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February 2014

INSIDE...
FEBRUARY 2014
FOCUS ON
TECHNOLOGY

Historic Installation of Judges

By Sarah Jane LaCova

Another chapter was added to Suffolk County's judicial history on Monday, January 13, 2014 when the Bar Association sponsored its annual Judicial Swearing-In and Robing Ceremony at Touro Law Center in Central Islip. A standing room crowd of well-wishers of friends, colleagues, and family members attended.

The justices, judges, and members of the Executive Committee and Board of Directors and Touro's Dean Patricia Salkin filed in behind Suffolk County's Court Ceremonial Unit who presented the colors and formally stood at watch throughout the proceedings.

Photo by Barry Smolowitz

At the Robing Ceremony were, from left, SCBA President Elect William T. Ferris, III, re-elected District Court Judges Chris Ann Kelley and Gaetan B. Lozito, re-elected Supreme Court Justice Arthur G Pitts, Presiding Justice C. Randall Hinrichs, newly elected Family Court Judge Deborah Poulos, newly elected District Court Judge Karen Wilutis, newly elected Supreme Court Justice David T. Reilly and newly elected District Court Judge Carl Joseph Copertino.

President Elect William T. Ferris opened the ceremonies noting the occasion, is a high point of the SCBA year, symbolizing the relationship of the bench and bar in Suffolk County. Following his welcome, he introduced Touro's Dean Patricia Salkin who congratulated the newly elected and re-elected justices and judges and spoke briefly about some of Touro's new initiatives.

Suffolk's District Administrative Judge the Honorable C. Randall Hinrichs presided over the ceremony and thanked the Bar Association for continuing the tradition of presenting the newly elected and re-elected justices and judges with robes and mementos every year. He also thanked Dean Patricia Salkin for allowing the Bar Association the use of Touro's beautiful auditorium, a perfect venue for such a momentous occasion. Judge Hinrichs said that an independent and honorable judiciary is indispensable to justice in our society. He said that an independent judiciary has never been more important than it is today in 2014 as we face critical legal issues in our changing

(Continued on page 19)

PRESIDENT'S MESSAGE

The Results Are Being Tabulated

Dennis R. Chase

By Dennis R. Chase

As indicated previously, *despite* the New York State Bar Association's ("NYSBA") nine-year opposition to mandatory reporting of pro bono, effective May 1, 2013, a new rule requires attorneys to report their voluntary pro bono services and financial contributions to organizations providing civil legal services on their biennial registration forms. What is the leadership of the Suffolk County Bar Association ("SCBA") doing for its members you may ask yourself?

Earlier this month, the SCBA forwarded to the leaders of close to 200 bar associations across the state (including all 62 county bar associations and other special interest bar associations representing more than one hundred and fifty thousand members) the following email seeking to elicit each respective bar association's position on the issue:

> As you may be are aware, effective May 1st, 2013, the Administrative Board of the Courts passed a rule requiring attorneys to report on their biennial registration form the number of hours of pro bono service performed and the monetary amount contributed to organizations that perform pro bono service. In June 2013, David Schraver, President of the NYSBA, wrote to Chief Judge Jonathan Lippman objecting to the mandatory reporting by attorneys. The SCBA is opposed to the mandatory reporting of pro bono service. We believe this rule should be eliminated or, at the very least changed, and also believe that presenting a unified front provides the best opportunity to effect change.

(Continued on page 26)

BAR EVENTS

Academy Happenings

Elder Law - with George Roach
Friday, Feb. 14, from 2 to 5 p.m.
Mr. Roach will cover developments in Medicare, Medicaid, estate planning, powers of attorney, nursing home placement, health care decisions and more.

Landlord Tenant - with Hon. Stephen Ukeiley and experienced faculty
Tuesday, Feb. 25, from 6 to 9 p.m.
Presenters will cover developments in commercial and residential properties, housing discrimination, predicate notice, settlement and negotiation strategies and more.

Matrimonial - with Vincent Stempel
Monday, March 10, from 6 to 9 p.m.
Mr. Stempel will cover decisional and statutory developments affecting equitable distribution, maintenance, child support, custody and more.

Bankptcy Update - with Hon. Alan Trust, Hon. Robert Grossman, Richard Stern, and others
Tuesday, March 11, from 6 to 9 p.m.
The focus will be on trends affecting bankruptcy practice in the Eastern District of New York.

FOCUS ON
TECHNOLOGY
SPECIAL EDITION

Suffolk County Bar Association

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Board of Directors 2013-2014

SCBA Calendar

OF ASSOCIATION MEETINGS AND EVENTS

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.

JANUARY 2014

17 Friday	Labor & Employment Law, 8:00 a.m., Board Room.
23 Thursday	Meet - Greet & Mingle - A complimentary cocktail reception for members, 6:00 p.m., Polish Hall, 214 Marcy Avenue, Riverhead. Registration is a must! Call or e-mail marion@scba.org.
27 Monday	Board of Directors, 5:30 p.m., Board Room.

FEBRUARY 2014

3 Monday	Executive Committee, 5:30 p.m., Board Room.
4 Tuesday	Supreme Court, 6:00 p.m., Board Room.
5 Wednesday	Appellate Practice, 5:30 p.m., E.B.T. Room.
10 Monday	Bench Bar, 6:00 p.m., Board Room Surrogate Court, 6:00 p.m., E.B.T. Room.
11 Tuesday	Education Law, 12:30 p.m., Board Room.
14 Friday	Labor & Employment Law, 8:30 a.m., Board Room.
19 Wednesday	Elder Law & Estate Planning , 12:15 p.m., Great Hall. Professional Ethics & Civility, 6:00 p.m., Board Room.
24 Monday	Board of Directors, 5:30 p.m., Board Room.
27 Thursday	Leadership Development, 5:30 p.m., Board Room.

MARCH 2014

3 Monday	Executive Committee, 5:30 p.m., Board Room.
5 Wednesday	Appellate Practice, 5:30 p.m., Board Room.
10 Monday	Surrogate Court Committee, 6:00 p.m., Board Room.
12 Wednesday	Elder law & Estate Planning, 12:15 p.m., Great Hall.
13 Thursday	Leadership Development, 5:30 p.m., Board Room.
14 Friday	Labor & Employment Law, 8:00 a.m., Board Room.
19 Wednesday	Education Law, 12:15 p.m., Board Room. Professional Ethics & Civility, 6:00 p.m., Board Room.
24 Monday	Board of Directors, 5:30 p.m., Board Room.

