their strength of spirit and inspired by the response from the Touro community as student groups continue to contribute what they can, from school supplies to gift cards, to try and ease the visiting students' transition.

It is easy to identify immediate needs after a natural disaster — shelter, food, water, relief funding and volunteers. But attending a school that is hosting displaced students so they can continue their legal education has expanded my attention to another need — the need to keep living.

It is a need so many Long Islanders have been trying to satisfy since Sandy reached our shores five years ago. For some of us, the aftermath of the storm was temporary, but others are still living in it. According to a recent Newsday article, of the 11,000 Long Island homes included in the New York Rising recovery program, 3,400 of them still aren't fully repaired. Just last month, during a press conference on the Sandy anniversary, my jaw dropped when I heard that the Disaster Relief Clinic at Touro Law Center is still hearing from first-time callers affected by Sandy.

I am proud to be able to say that I attend a school that is helping people get through the aftermath, whether it be a few months after tragedy strikes, or five years later. If you believe, like I do, that law is a calling and not just a profession, helping people through the aftermath — from lawsuits and conflicts to business deals or legal trouble — is exactly what one should be doing with the special knowledge one gains as a member of the legal community.

Note: Luann Dallojacono is in her final year in the evening program at Touro Jacob D. Fuchsberg Law Center, where she serves as managing editor of the Touro Law Review. An award-winning journalist, she works full time as a special assistant for media relations to the Presiding Officer of the Suffolk County Legislature. She also chairs the Legislature's Next Generation Advisory Council, a group of young professionals that weighs in on legislative proposals affecting the "next generation" of Suffolk residents. Luann can be reached at Luann-Dallojacono@tourolaw.edu.

CIVIL RIGHTS

Focus on FOIL: Recent Noteworthy New York Court of Appeals Decisions

By Cory Morris

New York's Freedom of Information Law, or FOIL, declares that "a free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions." An agency's records "are presumptively open to public inspection, without regard to need or purpose of the applicant." When faced with a FOIL request, an agency must either disclose the record sought, deny the request and claim a specific exemption to disclosure, or certify that it does not possess the requested document and that it could not be located after a diligent search. Exemptions are contained within New York Public Officers Law Section 87. New York courts consistently hold that "[t]he exemptions from disclosure are to be 'narrowly construed' so as to ensure maximum public access to government documents."[1] Recently, the Court of Appeals clarified some of the exemptions contained within Public Officers Law Section 87(2)(e), compiled for law enforcement purposes exemption.

In *Madeiros v. New York State Educ. Dep't*, 30 N.Y.3d 67 (2017) ("*Madeiros*"), the agency's (New York State Education Department, hereinafter "The Department") administrative denial cited Public Officers Law § 87(2)(e), without referencing a specific subdivision. In *Madeiros*, the petitioners sought records related to municipalities' correspondence and plans for auditing special education preschool provider costs. After a FOIL request, administrative denial, an article 78 proceeding, the production of 55 pages of redacted documents and an appeal, the Third Department held that "the vast majority of the challenged redactions were appropriate and, because [the petitioner] has not substantially prevailed, petitioner is not entitled to an award of counsel fees."[2] The Court of Appeals noted, however, that "the justification offered . . . plainly tracks the language of subdivision (i), not subdivision (iv) [and] the Department did not make any contemporaneous claim that the requested materials constituted non-routine 'criminal investigative techniques.'" The Court of Appeals found that "[b]ecause the Department did not rely on subdivision (iv) in its administrative denial, to allow it to do so now would be contrary to our precedent, as well as to the spirit and purpose of FOIL." In reversing the Third Department, the Court of Appeals held that the *Madeiros* petitioners substantially prevailed in that it received the documents it sought after filing suit.

Cory Morris

It is a settled law that "judicial review of an administrative determination is limited to the grounds invoked by the agency" and "the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis"[3]

The *Madeiros* decision is important because the Court of Appeals interpreted the exemption at issue to expand beyond criminal law enforcement. The Court of Appeals forewarned that the *Madeiros* decision does not encompass every audit and there must be some inquiry into the FOIL request as opposed to the government providing a blanket assertion in denying access to records.

In *Friedman v. Rice* ("*Friedman*"), a FOIL request involving sex crime convictions, the petitioners sought "information in the control of the Nassau County District Attorney's Office, including the victim statements and other information gathered during police interviews of child witnesses."[4] The *Friedman* Petitioners filed their request, appealed the administrative denial and commenced an article 78 proceeding where the Supreme Court ordered the release of "all documents and records in his case file, as well as the grand jury minutes, with the names of three witnesses redacted." On appeal, the Second Department "concluded that the case file was appropriately withheld under section 87(2)(e)(iii)…" The Court of Appeals disagreed and clarified the standard for this often used exemption cited in response to requests made to law enforcement agencies.

The *Freidman* Court held that "this exemption [pursuant to Public Officers Law § 87(2)(e)(iii) applies] only if the agency establishes (1) that an express promise of confidentiality was made to the source, or (2) that the circumstances of the particular case are such that the confidentiality of the source or information can be reasonably inferred." In so doing, the court ordered the matter be remanded and timely considered with the appropriate legal standard. In *Friedman*, Associate Court of Appeals Justice Jenny Rivera reiterated that FOIL exemptions are to be "narrowly" construed rather than expansively, and that "a blanket exemption for any statement made to law enforcement on the ground that it is inherently confidential admits of absurd results."

Notably, in *Madeiros*, The Court of Appeals remanded the matter to consider petitioner's application for reasonable attorney's fees. The Court of Appeals determined that the *Madeiros* petitioners substantially prevailed because "petitioner's legal action ultimately succeeded in obtaining substantial unredacted post-commencement disclosure responsive to her FOIL request — including both disclosure that was volunteered by the agency and disclosure that was compelled by Supreme Court's order."[5]

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Good Cheer at SCBA Holiday Party

SCBA honors Justice Eng who has retired

Photos by Barry Smolowitz

VEHICLE AND TRAFFIC

SCTPVA Practice Tips

By David A. Mansfield

The end of the year serves as an appropriate time to review the requirements for effective assistance for our clients when dealing with the Suffolk County Traffic and Parking Violations Agency (the Agency).

The initial consultation should be conducted as an in-depth interview like any defense lawyer would do in any criminal matter. Your client may forward you a copy of their current driving record but that may not be sufficient in order to be able to properly advise the likely result of plea bargain negotiations or to anticipate a trial.

The public driving record must be read as a credit report. It is a very useful tool in order to anticipate any additional collateral consequences such as Driver Responsibility Assessment fees, possible suspensions or revocations.

The Agency will not grant time to pay fines to your client if there are previous driver license suspensions for failure to pay fines. Additionally, late payment of previous fines at the Agency without suspensions may also result in "no time to pay."

An inquiry into unpaid red light camera notices of liability is important. These fines will result in no plea bargain offers until paid.

David Mansfield

It is also essential to know if your client had any previous high speeds. The Agency defines this as eight points or higher within the past 10 years, or if the client had an eight points or higher speed reduced. Charges that were dismissed do not count.

Should your client be charged with speeding, any recent speeding summons issued in the last three years or reductions of those charges will be taken into account by the Agency.

You should also ask about pending charges because the Agency will be aware by use of the Department of Motor Vehicles Compass System of any matters yet to be resolved as well as reductions of previous charges.

When defending clients on 11- point speeding summonses, it is likely that the Agency prosecutors will request, and the judicial hearing officer may grant, a suspension pending prosecution of Vehicle and Traffic Law §510(3)(a).

If your client is under 25, they may be eligible for a Dangerous Driver Diversion program in exchange for a reduction, but that reduction may be only as to the speed within the 11- point category.

Should the disposition involve a plea or conviction after trial for an 11- point offense, you will have to advise your client that the administrative hearing is a separate fee matter as set forth in your retainer agreement matter. They will be subject to a mandatory Department of Motor Vehicles Hearing 15 NYCRR Part §131.4(3c) to determine if their driver's license will be suspended or revoked.

You should also advise your client that in certain extreme cases the Agency may request a §510(3)(d) post-conviction suspension or revocation, which renders your client ineligible for a restricted use license unless the judicial hearing officer so orders under 15 NYCRR Part 135.7(8).

Defense counsel should request that the judicial hearing officer enter language into the order that your client be made eligible for a restricted-use license subject to the approval of the Department of Motor Vehicles Driver Improvement Bureau. The Agency prosecutors will oppose this request.

It is essential to know is whether or not your client was in conditional or restricted-use license status when the alleged violation was committed because the Agency will not reduce those charges. You must be able to ascertain if there is a path to having your client's full license privileges restored prior to the ultimate disposition or trial of the charges.

This is particularly problematical where it involves a suspension for child support or arrears in New York State taxes which have many moving parts to resolve and can involve a substantial amount of money, which is very often beyond your client's ability to pay.

When representing someone on a five points or higher violation an inquiry should be made in the most professional, but direct way as to any previous DWI convictions or chemical test refusals. Should your client indicate that they can recall more than one alcohol or drug related driving conviction or incident, have them execute an MV-15GC or general consent to obtain personal information, a copy of the photo ID and then complete a MV-15 FOIL form and request a copy of the lifetime driving

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FREEZE FRAME

Congratulations to Annamarie Donovan and her husband Walter, on the birth of their first grandchild, Walter Carlyle Donovan IV. His parents Walter III and Jennifer, are enjoying their new baby who was born on Oct. 11 and is doing well.

Jon-Paul Gabriele and his wife, Danielle, are proud to announce the birth of their daughter, Valentina Grace Gabriele, who was born on Sept. 6, 2017.

Congratulations to Rick Stern and his wife, Karen, on the birth of their grandchild, Clara Stern, who was born on Oct. 10, at 6 lbs. 5 ounces to their son Jeffrey and daughter-in-law Gwyn.

CONSUMER BANKRUPTCY

Sexual Misconduct Claims in Bankruptcy Court

By Craig D. Robins

During the past few weeks we have seen a wave of sexual misconduct allegations against a host of well-known male celebrities and politicians stemming from the fallout in the wake over the Harvey Weinstein scandal.

Unfortunately, sexual misconduct is more prevalent than we would like to think, and also perpetrated by many others who are not so much in the public eye. Victims of such offenses sometimes bring civil suits seeking compensation for damages. If the perpetrator seeks bankruptcy relief, can he discharge his obligation to pay such claims?

Most sexual misconduct claims cannot be discharged. The Bankruptcy Code discharges preexisting debts in order to give "honest but unfortunate" debtors a fresh start. However, the Bankruptcy Code contains numerous exceptions to the "fresh start" principle and denies relief to debts resulting from certain types of undesirable behaviors, such as intentional injury by the debtor to the creditor.

In general, bankruptcy courts have held that sexual misconduct, sexual harassment and sex discrimination are inherently intentional torts. Bankruptcy Code Section 523(a)(6) excepts from discharge intentional torts that result in willful and malicious injury. The creditor victim has the burden to demonstrate such injury. The victim must establish, by a preponderance of the evidence, that her injury resulted from the willful and malicious conduct of the debtor.

There are a number of cases in which bankruptcy courts have wrestled with whether a debtor's pre-petition conduct which resulted in sex discrimination contained the requisite willful and malicious components necessary to render the debt non-dischargeable. These issues become less significant in more serious sexual misconduct situations in which the debtor's state of mind is more obvious and it is clear that the conduct has risen to the level of malice, such as in cases involving sexual or *quid pro quo* harassment.

Craig Robins

If the issue was previously fully litigated in a trial court resulting in a determination, that determination could be considered conclusive in bankruptcy court under the doctrine of collateral estoppel. However, there must be some finding that the debtor engaged in willful or malicious conduct, as these are the required elements in bankruptcy law in order for the debt to be non-dischargeable.

Judge Robert E. Grossman, sitting in the Central Islip Bankruptcy Court, ruled that collateral estoppel should only be applied when the prior judgment from the trial court is based upon findings that clearly and unequivocally establish non-dischargeability. *Rocco v. Goldberg (In re Goldberg*), (Bankr. E.D.N.Y. 2013, Case No. 811-78915-reg, Adv. Pro No. 812-08099-reg).

In that case, even though the trial court determined that there was sex discrimination and harassment, and awarded the victim over half a million dollars, the Bankruptcy Court determined that the trial court had not made an express finding of malice. However, Judge Grossman, in reviewing the trial court's detailed findings of fact, reached his own independent conclusion that the debtor's conduct was sufficiently rooted in malice to require the trial court award to be non-dischargeable.

The United States District Court for the Eastern District of New York issued a decision earlier this year in which it cited the position here in the Second Circuit that for bankruptcy purposes which require interpreting Code Section 523(a)(6), the word "willful" indicates "a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury." The injury caused by the debtor must also be malicious, meaning "wrongful and without just cause or excuse, even in the absence of personal hatred, spite, or ill-will." Malice may be implied "by the acts and conduct of the debtor in the context of [the] surrounding circumstances." *Townsend v. Ganci*, 566 B.R. 129 (E.D.N.Y. Feb 27, 2017), appeal filed.

The District Court held that certain acts committed by the debtor evinced intentional conduct. These included subjecting the creditor victim to offensive acts or statements about sex which the victim did not invite or solicit, and that the acts or statements were so severe or pervasive that they altered the conditions of the victim's employment. In that case, the debtor was unsuccessful in opposing the victim's efforts to have the debt declared non-dischargeable.

The above cases involved collateral estoppel. However, if a sexual misconduct case had been commenced in trial court, but no jury award or decision had been reached at the time the debtor filed the petition, then the bankruptcy judge would likely abstain from entertaining that litigation in the bankruptcy court, and would therefore kick the matter back to the trial court to reach a determination of the issues and create findings of fact.

In those situations where the debtor perpetrator sought bankruptcy relief before the sexual conduct claims were ever litigated, the bankruptcy court would likely hear the case.

Regardless of when the perpetrator commences the bankruptcy case, the victim must quickly take affirmative steps to get the bankruptcy court to determine that the debt is non-dischargeable. Once the bankruptcy case is filed, the victim, who the debtor should have named as a potential creditor, has a limited period of time to file an adversary proceeding, which is essentially a federal suit brought within the bankruptcy case. Creditors must bring such suits within 60 days of the date of the first scheduled meeting of creditors, or approximately 90 days after the bankruptcy case is commenced. This date is often referred to as the bar date, and failure to bring a dischargeability suit by the bar date prohibits the creditor from ever doing so.

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

CYBER

An e-Discovery Checklist

By Victor Yannacone

To properly prepare for a Rule 26(f) e-discovery conference, consider the issues that must be identified and addressed, at least to some extent, in the Conference Report — matters dealing with preservation, liaison, informal discovery about location and types of systems, proportionality and costs, search, phasing, production, and claims of privilege or of protection as trial-preparation materials.

Liaison

Counsel for each party should be designated before the initial conference.

Preservation

The range of creation dates for any ESI should be preserved. This requires determining the dates before which the ESI is not relevant. Disagreements over dates can be resolved by phased discovery.

ESI from sources that are not reasonably accessible because of undue burden or cost must still be preserved, if relevant.[1] Backup ESI should always be preserved.

The description of ESI from sources that the party believes could contain relevant information, but has determined, under the proportionality factors, is not discoverable and should not be preserved. The issue under governing proportionality rules will be the "importance" of the information to material issues of fact in dispute and its probative value.

Victor Yannacone

Suspension of any document-destruction program, such as ongoing erasures of e-mails, voicemails, and other electronically recorded material. The key custodians of ESI should have their email and voice mail auto-delete functions turned off and as many deletions as possible recovered from backups.

The names, general job titles, and descriptions of custodians for whom ESI will be preserved. The broad list of key custodians may be divided in classes by probable importance of their ESI to the outcome of the case in order to stage the actual production and review.

The list of systems, if any, that contain ESI not associated with individual custodians that must be preserved, such as enterprise databases.

Any disputes related to scope or manner of preservation should be resolved quickly with the ESI preserved until the issue is resolved.

Discovery about location and types of systems

Systems containing ESI such as e-mail, finance, and HR should be prioritized according to their probative value, particularly to the extent they contain communications between people and contemporaneous writings.

Descriptions and location of *all* the IT systems, including document management systems and network drives and servers where relevant ESI might be stored and how potentially discoverable information is stored — whether it is stored manually at the discretion of listed custodians or stored automatically by other software systems.

The best methods for collecting discoverable information from systems and media in which it is stored without modifying or damaging the metadata.

Proportionality and costs

The amount and nature of the claims being made by the parties and the actual disputed facts determine the evidentiary value of the ESI and whether it is relevant and material to claims and defenses that have actually been raised in the case.

The nature and scope of burdens associated with the proposed preservation and discovery of ESI should be stated in terms of meaningful, verifiable time and expense budgets, usually with suggestions on the metrics the court should use to consider the issues and monitor the effort.

If objections are raised, the party seeking discovery must offer *prima facie* evidence of the likely benefit of the proposed discovery.

Because of confidentiality issues, beware of offers to share costs through use of a common electronic-discovery vendor or a shared document repository, even with co-defendants or co-plaintiffs.

Preservation is required by law to be reasonable, not exhaustive or perfect and limits on the scope of preservation or other cost-saving measures must always be considered.[2] "Reasonable" means proportionate to the needs of the case. Only relevant ESI need be preserved.

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PERSONAL INJURY

Getting Medical Records Into Evidence

By Paul Devlin

You may find yourself handling a personal injury case on the court's trial calendar. Whether you represent the plaintiff or the defendant, there are probably medical records that you want in evidence to support your claims or defenses. However, those records are inadmissible hearsay. The easiest way to get them into evidence is to stipulate with adverse counsel. Usually, adverse counsel is not keen on making their adversary's job any easier. If the attorneys do not agree, then you could have the records admitted into evidence based on the business records exception to hearsay set forth in CPLR 4518.

CPLR 4518(a) provides in sum that a business record may be admissible if a judge finds that it was the regular course of the business (e.g., medical office) to make the record and that the business records was made at the time of the act, transaction, occurrence, or event, reflected in the records (e.g., medical treatment) or within a reasonable time thereafter. All other circumstances of the making of the records may be proven to affect their weight, but those circumstances shall not affect admissibility. You could have an employee from the medical office with the appropriate knowledge appear at trial and testify in order to satisfy each of the requirements of the rule. Having done so, your motion to have the records admitted into evidence will almost certainly be granted.

Paul Devlin

But what if you want to avoid the inconvenience of calling an employee of the medical office where the records were created to testify at trial? CPLR 3122-a permits self-authentication of certain medical records provided that specific requirements are satisfied. The first step is to obtain the medical records. Traditionally, the records are subpoenaed. Most firms make the subpoena returnable to the subpoenaed records room in the courthouse. However, there are also firms that make the subpoenas returnable to their office. On August 11, 2014, CPLR 3122-a was amended to add sub-section (d), which eliminates the need for a subpoena so long as the records are accompanied by a property certification. The certification must be sworn in the form of an affidavit stating the following: (1) the affiant is the custodian or other qualified witness and has authority to make the certification; (2) the records or copies are accurate versions of the documents described in the subpoena; (3) the records are complete, or if not, an explanation as which documents are missing and an explanation for their absence; and (4) the records were made by the personnel of the business or persons acting under their control in the regular course of business, at the time of the transaction, act, occurrence, or event recorded, or a reasonable time thereafter. This listing of the requirements is abridged. Please refer to CPLR 3122-a for the complete text of the requirements.

If you subpoenaed the records, be sure to promptly serve a copy of any subpoenas on all parties pursuant to CPLR 2303(a). Returning to the requirements of CPLR 3122-a, the final step is to give notice to the other parties of your intent to offer business records into evidence pursuant to this rule. The notice must be made at least 30 days before trial. The party upon whom such notice is served may object no later than 10 days before trial. Unless such an objection is made or an objection at trial is made based upon evidence which could not have been previously discovered by the exercise of due diligence, business records certified in accordance with CPLR 3122-a shall be deemed to satisfy the requirements of CPLR 4518(a). It should also be noted that Rule 4518(c), referring to Rule 2306, provides in sum that subpoenaed and certified hospital records are prima facie evidence of the facts they contain.

Keep in mind that merely because records are subpoenaed does not automatically mean they are admissible at trial. In fact, a subpoena is no longer necessary. If the records at issue are favorable to your case, then make certain that all of the requirements listed above have been satisfied. On the other hand, if the records at issue are unfavorable to your case, you may have a valid objection if any of the requirements have not been satisfied. Of course, records contained in one medical provider's file that were created by a different provider do not satisfy the requirements of this rule.

Note: Paul Devlin is an associate at Russo & Tambasco where his practice focuses on personal injury litigation. He is an active member of the SCBA, serving as co-chair of the Young Lawyers Committee and Treasurer of the Suffolk Academy of Law.

TAX

Thou Shalt Not Hold Real Property in a Corporation

By Louis Vlahos

This is part two, of a two-part series.

There may come a time when the RP is sold. In the case of a C corporation, that means a corporate-level tax followed by a taxable liquidating distribution to its shareholders. IRC Sec. 331.

There is also a corporate-level tax where an S corporation that is subject to the built-in gain rules sells its RP within the recognition period (the 5-year period beginning with the first day of the first taxable year for which the corporation was an S corporation). IRC Sec. 1374.