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APRIL 2014

2 Wednesday	Appellate Practice, 5:30 p.m, Board Room.
3 Thursday	Annual Peter Sweisgood Dinner -Watermill Restaurant, Hauppauge. Further details forthcoming.
7 Monday	Executive Committee, 5:30 p.m., Board Room.
8 Tuesday	Surrogate Court, 6:00 p.m., Board Room.
11 Friday	Labor & Employment Law, 8:00 a.m., Board Room.
16 Wednesday	Elder Law & Estate Planning Committee, 12:15 p.m., Great Hall. Professional Ethics & Civility, 6:00 p.m., Board Room.
21 Monday	Board of Directors, 5:30 p.m., Board Room.

Our Mission

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

The opinions, beliefs and viewpoints expressed by the various authors and frequent contributors of The Suffolk Lawyer are theirs alone and do not necessarily reflect the opinions, beliefs and viewpoints of The Suffolk Lawyer, The Suffolk County Bar Association, the Suffolk Academy of Law, and/or any of the respective affiliations of these organizations.

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

Thomas More Group Twelve-Step Meeting

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

LAWYERS COMMITTEE HELP-LINE:
631-697-2499

THE SUFFOLK LAWYER

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Long Island Attorneys Respond to Foreclosure Crisis

By Ellen R. Krakow

Turnout was high at the December 12, 2103 Continuing Legal Education program offered by the Suffolk County Bar Association (SCBA) - "Foreclosure Training for the Suffolk County Pro Bono Foreclosure Settlement Conference Project." The aim of the Suffolk event was to both recruit and train new attorney volunteers to represent clients at settlement conferences and to offer enrichment for the project's existing volunteers. As a result of this program, underwritten by the Suffolk Pro Bono Foundation, the project added a substantial number of new volunteers to its ranks.

Barry Smolowitz, who is responsible for the concept of the original project, was pleased with the attorney participation. "This program was very important in order to keep the project's attorneys up to speed on the law and to provide instruction to new volunteers interested in helping out," Barry said.

The Suffolk County Pro Bono Foreclosure Settlement Conference Project is jointly run by the SCBA and Nassau/Suffolk Law Services, offering free legal representation to Long Island homeowners facing foreclosure. The Project's December CLE program was geared to both new recruits and the project's veteran volunteers. Speaking at the event were long-time project volunteers, attorneys Raymond Lang, Barry Lites, Eric Sackstein, and Glenn Warmuth, Project Coordinator, Barry Smolowitz, and Maria Dosso and Michael Wigutow of Nassau/Suffolk Law Services. The presenters provided instruction on the several phases of foreclosure litigation, from the commencement of the action to appeals, with particular emphasis on the settlement conference. They also described the various ways the project provides support to new volunteers, if they need assistance. With Long Island's home foreclosure rate still steadily rising and with it the demand for legal assistance, the program's organizers were extremely pleased with the turnout at the CLE event.

With Long Island's home foreclosure rate still steadily rising, the demand for legal assistance continues to grow. While nationwide the number of foreclosure filings this fall were down 34 percent from the same time last year, on Long Island the number of foreclosure filings over the same period *increased* 25 percent, according to numbers compiled by Realty Trac, (and recently reported by Newsday and Bloomberg Press.) Experts attribute Long Island's trend-bucking spike in foreclosures to the slower pace of Long Island's economy, as compared to other regions, coupled with New York's lengthy foreclosure legal process. (September 28, 2013 *Newsday*, "Rising Foreclosures Hurt Island as Nation Recovers.")

The number of foreclosure actions presently in New York State's judicial pipeline is staggering. Foreclosure cases constitute a full third of New York State Unified Court System's Supreme Court civil caseload. Statewide, between October 2012 and October 2013, over 91,500 foreclosure settlement conferences were held. In more than a third of these, homeowners appeared without counsel.

Photo by Barry Smolowitz

Many attended a recent CLE program on Foreclosure Law where they learned about available remedies for bank's failures to negotiate in good faith.

The project has successfully responded to this need for foreclosure counsel on Long Island. Since its inception in 2009, the project has assisted over 2,000 clients, through the volunteer services of approximately 200 lawyers.

Nassau/Suffolk Law Services (NSLS) administers the day to day operation of the project, and is the initial contact for potential clients. NSLS schedules the client intake and then registers appropriate clients for the project. Once referred, the client controls the degree and length of the attorney's involvement. Using an "attorney-of-the-day" system, an attorney is assigned to represent the client at the scheduled settlement conference. During the settlement conference, that attorney will negotiate with the bank, and, whenever possible, help the client obtain a loan modification to save the home. Where loan modifications are not appropriate, the attorney will help the homeowner negotiate an alternative outcome, such as deed in lieu of foreclosure.

The project's original coordinator, Mr. Smolowitz, has devoted hundreds of pro

(Continued on page 19)

Meet Your SCBA Colleague

David J. Sobel, **a solo practitioner concentrating on trial work, was exposed to law earlier than most, when he worked in high school at his cousin's personal injury law firm in Nassau County. Initially he took the job for the cash, but then he got hooked on the profession of law.**

By Laura Lane

What did you do at the law firm? I filed and did clerical work for Blume, Easton & Clark in Levittown. I continued working for them when I was in college and was drafting proceedings. That's when I realized this stuff – tort - is really cool. I could see myself doing it.

What exactly did you like about law? Law is a dynamic thing; it isn't the same day in and day out – things change. I gravitated toward personal injury. And I did very well in those types of courses in law school. I always understood it.

Once you became an attorney how did you find the profession? I'm a people person and have always liked meeting with clients. I always enjoyed hearing their side of the story. I've always enjoyed reading too. I like to read Appellate Division decisions to see how the law is changing. I enjoy explaining to a judge and the jury my client's side of the story.

Were you the first from your circle of friends to pursue law? Most of the guys I grew up with got into trouble and very few went to college.