Where the S corporation was always an S corporation, and did not acquire the RP from a C corporation in a tax-free exchange, there is no corporate-level tax, and the gain from the sale is taxed to its shareholders. The subsequent distribution of the net proceeds from the sale may be taxable to a shareholder to the extent it exceeds his stock basis (as adjusted for his pro rata share of the gain from the sale of the property). IRC Sec. 331.

Again, in the case of a partnership, there is no entity-level tax, its partners are taxed on their pro rata share of the gain recognized on the sale (though the partner who contributed the disposed-of RP may receive a special allocation of taxable gain based upon the gain inherent in the RP at the time it was contributed to the partnership), and a partner may recognize additional taxable gain to the extent the amount of cash distributed to the partner exceeds his basis for his partnership interest (as adjusted for his pro rata share of the gain from the sale of the property). Treas. Reg. 1.704-3.

Louis Vlahos

What if the disposition is to take the form of a like kind exchange? In that case, the taxpayer that sells the "relinquished property" must also acquire the "replacement property;" thus, a corporation-seller must acquire the replacement property — there is no opportunity for a single shareholder to participate in such an exchange if most of the shareholders have no interest in doing so. IRC Sec. 1031.

In the case of a partnership, however, the partnership and one or more of the partners may be able to engage in a so-called "drop and swap" — by making a non-taxable in-kind distribution of a tenancy-in-common interest in the RP to one or more partners — thus enabling either the partnership or the distributee partners to participate in a like kind exchange. IRC Sec. 731.

Distribution of the property

What if the RP is not to be sold? What if it is to be distributed by the entity to one or more of its owners?

In general, a corporation's distribution of appreciated RP to its shareholders is treated as a sale of the property by the corporation, with the usual corporate tax consequences. In addition, the shareholders will be taxed upon their receipt of the property, either as a dividend or as an exchange, depending on the circumstances. IRC Sec. 311; Sec. 301; Sec. 302.

Where the corporation is an S corporation, and the RP will be depreciable in the hands of the shareholders, the gain realized on the deemed sale of the RP may be treated as ordinary income and taxed to the shareholders as such. IRC Sec. 1239.

There is an exception where the corporation's activity with respect to the RP rises to the level of an "active trade or business." In that case, the actively-conducted RP business, or another active business being conducted by the corporation, may be contributed to a subsidiary corporation, the stock of which may then be distributed to one or more shareholders on a tax-deferred basis. Unfortunately, if the RP is owner-occupied, the corporation will generally not be able to establish the existence of such an active business. Moreover, the corporation will have to be engaged in a second active business. IRC Sec. 355; Treas. Reg. Sec. 1.355-3.

In general, a distribution of property by a partnership to its partners will not be treated as a taxable disposition; thus, the partnership may be able to distribute a RP to a partner in liquidation of his interest, or it may split up into two or more partnerships with each taking a different property, without adverse tax consequences. Treas. Reg. 1.708-1. There are some exceptions.

For example, if RP is distributed within seven years of its having been contributed to the partnership, its distribution to a partner other than the contributor will be treated as a taxable event as to the contributor-partner. IRC Sec. 704. If a contributor-partner receives a distribution of RP within seven years

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The Effect of 'Cancellation of Indebtedness' Prior to a Bankruptcy Filing *(Continued from page 9)*

related propositions that a) the issuance of a 1099-C does not automatically signify the discharge of debt and b) therefore, if the debt survives through the bankruptcy case, then the bankruptcy discharge of said debt excludes the cancellation of indebtedness income from taxation. Under this interpretation of the case law, a bankruptcy practitioner may advise a debtor that a bankruptcy filing will solve the debtor's potential tax problem (along with discharging such debt as currently remains).

In *Bononi v. Bayer Employees Fed. Credit Union* (In re *Zilka*), 407 B.R. 684 (Bankr. W.D. Pa. 2009), a Chapter 7 debtor objected to certain proofs of claim filed by a creditor on the grounds that the debtor had previously received from the creditor a Form 1099-C, which the debtor argued was the legal equivalent of a cancellation of the underlying indebtedness. Bankruptcy Judge M. Bruce McCullough rendered an exhaustive analysis of the implications of the filing of a 1099-C. First, the court pointed to 26 U.S.C. § 6050P and amplificatory regulation 26 C.F.R. § 1.6050P-1a(1), which regulation sets forth eight (8) identifiable events that trigger the filing by a creditor of a Form 1099-C. One such event under Subsection ("G") thereof arises from "a decision by a creditor, or the application of a defined policy of the creditor, to discontinue collection activity and discharge debt." 26 C.F.R. § 1.6050P-1b(2)(i) (West 2009). The court, in its decision relied upon the Internal Revenue Service's own interpretation of its regulations, referencing I.R.S. Info. Ltr. 2005-0207, 2009 WL 35611135 (Dec. 30, 2005) for the proposition that the IRS itself does not view the filing of a 1099-C as an admission by a creditor that the debt has been discharged; see also, *Simms v. Commissioner*, T.C. Summ. Op. 2002-76, 2002 WL 1825373 at 2 (T.C. 2002); *Debt Buyers' Association v. Snow,* 481 F. Supp. 2d 1, 13-14 (D.D.C. 2006).

The *Zilka* court further noted that on occasion a Form 1099-C may be filed in error and the IRS expressly authorizes a creditor to file a corrected Form 1099-C. 407 B.R. at 689. It also noted that as a matter of law, a Form 1099-C is not an instrument which legally discharges a debt. *Id;* citing *Owens v. Commissioner,* 67 F. App'x 253 (5th Cir. 2003) ("issuance and filing of Form 1099-C does not constitute actual cancellation of the loan"); *Leonard v. Old National Bank Corp.* 837 N.E. 2d 543, 545-546 (Ind. Ct. App. 2005) ("filing a Form 1099-C is merely an informational filing with the IRS, done to report an event that has already happened, and thus does not operate to cancel itself"), *Sims v. Commissioner,* T.C. Summ. Op. 2002-76, ("Form 1099-C does not establish that petitioner's debt was ever discharged, which necessarily means that such form did not operate to cancel such debt"); *Debt Buyer's Association,*481 F. Supp. 2d at 13-14 ("a creditor can attach to a Form 1099-C a notice that such creditor plans to continue debt collection activities with respect to a debt described in such Form 1099-C, which necessarily means that such form did not operate to cancel such debt.")

Thus, while *Zilka* was decided in a different context, a fair reading of it and the cases it cites is that notwithstanding the issuance by a creditor of a 1099-C, the referenced debt is not formally discharged by the delivery thereof, and remains in force and effect. Thus, as a matter of simple logic, if the receipt thereof is followed by a subsequent bankruptcy filing, the debt will only then be discharged as part of the bankruptcy case.

In *FDIC v. Cashion,*720 F. 3d 169 (4th Cir. 2013), the Fourth Circuit expressly acknowledged that the analysis found in *Zilka* is supported by a majority of the courts that have decided the issue and that such majority view is persuasive. The court stated:

> A small minority of the lower courts have held, as Cashion urges us to do here, that filing a Form 1099-C with the IRS constitutes *prima facie* evidence of an intent to discharge a loan, at which point the burden of persuasion shifts to the creditor to proffer evidence that is was filed by mistake or pursuant to another triggering event of the regulations..."

While we cannot say that the analysis summarized above lacks any support, we find a different approach taken by a majority of the courts to consider the matter ultimately more persuasive.

That analysis relies principally on the language of the IRS regulations and the purpose of a Form 1099-C.

e.g. Capital One, N.A. v. Massey, Case No. 4:10-CV-01707, 2011 (S.D. Tex. 2011) (unpublished); *In re Zilka,* 407 B.R. 684, 687-92 (Bankr. W.D. Pa. 2009); *Lifestyles of Jasper, Inc. v. Gremore,* 299 S.W. 3d 275, 276-277 (Ky. Ct. App. 2009). 720 F. 3d. at 178.

The Fourth Circuit also referenced the amplificatory regulations to 26, U.S.C. § 6050P which state:

> any applicable entity... that discharges an indebtedness of any person ... must file an information return on Form 1099-C with the Internal Revenue Service. Solely for purposes of the reporting requirements of [the applicable statute and this regulation], a discharge of indebtedness is deemed to have occurred... if and only if there has occurred an identifiable event described in paragraph (b)(2) of this section, *whether or not an actual discharge of indebtedness has occurred* on or before the date on which the identifiable event has occurred.

Thus, the supporting regulations are unambiguous that the issuance of a Form 1099-C does not, in and of itself, constitute a discharge of debt.

In the recent case of *ZB, N.A. v. Crapo,* 2017 UT 12 (S.Ct. Utah 2017), the Court sets forth additional support for the proposition that the delivery to the debtor of a Form 1099-C does not automatically signify a taxable event. The court notes that Form 1099-C itself which contains instructions for the debtor states as follows:

> if an identifiable event [referencing the eight categories of identifiable events set forth in 26 C.F.R. § 1.6050P-1(a)(1)] has occurred but the debt has not actually been discharged, then include any discharged debt in your income in the year that it is actually discharged. *Id.* at 7.

Crapo itself was based upon the delivery of a 1099-C by virtue of the occurrence of the eighth "identifiable event." "Event Code H" requires the filing of a 1099-C by a financial institution or federal executive agency if a payment on account of its debt has not been received in a "36-month period increased by the number of months the creditor was prevented from engaging in collection activity by a stay in bankruptcy or similar bar under state or local law." *See, Publication 4681*at p.4.; *Crapo*, 2017 UT at 7. *Crapo* thus reasoned that the filing of Form 1099-C upon the occurrence of an "Event Code H" event did not automatically contemplate a discharge.

Even where the creditor's acts are consistent with the cancellation of a debt and concomitant discharge of the indebtedness, because of the uncertainties surrounding the utilization of Forms 1099-C, credible arguments can be made that in light of such uncertainty, it is the subsequent bankruptcy filing that unequivocally discharges the debt. Thus, in *Habtemariam v. Vida Capital Grp., LLC,* 2017 U.S. Dist. LEXIS 20930 (E.D. Cal. 2017), after delivering to the debtor a Form 1099-C, the bank took no steps to enforce its obligation for several years, during which period the debtor filed a tax return recognizing and then paying tax on such obligation. The bank thereafter assigned the loan, and the debtor sought a determination of quiet title as against the assignee. The court denied the mortgagee's motion to dismiss the debtor's suit seeking cancellation of the debt concluding that the plaintiff stated a *prima facie* case for debt cancellation, and allowed the case to proceed to trial to determine factual issues. It is of note that the court was not prepared to reach a determination absent a trial.

Thus, a canvassing of the developing case law surrounding the implications of the issuance of Form 1099-C illustrates that the filing of the form in and of itself does not conclusively create a cancellation of indebtedness triggering a tax consequence. In the event a debtor chooses to file a bankruptcy case subsequent to the receipt of a 1099-C, strong arguments exist that it is the bankruptcy case itself which discharges the indebtedness, thus enabling the debtor to avoid income tax consequences on a transaction. As the issue of the consequences of the receipt of a Form 1099-C arise with greater frequency, the bankruptcy practitioner should communicate to his client the existence of the developing body of case law that supports the saving of substantial tax liability.

Note: Robert Pryor founded the firm Pryor & Mandelup, LLP, in Westbury. He served as law clerk to the Honorable Chief Judge C. Albert Parente from 1983 to 1984. Since 1984 he has been a member of the Panel of Trustees for the Bankruptcy Court, Eastern District of New York. Mr. Pryor is a member of Theodore Roosevelt Inn of Court, American Bankruptcy Institute, National Association of Bankruptcy Trustees and the New York State Bar Association. He is the author of various scholarly articles appearing in the New York Law Journal, The Suffolk Lawyer, Nassau Lawyer and is a contributor to Newsday with his "Ask the Expert" column.

[1]While there are exceptions to the general proposition, debt cancelled by a creditor constitutes taxable income to a debtor.

[2]The IRS, for example has the ability to file a notice of Federal Tax Lien without the preliminary steps of bringing suit and litigating same to judgment. The IRS has the power to garnish an amount substantially in excess of the amounts otherwise available to garden variety creditors under applicable state law. New York State itself exercises the power to suspend a debtor's driver's license if he falls into arrears in the payment of New York State taxes.

President's Message (Continued from page 1)

munity and to keep that spirit alive all year.

The Latin term "*pro bono publico*" means "for the public good," and involves the delivery of legal services to those of limited means. Pro bono work certainly can enrich a lawyer's life, especially for newer attorneys who will gain knowledge and experience in handling a matter that involves substantive legal work. There are opportunities for all lawyers, both newly admitted, as well as the experienced lawyer, in giving time to those who would otherwise face the legal process without assistance. In volunteering, an attorney not only fosters the spirit of the holiday season, but will also effectively learn networking skills, develop leadership experience and acquire transactional, trial or negotiation experience. These opportunities are invaluable and will enhance an attorney's career.

Many do pro bono work because they have a sense that this work is a moral obligation, they want to make a meaningful contribution to our society, gain experience or help address social disadvantage and provide access to justice.

Whatever the motivating factor, it is a fact that pro bono work does help grow your business. It provides skills, helps to build networks, not only in the community, but also in the legal field, provides opportunity for potential referrals and for further business. While pro bono work offers an opportunity for professional development, to get expertise and experience in new areas of law, it also provides an opportunity for future referrals of paying clients.

The SCBA's efforts in the pro bono area are organized and delivered through two related organizations, the Pro Bono Project and the Pro Bono Foundation, which have provided assistance to Suffolk County's indigent population for over 30 years.

The Pro Bono Project, co-sponsored by Nassau Suffolk Law Services, was founded in 1980. A strong collaboration between the SCBA and Nassau Suffolk Law Services, along with Touro Law School, has resulted in the development of exceptional programs, helping hundreds of low-income clients receive legal assistance from generous volunteer attorneys.

The SCBA's Pro Bono Foundation was created in 1989 to coordinate efforts to increase the availability of legal services for the economically disadvantaged. The quality and quantity of SCBA volunteer efforts has been recognized by the NYSBA and the ABA as one of the premier volunteer efforts in the country. Our pro bono effort includes attorneys from many areas of law, including matrimonial law, family law, guardianships, bankruptcy and landlord tenant, as well as public sector and corporate law. In a few months, the SCBA hopes to initiate a program in immigration law to assist immigrants with the application process for citizenship.

In conjunction with the Suffolk Academy of Law, the Pro Bono Project provides training and resource materials that assist volunteers, expanding knowledge of the applicable law. Along with the Military & Veterans Affairs Committee, the Academy presents a program where volunteers are trained in various areas of law to represent our veterans, who otherwise would not have legal assistance.

William Hubbard, Past President of the ABA once stated "The Preamble to the Constitution says 'We the People of the United States, in order to form a more perfect union, establish justice..., 'justice' is the first item in the preamble of the Constitution. If people don't have access to that justice, they don't have justice."

It is a pleasure to celebrate the accomplishments and exemplary work of SCBA volunteer attorneys who "do the public good." Without the assistance of our volunteers, access to the legal system would be out of reach for many. By embracing the spirit of this season, by working together to provide the delivery of quality legal representation to the economically disadvantaged, we can have a positive influence on the legal profession, while making a contribution to Suffolk County, to our communities, to our system of justice, and most importantly, to the clients who we serve.

I want to wish all our members the warmth of this holiday season, health for you and your family, peace, friendship, prosperity and happiness throughout the new year.

When Commercial Principles Surface in a Wrongful Death Action (Continued from page 8)

On May 30, 2008, approximately one month after being erected, the crane was being used for the construction of the 14th floor of the project when, with the decedent operator in the cab, the crane teetered and then fell backward from a height of 200 feet, struck another building and bounced off a number of terraces until it crashed down upon the other decedent. The First Department, in extraordinary and compelling narrative, summarized the trial court testimony concerning the hell that the crane operator encountered between the time that the crane failed and his ultimate demise many stories below. Indeed, much of the decision centered upon the basis for plaintiffs' pre-impact terror damages:

> "The injuries [Plaintiff] sustained from the impact were "blunt impact head trauma" with "cranial fracturing," "pulpification of the brain" and "near-complete decapitation." Specifically, [Plaintiff] suffered multiple rib fractures piercing his lungs, a fractured pelvis, head trauma, bilateral humerus fractures, and bilateral transected leg fractures. Medical testimony was elicited that the fractures to his arms and legs indicated that he was aware of his situation and tried to brace himself, aware of his impending death. It was also opined that [Plaintiff] was consciously aware, and under a significant amount of physical and mental distress, while trapped in the glass cab, alone, and able to see everything as it happened. [Plaintiff's] father, also a crane operator, saw his son in the rubble with his eyes open and shaking. The EMS technician reported him as alive and conscious approximately seven minutes after the accident, and the medical examiner determined the time of death to be nine minutes after that . . ."
>
> "The evidence supported the jury's findings that [Plaintiffs] both endured inconceivable pre-impact terror. It is undisputed that the crane did not fall straight to the ground. With [Plaintiff] in the glass cab, it first teetered, and then fell backward from a height of 200 feet (approximately 14 stories), struck the Electra building, and bounced off a number of terraces before reaching the ground, where it crashed down onto [co-Plaintiff]. [Plaintiff], trapped in the glass cab, was aware of his impending death, as detailed by witnesses in the adjacent apartment buildings. Witnesses described the look of sheer panic and fear on [his] face. They described him making a series of hand movements and putting his hands together as if praying. They described him as then seeming to attempt to brace himself, placing both his hands forward on the cab glass, and they described the cab as ultimately sliding to [Plaintiff's] left side until it was gone."

The trial court

Two wrongful death actions were commenced wherein the plaintiffs contended that the accident was the result of a defective weld by RTR during the manufacture of the bearing ring. The jury determined that Lomma, JF Lomma and NY Crane were negligent and that the corporate veil should be pierced to assess personal liability against Lomma.

The Appellate Division

Defendants appealed arguing that the awards should be set aside as excessive and that the trial court erred in permitting the jury to pierce the corporate veils of NY Crane and JF Lomma. Although the Appellate Division agreed that the awards were excessive and significantly reduced them, the court upheld the jury's decision to pierce the Lomma entities' respective corporate veils.

Relying upon, *inter alia*, the Court of Appeals' decision in *Matter of Morris v. New York State Dept. of Taxation and Fin.*, 82 N.Y.2d 135 (1993), the Appellate Division held that jury's conclusion to pierce the corporate veils of NY Crane and JF Lomma was warranted because Lomma had conducted business in his various corporations "as a single entity." The evidence presented in the cases demonstrated that while different Lomma-controlled entities served different purposes, the entities rented out each other's equipment at will and the actual ownership of the equipment amongst the entities did not matter. Lomma also had the discretion to shift profits between his companies and all the entities were from the same offices using the same email system, as well as the same management and administrative personnel. The court found that Lomma exercised domination and control over multiple corporations that he treated as one entity, warranting piercing. The court further determined that jury's determination of Lomma's personal liability was warranted due to his personal participation in the corporate defendants' affirmatively tortious acts launching the dangerous instrumentality that caused the accident.

While it is certainly rare for commercial principles to appear in the personal injury realm, the interplay is a gentle incentive for lawyer "cross-training" (wherein "niche" practitioners occasionally sit for CLEs outside their primary practice areas to keep abreast of developments in distinct practice areas).

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

Spotlight on Advocacy: LGBTQ Youth in Suffolk County (Continued from page 14)

more and more prevalent and if not for my own personal experience with my transgender child I would be ignorant about the issues these children face. These children often suffer from anxiety, depression, suicidal ideation, isolation, rejection," says Ms. Miller. She cautions, "we are not social workers, but in representing children or the parents of LGBT children, we need to be educated about the available resources and we should know that there is a system in place that will consider the needs of LGBT youth."

When asked about the issues these children face. Ms. Miller pointed out by way of example, an LGBTQ child attending school that deals with bullying, bathroom use, changing for gym class, and social stressors. Further, LGBTQ youth at home may face parents or siblings that are not accepting, punishing, bullying, or worse.

Ms. Miller also observed that "we may think that these issues don't exist in 2017, but change is slow to take place." Shockingly, there are only 18 out of our 50 states that have non-discrimination laws protecting the rights of transgender people, and New York is *not* one of them. However, New York does protect the rights of people based on their sexual orientation. In 2008, Gladys Carron, with the OFCS, was one of the first in New York to attempt to address LGBTQ youth in the N.Y. justice system, but was met with no real follow up, and more importantly, no real policy change.

Miller is working diligently toward this policy change. She recently, along with several other AFCs, submitted individual and group applications with proposals for an initial Capstone project. A Capstone Project is a set of actions each Certificate Program participant will design and undertake within their organization and/or in their community to initiate or continue system improvement efforts related to the program they attended. The Capstone Project is required of every Certificate Program participant and must be approved by the Center for Juvenile Justice Reform for successful completion of the program and acceptance into the Fellows Network. The Capstone Project provides an opportunity to apply and develop learning from the Certificate Program. It must be an effort that involves more than one child serving system and must be focused on some aspect of the respective Certificate Program.

The Capstone project is intended to: Gather data to prove a need for policy change; create the policies for the juvenile justice system and the child welfare system, by training and educating on all levels, including attorneys, so that these children are properly represented and even for private matrimonial and family court attorneys, to aid in representation of parents confronted with these issues.