So why didn't you go into criminal law? You'd think I would have, but criminal law never clicked with me. It isn't paper intensive like civil litigation is, which is what I do. My mother worked in a hospital as a hematologist, so I was exposed to the medical profession from her. My dad was a salesman who enjoyed schmoozing with people. Whether parents think we see things or not – we see them.

You weren't always solo. No. I came with my cousin to Suffolk to form Blume, Birzon & Sobel, which lasted for a year and a half. Then Mitch Birzon and I became partners from 1990 to 1995. I always practiced personal injury law. We were very, very busy and had a staff, associates and then we went our separate ways.

How long did you practice solo? I was solo until 2000 when I went to Smithtown when Kenneth Seidell and I formed a partnership. The practice was the same but we added municipal law too. It was interesting and new, but Ken did handle most of the municipal law stuff. We stayed together until 2009. I've been on my own ever since.

In what does your practice focus? I have developed a solo practice in all areas of litigation and trial work including personal injury defense, insurance claims, vehicular and premises liability claims. In addition, I provide representation to clients with respect to their insurance, corporate and contractual needs.

What are some of the challenges you face? It's hard to take a vacation, everyone wants me and sometimes it is hard to leave work behind and I end up bringing it home. I sometimes miss having someone to bounce off situations to, but I am very happy here in Suffolk County.

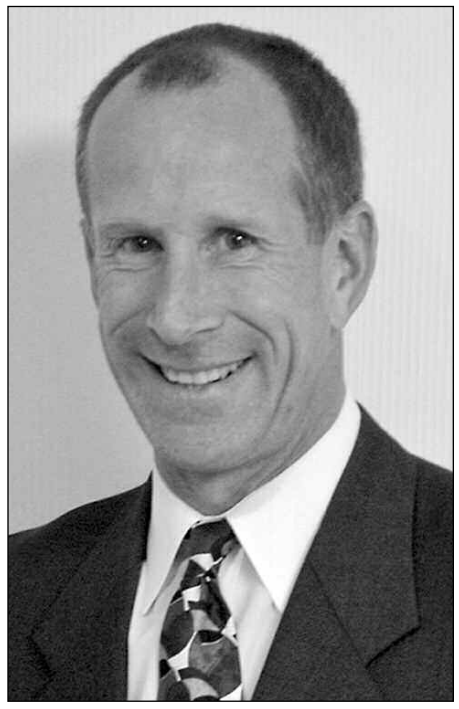
What do you like about practicing in Suffolk? I have colleagues, not adversaries. There is a mutual admiration society going on here. The spoken work is your bond. It's a small community and if you are not capable of upholding your word it gets around. It's never personal. The bench and bar are very tight.

What do you like about the bench in particular? The bench is wonderful out here and all of our judges are terrific. They treat people with respect, not like in New York City. Eighty percent of my practice is in Suffolk and the other twenty in Nassau.

When did you join the SCBA and why? In 1989 quickly after I got to Suffolk. I wanted to get involved.

How have you been involved at the SCBA? I lectured at the Academy on various ethics and no-fault insurance related subjects, was the co-chair of the Suffolk County Bar Association Professional Ethics Committee, have also been a member of the Supreme Court Committee, Grievance Committee and the Judicial Screening Committee. I'm doing the Mock Trial through the SCBA. Joining the bar gives you support to give back in the community and network.

What do you enjoy about being a member of the SCBA? My colleagues – they really are wonderful people. The guys, ten to fifteen years older than me, are extremely talented attorneys and are happy to share their knowledge. We are lucky to have the civility and collegiality we have here.



David J. Sobel

Why would you recommend others join? The young attorneys could learn from the older guys. And the Academy puts on so many great programs. There are so many opportunities to meet people, learn and interact as a member of the SCBA. The ladies who work at the SCBA from Dorothy to Janie and everyone in between are all wonderful. They have always been very helpful to me. The SCBA is very well recognized in New York State by the governor and other bar associations too. The association has a lot of influence in the state.

BENCH BRIEFS

By Elaine M. Colavito

SUFFOLK COUNTY SUPREME COURT

Honorable Joseph C. Pastoressa

Motion directing defendant to produce an additional witness for deposition granted; testimony of witness was insufficient or inadequate and there was a substantial likelihood that the proposed witness may possess information, which was material and necessary.

In *Alessandra Notarnicola v. The County of Suffolk, The Town of Brookhaven, The Town of Brookhaven Highway Department, Rosemar Contracting and Corazzini Asphalt, Inc.,* Index No.: 38097/2008, decided on October 22, 2013, the court granted plaintiff's motion directing defendant Corazzini Asphalt, Inc. to produce an additional witness for deposition. This action was for personal injuries sustained by plaintiff when she stepped on hot laid asphalt in front of her residence. Plaintiff averred that she was permitted to proceed down her block in a vehicle and that upon exiting the vehicle, she burned her feet on newly laid asphalt. Here, the defendant produced its president for deposition in connection with the action, however, plaintiff sought to depose an employee "roller operator" of the defendant who allegedly had a conversation with plaintiff immediately prior to the incident. In rendering its decision, the court noted that the plaintiff may demand the production of additional witnesses upon a showing that (1) the representative already deposed had insufficient knowledge or was otherwise inadequate, and that (2) there is a substantial likelihood that the person sought for deposition possesses information, which is material and necessary to the prosecution of the case. In granting the motion, the court found that plaintiff demonstrated that the testimony of defendant's witness was insufficient or inadequate and there was a substantial likelihood that the employee "roller operator" may possess information, which was material and necessary to the prosecution of the case.

Elaine M. Colavito

Motion to quash subpoenas granted; subpoena duces tecum may not be used for the purpose of discovery or to ascertain the existence of evidence

In *Hasene Talgat v. Ural Talgat,* Index No.: 17867/2011, decided on May 6, 2013, the court granted defendant's motion to quash the subpoenas duces tecum issued by plaintiff's attorneys on defendant's alleged bank accounts. In rendering its decision, the court noted that in general, a subpoena duces tecum may not be used for the purpose of discovery or to ascertain the existence of evidence. Rather, its purpose is to compel the production of specific documents that are relevant and material to the facts in a pending judicial proceeding. Here, the court found that the plaintiff's issuance of subpoenas duces tecum for information of the defendant's alleged bank accounts should be sought through the normal discovery process provided for in Article 31 of the CPLR, and accordingly the motion to quash said subpoenas was granted.

Honorable Arthur G. Pitts

Motion and cross-motion for leave to reargue denied; parties failed to attach a complete copy of the papers filed with the court.

In *JT Queens Carwash, Inc., and Frank Roman v. JDW & Associates Inc and Jay Weiss,* Index No.: 18782/2012, decided on October 3, 2013, the court denied plaintiffs' motion and defendants'' cross-motion for leave to reargue. In denying the motions without prejudice, the court noted that the parties failed to attach a complete copy of the papers filed with the court in their respective motions for leave to reargue. Without a complete copy of the underlying motion papers, it was unclear what arguments were raised and what evidence was submitted by the parties with the prior motions. The court further stated that movants should be aware that the court does not retain the papers following the disposition of a motion and should not be compelled to retrieve the clerk's file in connection with its consideration of a subsequent motion.

Honorable William B. Rebolini

Motion to reargue granted; upon reargument, motion to seal certain documents granted; on limited issue of discoverability of settlement agreement, litigants cannot shield a settlement agreement from discovery merely because it contains a confidentiality provision.

In *Patricia Hiller v. Joseph V. Amella and Michael J. Golde,* Index No.: 36269/2009, decided on July 30, 2013, the court granted non-party Accretive Solutions, Inc.'s motion to reargue its prior application for an order sealing certain portions of the motion papers on file with the Court, and upon such reargument granted the motion and sealed the documents referred to therein. One issue that arose in deciding the application was the discoverability of a settlement agreement. In addressing this limited issue, the court noted that although litigants cannot shield a settlement agreement from discovery merely because it contains a confidentiality provision, its disclosure will be required only if it is "material and necessary" for the prosecution or defense of an action. Here, it had not been demonstrated that the pretrial disclosure of the financial terms of the confidential settlement agreement in the administrative proceedings between plaintiff and the non-party Accretive Solutions was warranted.

Motion to compel denied; no showing that requested documents would result in disclosure of relevant evidence or that it was reasonably calculated to lead to the discovery bearing on plaintiff's claims.

In *Louis Howard v. West Babylon School District*, Index No.: 24858/2012, decided on September 24, 2013, the court denied defendant's motion to compel. The court noted the facts as follows: plaintiff commenced this action for a judgment reinstating him to the tenured position of Athletic Director and awarding him lost wages and benefits. By notice, the defendant demanded that plaintiff provide documents concerning jobs held by plaintiff since 2004 in addition to his employment with the school district, and all documents concerning any income received by plaintiff through grants. Defendant also sought disclosure of plaintiff's separation agreement and divorce decree as well as copies of plaintiff's federal income tax returns for the past five years. In denying defendant's application in its entirety, the court found that it had not been shown that the requested documents would result in disclosure of relevant evidence or it was reasonably calculated to lead to the discovery bearing on plaintiff's claims. The

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SCBA Helps Make the Holidays Brighter

This year the SCBA's Charity Foundation donated 1,000 stuffed animals to the Suffolk County Family Court. Those involved included from left, Major Leonard Badia, Managing Director of the SCBA's Charity Foundation; Board of Managers Lynn Poster-Zimmerman; Margaret Schaefler; Supervising Judge of the Family Court the Honorable David R. Freundlich; Evie Zarkadas; Robert Gallo and Arza Feldman.

Join Our Leadership

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

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

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

— LaCova

What Happens to Student Loans When You Die?

By Alison Besunder

Today's students are graduating college and graduate programs with an unprecedented amount of student loan debt - $1 trillion as of 2013.[1] In fact, 88.6 percent of law students take out loans to pay for law school, with $80,000 in cumulative graduate debt.[2] Although credit card, mortgage, and other non-revolving debt are contracting, the federal government will lend out *$1.4 trillion dollars* by 2023 – mostly student loans – even though GDP growth will not match it.[3] There are 37 million student loan borrowers with outstanding student loans today.[4]

And how much of these trillions in loans are repaid? Read on for what happens to these student loans when you die? Or whether and when these debts are forgiven? You may be surprised to learn that many of these loans are forgiven and discharged based on various programs or on death.

Federal Student Loans

If a borrower on a federal student loan dies, the loan is automatically canceled and the debt is discharged by the government. Recipients of private student loans do not enjoy the same debt forgiveness on death. For private student loans, forgiveness on debt depends on the terms of the individual loan and the lender's policies. Some private lenders might offer death insurance, whereby the debt is discharged on death. For lenders such as Sallie Mae (Sallie Mae's Smart Option Student Loan, New York HESC's NYHELPs loans, and WellsFargo private student loans), these programs offer death and disability forgiveness policies. This is not standard for private lenders.

Allison Besunder

Even where a student loans is forgiven, the debtor is not completely off the hook. There are tax implications to debt forgiveness, which is treated as income. Even where the debt is forgiven due to disability or death, the tax authorities will impose a tax on the amount of the forgiven debt. In other words, the estate could owe as much as 35 percent on the full unpaid amount of the loan.

Can a spouse be liable for the debt

A spouse does not have repayment liability on a federally backed education loan. If a spouse is not on the student loan as a co-signer or joint borrower, the surviving spouse is not legally liable for the debt. (If the decedent and spouse lived in a community property state like California or Texas, the result might be different. It would depend on the type of loan and the laws of the individual state). However, the same result might ensue if the debt can be collected from the decedent's estate, thereby reducing the spouse's share.

What happens to student loans during your life?

Now that you know what happens to the loans when you die, what happens to the loans during your life?

There are four main income-based repayment programs for federal (not private) loans. Private loans are at the mercy of the lender.

Deferment or Forbearance

The borrower need not make student loan payments while the loan is in deferment. Subsidized loans accrue no interest during deferment; unsubsidized loans accrue interest, which is "capitalized" with interest added to the balance and interest charged on the interest. Those not qualified for deferment might secure forbearance, which allows the borrower to make no payments, or reduced payments, for up to a year. Interest accrues on subsidized and unsubsidized loans (including all PLUS loans) and unpaid interest is capitalized. Both deferment and forbearance can be very expensive propositions in the long run.