Ms. Miller cautiously and appropriately observed that, most importantly, "[we must] follow up to ensure that the policies are implemented, and we are not going to get every judge, court officer, probation officer, attorney, etc. to be accepting, but regardless of personal beliefs, what needs to be remembered is it is part of their job to represent, assist or protect."

The Suffolk County Bar Association's LGBT Law Committee wishes to express our gratitude for Catherine, and the other AFCs that attended the program, including Michael Gulotta and Ian Moss.

Catherine E. Miller contributed to this article.

Note: Christopher J. Chimeri is partner with the Hauppauge law firm Quatela Chimeri PLLC and heavily focuses on complex trial and appellate work in the matrimonial and family arena. He sits on the Board of Directors of the Suffolk County Matrimonial Bar Association and is a co-founder and co-chair of the Suffolk County Bar Association's LGBT Law Committee. From 2014-2017, he has been peer-selected as a Thomson Reuters Super Lawyers® "Rising Star," and was recently featured in Forbes Magazine, Long Island Business News, and New York Magazine as a "Leader in Law."

ADA Accessibility for Websites (Continued from page 13)

is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the goods, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden." *42 U.S.C.S. § 12182(b)(2)(A)(iii)*. The court specifically noted the following examples of accessibility: "if a menu cannot be read by a blind person, the restaurant need not make the menu available in Braille; the restaurant could ensure that waiters are available to explain the menu;" and "while a bookstore must ensure that it communicates with its customers in formats, which accommodate the disabled, a bookstore is not required to stock books in Braille." Courts therefore recognize that there may be significant limitations on the possibility of making a website completely ADA accessible.

In a more recent case, *Robles v. Domino's Pizza LLC*, a blind plaintiff claimed that he could not order pizza from the Domino's website because it was not accessible using a screen reader. The court found that although Domino's website was not in compliance with the WCAG guidelines, their 24-hour toll free phone number, where live agents provided assistance with using the website, was enough to meet its obligations under the law.

Absent further guidance, businesses and individuals are urged to ensure website accessibility.

Note: Christine Malafi, Esq. is a partner at Campolo, Middleton & McCormick, LLP and chairs the firm's Corporate department, one of the most robust teams in the New York region. Her practice focuses on mergers and acquisitions, corporate governance, labor and employment matters, as well as municipal, insurance coverage, and fraud issues. Contact Christine at cmalafi@cmmllp.com.

SCTPVA Practice Tips (Continued from page 18)

record. When the application is submitted correctly, the turnaround time is approximately two weeks.

It is very important because should the Agency decline to reduce the charges below the threshold of five points defined as a high-point driving violation your client will be subject to lifetime driving record review under Part §132, in an event of a conviction for such an offense. A conviction will trigger a notice of revocation in the event that your client has three or more such incidents or convictions during the 25 year look back period or lifetime review for five or more incidents or convictions.

A request for a hearing on the notice of revocation for a hearing must be filed within 30 days of the date of the notice.

The request for a hearing should be filed by certified mail with a return receipt requested.

The purpose of the hearing is to persuade the administrative law judge that based upon the presentation of unusual, extenuating and compelling circumstances that the revocation should not be imposed.

The Agency also has special rules, which result in lesser reductions of the charges for school zone offenses, lower posted speed zones, unlicensed drivers, learner's permits, Class DJ licensed clients, and probationary violations §510-b.

Cell phone violations and portable electronic device violations require 10 years of licensing before a reduction may be considered with different rules for portable electronic device violations §1225-d, as opposed to improper cellphone use summons under §1225-c2a.

The complex nature of the plea bargaining guidelines at the Agency mandate a very detailed initial consultation to effectively represent your client.

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

Focus on FOIL (Continued from page 16)

The release of records after an article 78 proceeding is commenced does not resolve the request for reasonable attorney's fees. Indeed, some FOIL cases result in protracted litigation and can result in large awards of attorney's fees such as the *TJS New York v. NYS Dep't. of Taxation*, where the Albany Supreme Court awarded over $100,000 in attorney's fees[6] to the petitioner(s). The increase of such awards should serve as a deterrent to government agencies, in preventing the unreasonable denial of access to records, and an incentive to attorneys, who should litigate such cases to ensure that the goals of FOIL are met.

Note: Cory H. Morris, named a SuperLawyer Rising Star, maintains a practice in Suffolk County and is the co-chair of the Suffolk County Bar Association's Young Lawyers Committee. He serves as a Nassau Suffolk Law Services Advisory Board Member and is an adjunct professor at Adelphi University. (http://www.coryhmorris.com).

[1] Public Officers Law, Section 6.
[2] Livson v. Town of Greenburgh, 141 A.D.3d 658, 660, 34 N.Y.S.3d 612, 615 (2nd Dep't. 2016).
[3] Madeiros v. New York State Educ. Dep't, 133 A.D.3d 962, 965, 18 N.Y.S.3d 782, 786 (N.Y. App. Div. 2015), *leave to appeal granted*, 27 N.Y.3d 903, 51 N.E.3d 565 (2016), and *aff'd as modified*, 30 N.Y.3d 67 (2017).
[4] Matter of Scherbyn v. Wayne–Finger Lakes Bd. of Coop. Educ. Servs., 77 N.Y.2d 753, 758 (1991) (internal quotation marks and citations omitted); see Matter of National Fuel Gas Distrib. Corp. v. Public Serv. Commn. of the State of N.Y., 16 N.Y.3d 360, 368 (2011); Matter of Scanlan v. Buffalo Pub. School Sys., 90 N.Y.2d 662, 678 (1997).
[5] Friedman v. Rice, No. 56, 2017 WL 5574476 (N.Y. Nov. 21, 2017).
[6] Madeiros v. New York State Educ. Dep't, 30 N.Y.3d 67 (2017).
[7] TJS New York, Inc. v. N.Y.S. Dep't of Taxation, Index No. 3480/2008 (Sup Ct, Albany County June 19, 2012),

Is Contract Repudiated When a Party Brings Suit for Rescission and Reformation? (Continued from page 10)

But what if the breaching party has "repudiated" the contract in advance of its performance? Does the injured party still have to keep itself ready to perform even if it knows or has reason to know that the breaching party will not perform? Must the injured party wait until the time for performance has come and gone before it can deem itself free of any obligation to perform? The doctrine of "anticipatory breach" addresses this issue. Under this doctrine, a contract has been "repudiated" when a party, by words or conduct, makes a statement that it cannot or will not perform and such statement is "sufficiently positive to be reasonably understood as meaning that the breach will actually occur."

Under Princes Point, the Court of Appeals held that there was no "positive and unequivocal repudiation" given that the amended complaint sought "reformation of the amendments to the contract and *specific performance of the original agreement*" (emphasis added). It determined that the action for rescission and reformation was seeking "at bottom . . . a judicial determination as to the terms of a contract and the mere act of asking for judicial approval to avoid a performance obligation is not the same as establishing that one will not perform that obligation absent such approval."

The court's ruling is narrow in that it acknowledges that the action brought by Princes Point sought to invalidate the terms of the amendment, but since Princes Point also requested reformation and specific performance, Princes Point cannot be deemed to have wholly refused to perform its obligations under the contract. Hence, Princes Point has not repudiated the contract and Muss Development is not free of its performance obligations under the contract.

Note: Gisella Rivera, Esq., CPA, is the principal of G. Rivera Law Office, PLLC. Prior to opening her law practice, Gisella was a partner in the Corporate and Business Group of Meltzer, Lippe, Goldstein & Breitstone, LLP, and worked as an associate attorney in the Capital Markets Practice of White & Case, LLP, a major Global Law Firm. Gisella worked as an accountant for over 15 years, amongst others, as the chief financial officer of a prominent mental health care provider in Suffolk County and as the North-East Regional Finance Director of an assisted living company ranked 3rd largest in 2015 by Provider Magazine. Gisella combines her business experience with her legal training in representing and serving her clients. Contact Gisella at gisellarivera@griveralaw.com, or at (631) 353-7230.

An e-Discovery Checklist (Continued from page 20)

Search

The search methods, that will be used to identify discoverable ESI and filter out ESI that is not subject to discovery must be identified and disclosed.

The producing party must identify and fully describe the quality-control method(s) they will use to evaluate whether a production is missing relevant ESI – the problem of Recall – or contains substantial amounts of irrelevant ESI — the problem of Precision and the associated problem of duplication.

Phasing

Phasing may not be necessary if all that is needed is produced in the first phase and the sources of ESI most likely to contain discoverable information are properly identified.

Phasing, however, permits discovery of ESI from disputed custodians and secondary custodians that only might possibly have important information or discovery of ESI from disputed time periods to be postponed or often avoided.

Production

A producing party should provide its ESI in the format requested, unless cost becomes an issue, provided any inherent searchability of ESI has not been and is not degraded during production.

The extent, if any, to which metadata will be produced and the fields of metadata to be produced should be clearly stated.

Privilege

Privileged or work-product or other protected information will not be produced, only logged. However, the parties should look towards agreement on alternative ways to identify documents withheld to reduce the burdens of such identification. The place to start is with the privilege log. E.g. a party should not have to log communications made after suit was filed.

Never allow a Rule 26 conference to conclude without a stipulation and order under *Federal Rule of Evidence* 502(d) that addresses inadvertent or other inappropriate production.

Note: Victor John Yannacone Jr. is an advocate, trial lawyer, and litigator practicing today in the manner of a British barrister by serving of counsel to attorneys and law firms locally and throughout the United States in complex matters. Mr. Yannacone has been continuously involved in computer science since the days of the first transistors in 1955 and actively involved in design, development, and management of relational databases. He pioneered in the development of environmental systems science and was a cofounder of the Environmental Defense Fund. He can be reached at (631) 475–0231, or vyannacone@yannalaw.com, and through his website https://yannalaw.com.

[1] *Federal Rule of Civil Procedure* 26(b)(2)(B).
[2] This is required of all parties, attorneys and judges under the 2015 revision to Rule 1, FRCP. So too is "speedy" and "just."

Exclusive Use, Occupancy Standard (Continued from page 12)

of the parties. See *Blumenfeld v. Blumenfeld*, 46 N.Y.S.2d 63 (2nd Dept. 1983). Recognizing the potential for an appeal, Judge Dollinger doubled down on his "marital strife" analysis as it relates to the "best interests of the children" and held:

"[T]his court determines to err on the side of reducing the children's exposure to abuse, regardless of whether it can properly and justifiably pinpoint the perpetrator at this early stage of the proceeding."

While there were other extenuating factors that Judge Dollinger relied on in rendering his decision, he emphasized that marital strife should be the standard for exclusive use when litigants are residing together. In taking his analysis a step further, he explained that the impact that marital strife has on children residing in the house is paramount:

"In the face of all of these complications, this court must implement New York's 'zero tolerance' policy on domestic violence in all its forms. The current standard for granting exclusive use or possession — safety of persons or property — is cast in the language and images of the 1970s and even unfortunately implies that "persons" and "property" have equivalent weight to the emotional security of children."