Income-based repayment (IBR)

A borrower who qualifies for IBR pays a maximum monthly payment of 15 percent of discretionary income, calculated under a specific formula. This means that a borrower exiting law school with an average monthly loan payment of $1,000 earning an annual salary of $50,000 can pay as little as a few hundred a month. The more recent Pay As You Earn (PAYE) program caps the payment at 10 percent of discretionary income. Depending on the borrower's program, and whether the borrower works in public interest, the balance could be forgiven after 10, 20, or 25 years. The government pays up to three years of accrued interest for subsidized loans. Unsubsidized loans accrue interest. In either case, interest is capitalized if the borrower no longer has a partial financial hardship.

Income-Contingent Repayment (ICR)

Borrowers in the ICR program make monthly payments based on their income, family size, and loan balance. The remaining balance is forgiven after 25 years, 10 years for public service loan forgiveness. Accrued interest is annually capitalized.

Public Service Loan Forgiveness (PSLF)

The PSLF forgives remaining debt to federal borrowers after 10 years of eligible employment and qualifying loan payments. Eligible employment is a range of "public service" jobs in government and nonprofit 501(c)(3) organizations. A public interest job is eligible if it is with (a) the federal, state, local, or tribal government (including the military and public schools or colleges); (b) any nonprofit, tax-exempt 501(c)(3) organization; (c) AmeriCorps or Peace Corps. A borrower may still be eligible if his or her employer provides certain public services such as emergency management, public safety, law enforcement, early childhood education, public health, public library services, or services for the disabled or elderly.

While it is admirable to incentivize a commitment to public service, and to provide some level of relief to those who do so at a sacrifice to a higher salary, the institution that benefits from the forgiveness remains the law schools at a high cost to the taxpayer.

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TRUSTS & ESTATES UPDATE

By Ilene Sherwyn Cooper

Subpoena Duces Tecum issued to decedent's prior counsel

In In re Soluri, a contested probate proceeding pending in the Surrogate's Court, Nassau County, the named executor in the will moved to quash a subpoena duces tecum issued by the objectants to the decedent's prior counsel and for a protective order, on the grounds, inter alia, that the subpoena failed to comply with the notice requirements of CPLR 3101(a)(4), violated the attorney-client privilege, and sought information outside the scope of the three year/two rule set forth in Uniform Court Rule 207.27.

As to the issue of notice, the court opined that the provisions of CPLR 3101(a)(4) require that discovery sought from non-parties state the circumstances or reasons such disclosure is sought in order to afford the non-party with information regarding the dispute between the parties, and the opportunity to decide how to respond. The court held that although the decedent's prior attorney was aware of the reasons his testimony and records were sought, the subpoena failed to include the required notice, and was therefore, facially defective and unenforceable.

Ilene S. Cooper

However, the court found that the information sought by the subpoena was not violative of the attorney-client privilege, and that special circumstances existed entitling the objectants to the testimony and documents sought. Specifically, the subpoena requested information related to powers of attorney and health care proxies prepared on behalf of the decedent, including whether counsel who prepared the documents represented the decedent or a third party; copies of billing records; the purpose of telephone calls made to counsel's office; and whether counsel had seen the decedent during the period in which the propounded will was executed. To this extent, the court determined that the attorney-client privilege does not shield the identification of an attorney's client, information as to whether telephone calls were made to request legal services, and an attorney's observations of a client. Moreover, the court held that testimony concerning the preparation of powers of attorney and health care proxies, as well as the reasons why counsel did not prepare the decedent's will, fell within the exception to the attorney-client privilege set forth in CPLR 4503(b). Finally, the court determined that special circumstances existed so as to extend the scope of discovery beyond the three year/two year period set forth in Uniform Court Rule 207.27.

Accordingly, the motion to quash the subpoena was granted, with leave to counsel for the objectants to re-serve with the inclusion of the required notice.

In re Soluri, N.Y.L.J., Aug. 23, 2013, at 39 (Sur. Ct. Nassau County).

Discovery of business records directed

In a contested accounting proceeding with respect to the trust created under the decedent's will, pending before the Surrogate's Court, New York County, the decedent's surviving spouse, who was a co-trustee, income beneficiary and discretionary principal beneficiary of the trust, sought an order, inter alia, limiting the scope of her examination pursuant to SCPA 2211, and compelling the production of documents relating to the decedent's business, the primary asset of the trust estate.

The record revealed that during the course of her SCPA 2211examination, the decedent's spouse was asked about her conduct as fiduciary, but also about the benefits she received from other testamentary trusts and inter vivos trusts having no relationship to her role as trustee. The court held that no authority existed for the proposition that a fiduciary may be questioned in a SCPA 2211 examination about matters entirely unrelated to his or her conduct as a fiduciary. Although the scope of a SCPA 2211 examination is broad, the court opined that it nevertheless must bear upon the fiduciary's account and the administration of the trust or estate at issue. Further, the fact that Article 31 document discovery was available did not expand the scope of the examination. Accordingly, the court granted the request of the decedent's spouse to limit her examination to questions relating to her accounting and the subject trust of which she was a co-trustee.

With respect to the motion to compel the production of documents, the court directed that information pertaining to the compensation of her co-trustee from the business asset, finding that the information was relevant, and was not ascertainable from other documents that had been produced to date. Further, the court held that documents relating to charitable donations made by the business, including but not limited to the amount of the donation, substantiation for the donation made, and the name of each donee. Finally, despite arguments to the contrary by the spouse's co-trustees, the court held that her motion to compel production in response to her Third Notice of Discovery and Inspection was not premature, and that an affirmation of good faith, other-

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The Suffolk Lawyer wishes to thank Technology Special Section Editor Glenn P. Warmuth for contributing his time, effort and expertise to our February issue.

Glenn Warmuth

Technology Advances and the Criminal Defense Lawyer

By Cornell V. Bouse

Not so long ago a criminal defense attorney would have to go across the street to the Old Country House restaurant/bar for messages from his office or from potential new clients or steal into the press room of the *Long Island Press* to make a few telephone calls between calendar calls or while awaiting a verdict. In those days, would-be clients would travel down to the courthouse to contact and retain a criminal defense lawyer – the good ones were usually in court. The advances in technology in the past two decades, however, have greatly and positively affected the way a criminal defense attorney is able to practice.