By supplanting the "safety of persons" test with the "marital strife" standard, Justice Dollinger erased the antiquated need for physical abuse as a condition precedent and replaced it with a standard that safeguards the emotional well-being of children in the hopes that they will not be caught in the harmful wake created by their parents.

Note: Michael F. LoFrumento is a partner at Barnes, Catterson, LoFrumento & Barnes, LLP with offices in Garden City, Melville and Manhattan and practices matrimonial and family law. He can be reached at MFL@BCLBLAWGROUP.COM or (516) 222-6500.

Thou Shalt Not Hold (Continued from page 21)

of his in-kind contribution of other property to the partnership, the distribution will be treated as a taxable event as to the contributor-partner. IRC Sec. 737.

In addition, the so-called "disguised sale" rules may cause a distribution of RP to be treated as a sale of the property; for example, where the partnership encumbers the RP with a mortgage (a "non-qualified liability") just before distributing the RP to the partner who assumes or takes subject to the mortgage. Treas. Reg. Sec. 1.707-5.

Even where the disguised sale rules do not apply, a distribution of RP may be treated, for tax purposes, as including a cash component where the distributee partner is "relieved" of an amount of partnership debt that is greater than the amount of debt encumbering the RP. Treas. Reg. Sec. 1.752-1.

"Choose wisely you must" – Yoda

The foregoing represents a simple outline of the tax consequences that must be considered before a taxpayer decides to acquire or place RP in a corporation or in a partnership.

There may be other, non-tax, considerations that also have to be factored into the taxpayer's thinking, and that may even outweigh the tax benefits.

All-in-all, however, a closely held partnership is a much more tax efficient vehicle than a corporation for holding, operating, and disposing of real property.

Yes, some of the tax rules applicable to partnerships are complicated, but that should not be the decisive factor. Indeed, with proper planning, these rules can be negotiated without adverse effects, and may even be turned to one's advantage.

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

Bench Briefs (Continued from page 4)

The court noted, that in some cases, courts have exercised its discretion to allow a foreclosing plaintiff not to sue the personal representative of the estate of a deceased mortgagor, who died intestate and against whom no deficiency judgment was sought, as a necessary party to a mortgage foreclosure action, instead allowing the action to be commenced or continued against the distributees of the intestate mortgagor. Here, it was unclear from the papers submitted whether plaintiff waived its right to seek a deficiency judgment against Christy Ann Plock, and whether Ms. Plock died testate or intestate. The court concluded that those factors were critical to establishing whether plaintiff may proceed against the distributes of the decedent or must serve the personal representative of the estate.

As to the specific relief requested, service by publication upon "the heirs," the court found that insofar as plaintiff had not yet attempted service on these individuals, plaintiff had failed to prove to the satisfaction of the court that other methods of service were impracticable and could not be made by due diligence. Additionally, the court stated that it appeared that the proper manner to proceed with the action was to make a formal inquiry of Suffolk County Surrogate's Court. And if no will or estate had been filed, to make an application for an administration proceeding and if necessary, the appointment of the Public Administrator in the Suffolk County Surrogate's Court. The court advised that it would not usurp the authority of the Surrogate's Court in a matter which was clearly within its jurisdiction. Accordingly, the motion was denied without prejudice as to renewal as to proper papers.

Motion for an order pursuant to CPLR §3101(a) directing that its examination before trial be held by video conference from its principal place of business in Buffalo, New York, rather than in Suffolk County denied; arguments essentially amounted to matters of inconvenience and imposition upon the time and responsibilities of the company president.

In *Linda May Mazeau, as the Executrix of the Estate of Raymond Higgins, deceased v. The Smithtown Special Library District, Rubberform recycled Products LLC, BBS Architect PC, BBS Architects Landscape Architects and Engineers PC, Roger Peter Smith, TG Nickel & Associates; LLC, TG Nickel Construction Group, LLC, TG Nickel Consulting, LTD, LKRK Enterprises LLC, R. Sail Van Nostrand, Pioneer Ashalt Paving, Contractors, LLC, Pioneer Ashalt Paving, Inc. and Gordon L. Seaman, Inc.,* Index No.: 25121/2013, decided on August 24, 2017, the court denied the motion by defendant, Rubberform Recycled Products LLC for an order pursuant to CPLR §3101(a). It directed that its examination before trial be held by video conference from its principal place of business in Buffalo, New York, rather than in Suffolk County, as agreed to by the parties in a so-ordered stipulation.

The court noted that depositions taken by video conferencing are governed by CPLR §3113(d), which provides in pertinent part, that "parties may stipulate that a deposition be taken by telephone or other remote electronic means and that a party may participate electronically." By its plain language, the court stated, this provision is an optional one, based upon the agreement of the parties. Since three defendants had not indicated a willingness to stipulate to such an arrangement, Rubberform had, therefore, relied on the argument that requiring its president to travel to Suffolk County would cause undue hardship to the company and its president.

In denying the motion, the court reasoned that Rubberform's arguments essentially amounted to matters of inconvenience and imposition upon the time and responsibilities of the company president. Consequently, the motion was denied.

Motion for leave to enter a default judgment denied; no proof of facts.

In *Gina Novack-Shapiro v. Walgreen Co., Image by J & K, LLC and First Solution Maintenance, Inc.*, Index No.: 9996/2015, decided on May 1, 2017, the court denied the motion for leave to enter a default judgment against defendant, First Solution Maintenance, Inc.

In denying the motion, the court concluded that there was no proof of the facts constituting the claim by one with personal knowledge before the court. Moreover, the court stated that the plaintiff failed to allege sufficient facts to allow the court to ascertain whether she had a viable negligence claim against First Solution Maintenance, Inc., as the amended complaint did not contain an allegation as to what caused her to fall at the subject location.

The court also stated that the affirmation in good faith from plaintiff's counsel contained no information whatsoever; reference was made to "these efforts" but such efforts were nowhere detailed. Accordingly, the motion was denied.

Honorable Denise F. Molia

Motion to dismiss complaint granted; plaintiff, without explanation or excuse, failed to attend the orthopedic independent medical examination scheduled; self-executing prior order.

In *Ana G. Martinez v. Steven Davilla, Patricia Ryan, and Robert Ryan,* Index No.: 1853/2014, decided on May 16, 2017, the court granted the motion of the defendants to dismiss the complaint.

The court noted that a prior January 19, 2017 court order directed that on or before March 24, 2017, the plaintiff was directed to appear for and submit to an orthopedic independent medical examination with physicians previously selected by defendant for such examinations. In the event plaintiff failed to attend either of these examinations at the next scheduled date, the complaint was to be dismissed. The order contained a provision wherein, it was self-executing.

By defendants' undisputed representation at the compliance conference, the court was advised that the plaintiff, without explanation or excuse, failed to attend the orthopedic independent medical examination scheduled. Accordingly, pursuant to the directive of the self-executing prior order, the complaint was dismissed.

Honorable David T. Reilly

Motion for default judgment granted; summons and complaint properly served; plaintiff submitted sufficient proof to enable claim is viable; excuse proffered for delay in responding unreasonable.

In *Thomas Desmond and Kathleen Carney v. Eugenia O'Connor, Jeremiah T. Desmond, Richard W. Desmond, Mary Howard, Nationstar Mortgage LLC, Bank of America, Bank of New York Mellon,* Index No.:4080/2016, decided on August 17, 2017, the court granted plaintiffs' application for an order directing entry of judgment in their favor pursuant to CPLR § 3215(a).

In granting the application, the court noted that plaintiffs met their burden by submitting Affidavits of Service attesting to the fact that the defendant Desmond was properly served on no less than two occasions with the Summons and Complaint. In addition, to demonstrate the facts constituting the claim the movant need only submit sufficient proof to enable a court to determine if a claim is viable.

The court examined the complaint and determined that a viable cause of action does exist. To oppose a motion for a default judgment based upon failure to appear or timely serve an answer, defendant must demonstrate a reasonable excuse for his delay and the existence of a potentially meritorious defense. Here, the only excuse proffered was that the defendant was unaware of the legal process and confused and disappointed when he read the complaint. The court continued and noted that it was telling, however, in the defendant's admission that he is a defendant in a companion action and has employed the services of a law library which has been a guide and source for the legal forms that he filed. Under the circumstances, the court found the defendant's excuse for failing to timely respond to be unreasonable.

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

Note: Elaine Colavito graduated from Touro Law Center in 2007 in the top 6% of her class. She is an associate at Sahn Ward Coschignano, PLLC in Uniondale. Ms. Colavito concentrates her practice in matrimonial and family law, civil litigation and immigration matters.

Raise the Age! *(Continued from page 12)*

tober 1, 2019) called "Adolescent Offenders"(AO's), while a juvenile offender (JO) remains a person who, while 13, 14 or 15 years old committed at least one felony listed in the Penal Law 10.00 (18). These crimes are both age dependent and crime dependent.

Creation of a Youth Part

Under RTA, a Supreme Court/County Court Youth Part staffed by a Family Court Judge will hear felonies committed by AO's (and any misdemeanor charges as part of the same criminal transaction) as well as JO's and Non JO felony cases and misdemeanors charged within the same criminal transaction. Local criminal courts will retain jurisdiction over vehicle and traffic law misdemeanors such as DWIs, Reckless Driving, and traffic infractions as well as violations committed while a person was 16 or 17 years of age if they are the sole charge(s).

Family Court

Under RTA, Family Court will hear misdemeanor cases (and any non-vehicle and traffic violations) as part of the same criminal transaction as the misdemeanor case committed by a person when they were 16 years old (effective 10/1/18) and 17 (effective 10/1/19) if not diverted by Probation. Family Court will also continue to hear all other juvenile delinquency cases where a person, who while under the age of 17 and at least 7 years of age committed an act, constituting a misdemeanor or felony.

Next Month — Determining which AO cases will be removed to the Family Court; arraignment of an AO or JO; detention and sentencing; diversion, rules for correctional facilities and more.

Note: Renée Pardo is a Principal Assistant County Attorney for Suffolk County and a Suffolk Criminal Bar Association board member. She handles abuse, neglect, and juvenile delinquency cases in Family Court. Prior to her appointment, Renée was in practice handling primarily criminal cases and was a bilingual 18b attorney. She has served as an Assistant District Attorney in Suffolk County and Tarrant County Texas.

Suffolk County Drug Treatment Court *(Continued from page 5)*

will impose the jail sentence that was agreed upon and made a part of the Drug Court Contract.

In the 19 years that the Suffolk County Drug Court has been in existence, of the participants who took a plea and were admitted into the program during this period 62 percent successfully graduated, 36 percent were terminated unsuccessfully, 2 percent were otherwise removed from the program (died, transferred to another part, etc.) and the remainders were still actively participating[4].

The Drug Treatment Court works. With more than 60 percent of people arrested testing positive for drug use, half of all inmates clinically addicted and a majority of drug abusers at risk of committing another crime once they get out of jail, the results of this Drug Court and the Drug Court all over this state are clear. Fully three-quarters of drug court graduates are able to avoid re-arrest for at least two years after the program. This program can be effective. It can help turn lives around, rebuild relationships, reunite families, help communities feel safer and more secure and make lives whole again.

Note: Derrick J. Robinson, an Acting County Court Judge, presides over the Suffolk County Drug Court and the Suffolk County Mental Health Court. Prior to the County Court appointment, he was and is a District Court Judge. Before becoming a judge, he was appointed to the New York State, Office of the Attorney General, as an Assistant Attorney General in the Litigation Bureau. Judge Robinson is the Suffolk County Bar Association Treasurer. As an active member of the SCBA, he has served as a member of the Board of Directors, Chair of its Judicial Screening Committee, the Bench and Bar Committee, and Nominating Committee.

[1]Cohen, S., & Filiano, D., (2017), *Interim Evaluation of Suffolk County Drug Court Expansion Project,* Stony Brook Research & Evaluation Consulting, LLC, p. 2
[2] Id at pg 4
[3]Id.
[4]Id at pg 6

Human Trafficking Court *(Continued from page 6)*

the hope that our resource bases increase and we can help more defendants with their individual problems.

Our court does not require these defendants to plead up front and as the judge in this part it is left to my discretion as to handle each case. If a defendant fails to abide by the rules of her release albeit attending the classes and following the treatment plan as well as keeping in contact with their advocate, I reserve the right to place bail and incarcerate a defendant when necessary to ensure that they understand that to continue in this program requires them to commit to compliance. In the event either I or the defendant feel they are no longer suited to continue in this court they will be sent to a regular part where they will no longer be afforded the more beneficial sentencing and will more than likely be sentenced to jail or probation.

Unlike the other treatment courts like Mental Health, Veteran's Court and Drug Court, Human Trafficking opens the advantage of a treatment court to a broad spectrum of society that has been previously overlooked in our population. Those individuals exploited because of their sex and *for* their sex have been thrust into a life cycle of abuse and poverty with no way out. We in the criminal justice system have a responsibility to at least attempt to provide these defendants with resources to help them extricate themselves from this cycle of abuse.

Perhaps we should consider changing the name to Human Treatment Intervention.

Note: Judge Janine Barbera-Dalli, a Suffolk County Acting County Court Judge, was elected to the Suffolk County District Court in November 2012 and sits in the 1st District Court in Central Islip. She has been an adjunct Professor of Paralegal Studies at New York Institute of Technology and is a licensed instructor of New York Real Estate Sales and Brokers Courses. She is a member of the New York Bar Association, Suffolk County Bar Association, The Woman's Bar Association and the Divorce Mediation Association.

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Dean's Club Initiative

As the educational arm of the Suffolk County Bar Association, the Suffolk Academy of Law seeks, first, to improve the quality of legal services to the public by providing a comprehensive program of continuing legal education that will help practicing attorneys, members of the judiciary, and legal paraprofessionals to strengthen their knowledge and competency and, second, to enhance the public's awareness of rights and responsibilities under the law by making law-related education available to the public through SCBA initiatives and through programs sponsored by schools, libraries and other public service organizations.

The Dean's Club members are the Academy's most exclusive and dedicated advocates. These individuals have made a tax deductible donation to the Academy and have given generously of their time and talent to bring quality programming to our membership in support of our mission. This special group of loyal donors is the foundation of support for the Academy. We invite you to join this exceptional group and take advantage of the following opportunities:

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- Acknowledgment for your generous gift on all marketing flyers
- Entrance to all CLE programs at no charge.

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- Special recognition in The Suffolk Lawyer publication
- Special recognition on Academy letterhead
- Our gift acknowledging your generous contribution at the Recognition Breakfast
- Your name as Benefactor of all Suffolk Academy of Law Programs during the academic year
- Acknowledgment for your generous gift on all marketing flyers
- Entrance to all CLE programs at no charge
- Suffolk County Bar Association membership upgrade to Sustaining Membership for the remainder of the Bar Association's membership year
- Guaranteed Seating at all CLE programs
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- A complimentary invitation for you and a guest to attend the Dean's Roundtable Dinner
- Admission for you and a guest at no charge to the Annual Suffolk County Bar Association Installation Dinner and the Annual Suffolk County Bar Association Judiciary Night
- Complimentary dinner at the Suffolk County Bar Association Annual Meeting Prominent recognition in the Annual SCBA Installation Dinner Journal

The Suffolk Academy of Law is a volunteer led, 501 c3 non-profit organization and 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. Your generous donation is deductible according to IRS regulations.

The Academy of Law would like to thank the following sponsors for their generous support.

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Trial Practicum

Improve Your Courtroom Confidence in Civil & Criminal Cases

Featuring

- Lectures by Top Litigators
- Mentoring Workshops and Feedback
- Mock Trials allow you to practice what you have learned

Enroll in the FULL PRACTICUM (lectures, mentoring workshops and mock trials) or INDIVIDUAL Sessions

Program Format

The Academy's Trial Practicum Series is designed to meet the needs of a wide range of practitioners, from those who seek a hands-on experience to those who want to pick up tips on selected aspects of the trial process. A faculty of respected judges and experienced trial attorneys will impart strategic advice on trial procedure, evidence, and the art of persuasion. Both civil and criminal trials are covered. Trials will take place the week of May 21, 2018.

The Syllabus

Lecture 1: Case Theory, Jury Selection, & Opening Statements
Tuesday, February 6, 2018
5:30 p.m.–9:15 p.m.
MCLE: 3.0 Skills; 1.0 Professional Practice

This lecture is your first step to learn how to formulate a trial theory. Gain insights into questioning and selecting jurors, including bases for challenges. Garner tips for dynamite openings that sets the stage for what follows.
Mentoring Workshop 1:
Tuesday, February 13, 2018
6:00 p.m. - 9:00 p.m.
Faculty: Ted Rosenberg, William Ferris, Hon. J. Efman, Steve Kunken, A. Craig Purcell

Lecture 2: Evidence
Wednesday, February 28, 2018
6:00 p.m. – 9:00 p.m.
MCLE: 1.5 Skills; 1.5 Professional Practice

Gain valuable insights into foundation, relevance, leading questions, witness recall, impeachment by prior inconsistent statement, hearsay, exhibits and much more…
Mentoring Workshop 2: Tuesday, March 6, 2018, 6:00 p.m. – 9:00 p.m.
Faculty: William Ferris, Hon. Mark D. Cohen, Brian Doyle

Lecture 3: Direct Examination
Tuesday, March 20, 2018
6:00 p.m. – 9:00 p.m.
MCLE: 3.0 Skills

Gain pointers for conducting direct and re-direct examinations smoothly and effectively; handling hostile witnesses; qualifying and examining experts.
Mentoring Workshop 3: Tuesday, March 27, 2018, 6:00 p.m. – 9:00 p.m.
Faculty: Mike Colavecchio, Hon. Barbara R. Kahn, Steve Wilutis

Lecture 4: Cross-Examination
Tuesday, April 10, 2018
6:00 p.m. – 9:00 p.m.
MCLE: 3.0 Skills

Improve your ability to decide when to cross–examine, to establish the purpose of the cross-examination, to structure the cross-examination, to elicit favorable testimony, to discredit unfavorable testimony and when to impeach a witness.
Mentoring Workshop: Tuesday, April 17, 2018, 6:00 p.m. – 9:00 p.m.
Faculty: Michael Levine, Hon. Peter H. Mayer, Hon. John B. Collins

Lecture 5: Closing Arguments
Tuesday, May 8, 2018
5:30 p.m. – 9:15 p.m.
MCLE: 2.0 Skills; 1.0 Professional Practice; 1.0 Ethics

Garner advice for arguing your theory of the case, organizing an effective argument, and an ethics presentation on ineffectiveness of counsel charges.
Mentoring Workshop: Tuesday, May 15, 2018, 6:00 p.m. – 9:00 p.m.
Faculty: Harvey Besunder, Alan Clark, Richard Haley, Hon. Emily Pines, Marvin Salenger

REGISTRATION:

Name:_____

Company:_____

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___Full Practicum (lectures, mentoring, mock trial and books)
SCBA member - $575 Non-Member Attorney - $625 Student - $500
___Five-Lecture Series
SCBA Member - $375 Non-Member Attorney - $450 Student - $200
___Individual Lectures
SCBA Members - $90 Non-Member Attorney - $120 Student - $50

Please place a check mark for the individual lectures you would like to attend:
___Lecture 1 – Case Theory, Jury Selection & Opening Statements – Tuesday, February 6, 2018; 5:30-9:15 p.m.
___Lecture 2 – Evidence – Wednesday, February 28, 2018; 6:00 – 9:00 p.m.
___Lecture 3 – Direct Examination – Tuesday, March 20, 2018; 6:00 – 9:00 p.m.
___Lecture 4 – Cross-Examination – Tuesday, April 10, 2018; 6:00 – 9:00 p.m.
___Lecture 5 – Trial Arguments – Tuesday, May 8, 2018; 5:30 – 9:15 p.m.

Book Bonus: Lecture registrants may purchase the following publications at a discount. Please pre –order as quantities are limited.
___Mauet's Trial Techniques & Trials, Tenth Edition - $149
___Objections at Trial, Seventh Edition (NITA) - $39

METHOD OF PAYMENT:
___Cash
___Check (payable to Suffolk Academy of Law)
___Credit Card: https://www.scba.org/salregform.php

SUFFOLK ACADEMY OF LAW

OF THE SUFFOLK COUNTY BAR ASSOCIATION

The Suffolk Academy of Law, the educational arm of the Suffolk County Bar Association, provides a comprehensive curriculum of continuing legal education courses. Programs listed in this issue are some of those that will be presented during the Fall of 2017.

REAL TIME WEBCASTS: Many programs are available as both in-person seminars and as real-time webcasts. To determine if a program will be webcast, please check the calendar on the SCBA website (www.scba.org)**.**
RECORDINGS: Webcast programs are available approximately one-week after the live program, as online video replays, 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.
REMINDERS: Cancellations for a full refund must be received within 24 hours before the course. You will be able to receive a credit for your **next live program up to three months** after the scheduled program.

Program Locations: Most, but not all, programs are held at the SCBA Center; be sure to check the website 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 form with your payment. Sign up online at: https://www.scba.org/salregform.php

Refunds:
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.