Criminal defense attorneys are usually in court five days a week and occasionally on weekend mornings for arraignment on new arrests. The practice on weekdays involves answering calendar calls in many courts and, on some days, in up to three counties. Communicating by cell phone has advanced the practice as it has arguably advanced society in general. Scheduling to meet clients in court on their given court date can often be a challenge with clients who often are unreliable. The opportunity for a defense attorney to text with a client while the attorney is confined to a courtroom is new to the profession and invaluable since, of course, no telephone calls were ever permitted within a courtroom. While at least one judge in Nassau County has banned the practice, it is generally permitted. The ability to forward office calls to a cell phone while in court and the use of a live operator answering service allow virtually instantaneous communication. Having operators send text messages detailing calls you have received is just one of many service scenario designs the *always in court* lawyer has to choose from.

Cornell V. Bouse

The technology behind the smartphone and tablet allows a defense attorney to get instant access to *WebCrims (https://iapps.courts.state.ny.us/webcrim_attorney/Login)*, a service provided by the Unified Court System, which allows a defense attorney to verify court dates, courtrooms, and case history including bail, offenses charged, the sitting judge on a case, and previous court dates while an attorney is on the run by the mere entry of a few letters of the defendant's first and last names (If a case is in warrant status, however, no case will come up and a call would still have to be made to the court). A similar requisition in WebCrims locates a court calendar for any given day for, effectively, up to two months following. These functions are not only valuable tracking tools available by smartphone or tablet but an invaluable tool when a potential new client calls an attorney on a pending case. It allows for an intelligent response to the potential client's inquiry and speaks clearly that the attorney has taken the time to look into the matter.

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Trial work similarly benefits by advances in technology. G*oogle earth* allows for a real overview of incident locations for both investigatory and evidentiary purposes. Facebook and general searches of complaining witness's name can create valuable areas for cross-examination to not only delve into substantive impeachment but to shake the witness's prepared demeanor. Additionally, jury instructions are available by visiting *nycourts.gov* - click on *CJI* (Criminal Jury Instructions) – choose the sections of law to both standard evidentiary jury instructions and charges on the particular penal code violation(s) charged. (This, of course, following a verification with the presiding judge of which CJI edition and sections the court will be reading from.) No summation ever makes more sense to a jury than when it contains the same legal buzz words and thought processes contained in the very law the presiding judge will be reading to them a short time following.

Additional websites which are valuable tools at every stage of a criminal case include *crimetime.nypti.org* which lists all NYS Penal Law, Corrections Laws, and Vehicle and Traffic Laws. The site lists permissible down charges and sentences to all sections. This site is *without charge* requesting only the providing of an e-mail address. A similar site charging a monthly fee and commonly used by judges and law secretaries in criminal parts is *gungaweb.com* which similarly is an invaluable tool to the criminal practitioner. The idea that all of these websites and tools are available remotely by smartphone and tablet makes these resources a very real carry-along limitless bank of information instantly available for the furtherance of the practice.

The relatively newly established video conferencing with Suffolk County inmates is a resource-saving method of visiting an incarcerated client. With the camera/monitor systems set up at the Cohalan Complex, defense attorneys can reserve time with corrections and then have a secure video conference with clients incarcerated in both the Riverhead and Yaphank facilities. County Court Supervising Judge Christopher Quinn is currently exploring the feasibility of video conferencing in Nassau County with hopes to offer the system to defense attorneys in the near future.

Note: Cornell V. Bouse is a notable criminal defense attorney practicing 24 years He is a past-president of the Nassau County Criminal Courts Bar Association, a frequent lecturer at Touro Law School and currently sits on the Board of Directors of the Suffolk County Bar Association.

Why to Choose a Smartphone

By Guido Gabriele III

For the past three months, I have been switching between four different phones - not for fun, but for science. I was preparing to write a comparison between the best smartphones available, and declare a winner – the "best lawyer's phone." Then I found out that nobody cared.

I surveyed some fellow attorneys: What's your phone of choice? How are you using it in your practice? What smartphone features are on your wish list? To my surprise, many had no opinion. They own smartphones, but don't put much thought into maximizing their use as a tool in their practices. Some even admitted, "Yea, I could probably be doing more with this thing."

This is, of course, perfectly fine. However, your next smartphone purchase deserves a researched, reasoned approach. That delicate device rattling around your briefcase is a $700 marvel of modern engineering. Let's put it to work.

The players

There are many smartphones on the market today, but we will focus on the most popular flagship models: Apple's iPhone running iOS, Samsung's Galaxy S4, Samsung's Galaxy Note 3, and HTC's One, which all run Android.

Blackberry and Windows Phone did not make the cut. Blackberry has failed to keep their platform relevant in recent years and cannot be recommended for a new phone purchase at this time. Windows Phone, despite its potential, still lags behind in operating system design, app store quality, and hardware offerings. You can and should do better with your money.

The goals: productivity, efficiency, and simplicity

Our goal is to find the phone that best suits our practice needs, simplifies and accelerates our workflow, and updates our old communication systems (faxing, copying and US mail). It's hard to make a bad choice - all high end phones have similar entertainment, media, and messaging features. They are all close enough in processing power, battery life, and data speed that these specs are almost irrelevant. All are thin and light with beautiful high-resolution displays. There are some significant differences among these devices, however, which will inform your ultimate decision.

Guido Gabriele III

Ambient Information and Personal Assistant

Both iOS and Android have built-in methods to notify you of events and messages, create calendar events and reminders, perform searches, navigation, and more. iPhones have Siri, and Android devices have the comparable Google Now. Voice dictation and commands are standard in all these devices.

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Siri is not quite as smart as Apple's marketing would suggest. Using voice commands, Siri can send text messages and emails, place calls, perform web searches, and retrieve information about things like sports, weather, stocks, and restaurants. Functionality is more limited than Google Now, and voice recognition is hit-or-miss. Siri also won't do anything unless you affirmatively ask her.

Google Now is the leader in Ambient Information Your location, calendar events, recent web searches, and other data are used to serve relevant information *before you ask for it.* If you have a conference scheduled 30 miles east, Google Now will check the traffic and remind you when it's time to leave. You can set reminders based on your location (e.g. "remind me to call Bob when I get to the office"). Searches are also conversational and seamlessly allow follow up questions.

Security

Years ago, Blackberry was the only platform suitable for business use. iPhones and Android phones have since caught up, offering the encryption, Exchange support, administrative tools, and remote-wipe features that businesses need. Google's Android Device Manager and Apple's "Find My iPhone" can help you find or erase a lost phone. HIPAA-compliant offices can take advantage of both platforms' encryption options. The iPhone has arguably raised the bar with its built-in fingerprint scanner – whether that's really necessary is up to you.

Camera quality

Your smartphone camera can double as a mobile scanner. This means no more illegible carbon copies of Preliminary Conference Orders or searching for a Staples to fax a document. Just snap a picture and email. Note that more megapixels doesn't necessarily mean better quality. The iPhone 5's 8MP camera is generally considered to take better photos than the Galaxy S4's 14MP camera, due to higher quality components and software. The HTC One's camera is only 4MP but takes great low light photos.

Cloud storage

All modern smartphones employ some kind of cloud service for some mix of your backups, email, documents, music, and photos. There is, unfortunately, no perfect out-of-the-box solution.

iPhones use Apple's iCloud service, which will automatically back up your phone's app data, voice mail, messages, and photos, and more. Android has no similar backup and restore service. All devices work well with popular cloud storage services like Skydrive, Google Drive, and Dropbox. Each of these services has free apps that will sync folders from your computer to the cloud, and all offer excellent mobile apps.

If you are skeptical about potential security risks, research each cloud service's security features and policies and choose the one that makes you the most comfortable. The best systems employ modern encryption, protect your passwords, and protect your data with redundancy in modern data centers.

Screen size

Big phones are growing in popularity, and for good reason. True productivity demands more space. If you've ever tried to show a judge a PDF that you have on your iPhone, you know that nobody likes viewing a document through a tiny window.

If you're sick of pinch-zooming and panning, the Galaxy Note 3 is for you – its 5.7" 1080p display gives you plenty of room for stylus input, and is a great compromise between phone and tablet. The Galaxy S4 and HTC One follow with 5" and 4.7" 1080p displays, respectively. Apple's iPhone is smallest, with a long and narrow 4" display.

File transfer

The ability to transfer files to your device is central to its value as a productivity device. Fortunately, this is one of the few areas where there is a clear winner.

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SIDNEY SIBEN'S AMONG US

On the move…

Jacqueline Siben

Karen A. Casey and Philip J. Siegel have formed their new firm, **Casey & Siegel, LLC**, with Richard P. Casey, of counsel. The firm will practice in the areas of famly law, civil litigation, real estate and zoning. Offices are located at 780 New York Avenue, Suite 2, Huntington, NY 11743, telephone: (631) 470-7407 and facsimile: (631) 470-7414.

After spending over 25 years in the hamlet of Coram, **Capasso & Capasso** has moved to 159 Route 25A, Building 2-Suite B, Miller Place, N. Y. 11764.

Hon. Janine A. Barbara-Dalli is now sitting in Central Islip, District Court, in the Cohalan Court Complex, Room D-537.

Annamarie Donovan would like to announce a change of address, effective January 1, 2014. Her new address is POB 465, Wading River, NY 11792. Phone (631) 929-0045; Fax (631) 929-0046. Her website and e-mail address remain the same. www.donovanlawfirm.com and ladylaw@donovanlaw.com,

Congratulations…

Tayne Law Group, P.C., headed by leading financial and debt attorney **Leslie Tayne**, Esq., was recently designated "Bethpage Best of Long Island 2014" by Bethpage Federal Credit Union for the category of Debt Consolidation Services. Tayne Law Group, P.C. was selected out of 18 nominee entries for Best of Long Island 2014" within the Debt Consolidation Services category. It will receive its award among fellow Best of Long Island 2014 recipients during a special awards celebration scheduled for Monday, February 3, 2014.

Kathleen A. Carlsson's painting *Lovely Cow #1* was awarded honorable mention at the Artist Member Show at the *Smithtown Township Arts Council* and was exhibited from December 2013 through January 10, 2014.

Edward J. Nitkewicz of the Sanders law Firm in Mineola received the 2014 Public Service Award at the Annual Alumni Winter Reception for the Touro Law Center on January 30, 2014. The Public Service Award is presented to alumni who have demonstrated exceptional leadership in the area of public interest law either through their full-time position or through significant pro bono initiatives. Ed serves as a member of the South Huntington School Board, he is a co-chair of Corporate Fund raising for Autism Speaks on Long Island and a member of the Board of the Asperger's and High Functioning Autism Association of New York. He was a founding coach of the Special Needs soccer and baseball programs in South Huntington and started a special needs religious instruction program in the St. Elizabeth Roman Catholic Church in Melville. Ed was also selected for recognition in the 2013 edition of New York Super Lawyers for his work in personal injury and special education litigation.

Congratulations to **Melissa Corwin** who has been made partner of Somer Heller & Corwin LLP after ten years of hard work and dedication to the practice.

Announcements, Achievements, & Accolades…

Brian S. Stolar, a partner with Sahn Ward Coschignano & Baker, PLLC, has been appointed as Village Attorney for the Village of Woodsburgh. In his new position, he will act as legal advisor to all village staff and the various village boards and commissions and assist them in carrying out their functions. He will also prepare legislation, draft and review contracts, assist the village in complying with federal, state and local regulatory laws and regulations, serve as litigation counsel, and render opinions on a variety of issues.

Members of **Genser Dubow Genser & Cona** donated holiday gifts for a displaced family of five in Lindenhurst due to Hurricane Sandy. The firm's employees enthusiastically collected over $400 worth of grocery store and other gift cards as well as specific items on the wish list for the family with three children that included sweatshirts, pajamas, gloves, board games, art supplies, a pocketbook and more. The Sandy holiday program is spearheaded by FEGS, one of the nation's largest and most diversified health and human services organizations, who partnered with LI Cares and other LI organizations for this effort.