NOTEWORTHY –
If you have paid for a live program and were not able to attend, you will be able to receive a credit for your **next live program up to three months** after the scheduled program.
The Academy will no longer offer a discount for on-line pre-registration beginning June 1, 2017.

We invite you to plan a course or suggest a topic for CLE credit. Contact Dean, Patrick McCormick or Executive Director, Cynthia L. Doerler at cynthia@scba.org.

Materials for all Academy programs are provided online and are available for download in PDF format prior to or at the time of the program. Printed materials are available for an additional charge. Register on-line at: https://www.scba.org/salregform.php.

December 2017 CLE Programs

Lunch and Learn

Power Up Your Power of Attorney

This crash course will teach you about modifications and execution of a Power of Attorney for your clients who are seniors. Non-elder law attorneys and new attorneys needing to draft a Power of Attorney will find this CLE effective for facilitating Medicaid and Estate planning documents.
- Guided tour through the Statutory Short Form of POA, with elder law modifications
- Learn which POA modifications are necessary or useful for Medicaid and Estate Planning
- Drafting and execution tips for the Statutory Gift Rider
- Learn practical and ethical consideration in drafting and execution of POA for seniors
- Review and critique common drafting errors

***December 5, 2017*; 12:45 p.m. – 2:00 p.m. registration at 12:30 p.m.**
Faculty: Janna Visconti, Esq., George Roach, Esq., Jay Sheryll, Esq.
Location: Central Islip Courthouse, Central Jury Room
MCLE: 1.0 CLE Credit – 1.0 Professional Practice [Transitional or Non-Transitional]; $30 SCBA members; $45 non-members

Evening Program

The Nuts and Bolts of Open and Closed Adoptions

The program will cover:
- Nuts & Bolts of Adoptions
- Basic Forms and petitions
- Pre and post adoption agreements
- Agency, private and international adoptions
- Interstate adoptions
- Ethical considerations
- Post adoption issues
- National registry
- Health issues
- Open and closed adoptions

***December 5, 2017*; 5:30 p.m. – 8:30 p.m. registration at 5:00 p.m.**
Faculty: **Hon. James F. Quinn, Acting Supreme Court Justice, Hon. Anthony S. Senft, Jr., Acting Family Court Judge, Tarsha C. Smith, Esq. Steven L. Sarisohn, Esq., Christine Olsen, Suffolk County Family Court, Adoptions Clerk**
Location: Bar Center, Hauppauge, NY
MCLE: 3.0 CLE Credit – 2.5 Skills; .5 Ethics [Transitional or Non-Transitional]; $90 SCBA members; $120 non-members

Lunch and Learn at the Courthouse

Admitting Social Media Materials – Recent Developments in the Law of Evidence

Why is social media posting important to your practice? If you are a lawyer who wants to admit or exclude social media postings in Matrimonial, Custody, Criminal or Guardianship proceedings or any other case, you must attend this recent developments Lunch and Learn that will provide you with information about:
- Recent Court of Appeals and Second Department case Law including People v Price
- The crossover and differences between authentication of photographs and social media postings and their contents
- The intersection of new Court of Appeals cases on adoptive admissions (People v Vining) and social media authentication

***December 6, 2017*; 12:30 p.m. – 2:00 p.m. registration at 12:15 p.m.**
Faculty: Harry Tilis, Esq.
Location: Central Islip Courthouse, Central Jury Room
MCLE: 1.5 CLE Credit – 1.5 Professional Practice [Transitional or Non-Transitional]; $30 SCBA members; $45 non-members

Interactive Program

Firearms: A Practice and Practical Overview

This is the second part of the two-part program intended to be a practical component with an opportunity for participants to handle a firearm and fire a weapon at Dark Storm Industries for a ***live firing experience!***
There will be an additional/separate cost for the range component (ammunition and range costs).
NOTE: Participation in Part 1 is a pre-requisite.
***December 6, 2017*; Part 2 –** 5:30 p.m. – 8:30 p.m. registration at 5:00 p.m.
Faculty: Len Badia, Esq., Marianne Rantala, Esq., Edward Newman – Dark Storm Industries
Location: Dark Storm Industries, 4116 Sunrise Hwy., Oakdale
MCLE: 1.5 CLE Credit – 1.5 Professional Practice [Transitional or Non-Transitional]; $95 SCBA members*; $125 non-members*
*Includes ammunition and range fees.

Surrogate Court Committee Program

Tax Payment Clauses

***December 7, 2017*; –** 6:00 p.m. – 7:00 p.m. registration at 5:30 p.m.
Faculty: Michael Ryan, Esq.
Location: Bar Center, Hauppauge
MCLE: 1.0 CLE Credit – 1.0 Professional Practice [Transitional or Non-Transitional]; $30 SCBA members; $45 non-members

All – Day Program

Article 81Guardianship Training

Guardians and Court Evaluators who are not attorneys may also be certified. In addition, law students who will be admitted within two years of the program date may be certified as Attorney for the Alleged Incapacitated Person, upon their admission.
***December 12, 2017*; –** 9:00 a.m. – 4:00 p.m. registration at 8:30 a.m.
Faculty: Hon Richard I. Horowitz, Sheryl Randazzo, Esq., Keri Mahoney, Esq., Michele Gartner, Esq., Richard Weinblatt, Esq., Vincent Messina, Esq., Jeffrey Grabowski, Esq.
Location: Bar Center, Hauppauge
MCLE: 7.0 CLE Credit – 6.0 Professional Practice 1.0 Ethics [Transitional or Non-Transitional]; $159 SCBA members; $189 non-members; SCBA Student Member - $50; Guardian - $50; Legal Assistant - $50

Evening Program

Representing Individuals with Disabilities

This program is designed to assist attorneys in understanding the possible presence of an intellectual and/or developmental disability in someone involved in the legal system and the type of resources available to help them. There will be discussions on the special challenges, including ethical considerations and communication tips in representing individuals with developmental disabilities.

***December 14, 2017*; –** 5:30 p.m. – 8:30 p.m. registration at 5:00 p.m.
Faculty: Anthony M. LaPinta, Esq., Reynolds, Caronia, Gianelli & LaPinta, Hon. Richard I. Horowitz, Suffolk County Supreme Court Guy Arcidiacono, Deputy Bureau Chief, Suffolk County District Attorney's Office; Deborah J. Chard-Wierschem, Ph.D., NYS OPWDD; Marybeth Anderson, Esq. LMSW, Urban Justice Center Mental Health Project; Dr. Kate Termini, a forensic neuro-psychologist
Location: Bar Center, Hauppauge
MCLE: 3.0 CLE Credit – 2.5 Skills; .5 Ethics [Transitional or Non-Transitional]; $90 SCBA members; $120 non-members;

(Continued on next page)

Lunch & Learn

Excel Essentials for Lawyers

Microsoft Excel is an important tool for the progressive legal practice. Excel can assist in supervising document reviews, calculating damages, and managing client information. In this interactive program, Ben Kusmin, a commercial litigator and the founder of Excel Esquire, will demonstrate the most important features of Microsoft Excel using concrete examples and realistic data. Attendees will have the option to download the data used in the presentation to follow along on their own electronic device.

***December 15, 2017*; –** 12:30 p.m. – 2:00 p.m. registration at 12:00 noon.
Faculty: Ben J. Kusmin, Esq., Founder, Excel Esquire

Location: **Bar Center, Hauppauge**
MCLE: 1.5 CLE Credit – 1.5 Practice Management or Skills [Transitional or Non-Transitional]; $45 SCBA members; $60 non-members;

2017 Annual School Law Conference

Whether you represent students or school districts, or whether you are an education professional, school administrator or a board member, this program features in-depth practical discussions of the legal and regulatory issues affecting schools and school districts.

On Friday, December 8th, more than 160 professionals gathered at the Nassau County Bar Association in Mineola to discuss issues such as –

- The potential demise of the agency fee and its impact on management and unions,
- Special education update: DASA Bullying,
- Board members' free speech rights and conflicts of interest,
- Mock 3020a proceeding and legal analysis of the standards for disciplining staff and students for exercising their freedom of expression,
- Negotiating health insurance benefits for active and retired employees
- Evolving issues in athletics and extracurricular activities: Concussions and clearance, mixed competition appeals and transgender issues

This informative program is presented by the Education Law Committees of the Suffolk and Nassau County Bar Associations in partnership with the Suffolk and Nassau Academies of Law.

The Suffolk Academy of Law would like to thank Conference Chairs – John P. Sheahan, Esq., and Candace J. Gomez, Esq., from the NCBA Education Law Committee and Carrie Anne Tondo, Esq., & Michael G. Vigliotta, Esq., Co-Chairs of the SCBA Education Law Committee for their expertise in this specialized area of law and the energy behind the creation of an interesting agenda for the conference.

A very special thank you to PrintingHouse Press APPELLATE SERVICES PROVIDER for printing the Suffolk Academy of Law Materials.

Academy of Law

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Bridge The Gap – New Format!

Mark your calendar for these dates to complete all of your required credits.

Monday, January 29, 2018; 5:30 – 9:30 p.m.
Wednesday, January 31, 2018; 5:30 – 9:30 p.m.
Monday, February 5, 2018; 5:30 – 9:30 p.m.
Wednesday, February 7, 2018; 5:30 – 9:30 p.m.

The Suffolk Academy of Law is pleased to once again offer newly admitted attorneys an opportunity to earn all of the credits needed to satisfy New York State requirements for continuing education credits. These transitional courses are designed to help newly admitted attorneys develop a foundation in the practical skills, techniques and procedures that are essential to the practice of law. Experienced attorneys who have an interest in other areas of practice can also benefit from this program by learning practical information from skilled and experienced practitioners.

This top-notch continuing legal education program offers 16.0 total credits. New York State requires newly admitted attorneys to complete at least 16 transitional CLE credit hours in ***each*** of the first two years of admission to the Bar. The first set of 16 transitional CLE credit hours must be completed by the first anniversary of admission to the Bar, in the designated categories of credit. The second set of 16 transitional CLE credit hours must be completed between the first and second anniversaries. To receive skills and ethics credit, newly admitted attorneys must take accredited transitional CLE courses in traditional live classroom settings, or through attendance at fully interactive video conference. All four sessions will be recorded, webcast and available for purchase on-demand or DVD.

The Academy will offer special pricing for newly admitted attorneys who sign up for all four sessions - $240 for all four sessions and $120 for each individual session. All sessions take place at the Suffolk County Bar Association located at 560 Wheeler Road in Hauppauge, NY.

Note: If you have graduated and haven't yet been admitted to the New York State Bar and don't have a New York attorney registration number, you are still able to receive New York State CLE credit as long as the program is completed between the date of law school graduation and the date of admission to the New York Bar.