John V. Terrana, partner at Forchelli, Curto, Deegan, Schwartz, Mineo and Terrana LLP, has been re-appointed Co-Chair of The Suffolk County Bar Association's Condemnation & Tax Certiorari Committee. Forchelli, Curto, Deegan, Schwartz, Mineo and Terrana partner **David A. Loglisci** has been appointed as Co-Chair of the Suffolk County Bar Association Creditor's Rights Committee.

Condolences…

The Suffolk County Bar ASsociation extends its heartfelt sympathy to the family and the legal community upon the passing of an extraordinary grentleman with a great knowledge ofthe law, **William "Billy" Levine, Esq.** His untarnished life leaves with us an example and inspiration for higher and nobler deeds.

New Members…

The Suffolk County Bar Association extends a warm welcome to its newest members: **Melinda Beck, Lane M. Bubka, Jacquelyn B. Cucuzza, Mark Geraci, Katherine A. Giovacco, Patrick J. Gunn, Valerie A. Marvin, Tom L. Moonis, Kalpana Nagampalli, Christopher R. Nicolia, Elizabeth Dalal Pessala, Kathleen Rose, Jacqueline Sabarese, Alyssa Solarsh, Arthur T. Wade, Stacy A. Yakaboski and Kelly M. Zic**.

The SCBA also welcomes its newest student member and wishes him success in his progress towards a career in the law: **Joelle Keypour amd Molly Zamoiski**.

Adventures In 3D Printing

By Glenn P. Warmuth

In 1982 I purchased a Timex Sinclair computer. This $100 computer did not do much and you had to write the programs yourself in BASIC language. Nevertheless, I thought this computer was the greatest thing I had ever seen. One of my favorite programs on the Sinclair was a two line program ("10 PRINT "Glenn Warmuth;" 20 GOTO 10) which printed my name on the screen over and over again. It was simple and pointless and I was amazed.

Flash forward 30 plus years and for $100 you can buy a phone that has more computing power than the Apollo 11 Lunar Module. Today the new horizon is 3D printing. In November my daughter and I paid $299 for a kit to build a 3D printer and we stepped into a whole new world.

Glenn P. Warmuth

We spent about two weeks building the "Printrbot Simple." The main parts of the printer are three motors, an extruder and a platform. The motors move the extruder around in three directions, left-right, forward-back and up-down, known in 3D design as the X, Y and Z axes. The extruder pulls in plastic filament from a spool, melts it and then extrudes it to create whatever "thing" you are printing. The filament we use is a bioplastic which is made of plant materials including corn starch and tapioca root. The platform is the base on which the object sits while being printed.

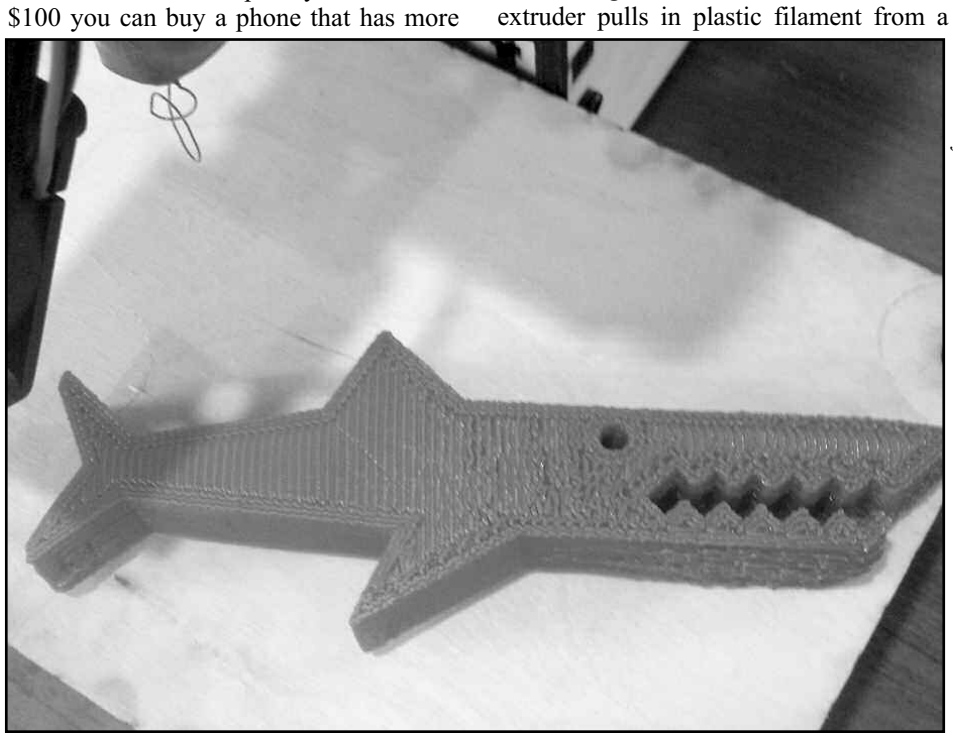

Photo courtesy of Glenn Warmuth

A shark, Mr. Jaws, can be downloaded for the inexperienced who wish to try to make 3D objects.

When the printer was complete we were anxious to print something out. We went online to www.thingiverse.com, which is a website which contains free code for thousands of printable 3D objects. You can browse the objects and download anything you want to print. We picked a shark called "Mr. Jaws" because it was recommended for first timers.

Getting the code for Mr. Jaws to the 3D printer was not a simple task. First we had to import the code into a computer program called Repetier-Host, which we downloaded for free. Repetier allowed us to make many adjustments including resizing Mr. Jaws to fit our printer. We then used a second free program called Slic3r. Slic3r works like a deli slicer and cuts the 3D model into many thin horizontal layers. Slic3r then creates new code for the 3D printer which tells the printer how to print out each of those layers one on top of the other to create the 3D object.

Once Mr. Jaws was sliced up we hit the run button which sends the instructions from the computer to the printer. This should have caused the printer to start printing but very little happened. This began a lengthy effort to print Mr. Jaws. At one point we printed a small blob about half the size of a penny. We rejoiced at the appearance of the blob. We printed many versions of Mr. Jaws which looked nothing at all like a shark. Finally we got it right and printed Mr. Jaws. Printing takes a long time and that version of Mr. Jaws took over an hour to print.

Over the next few weeks we printed dozens of things including: Christmas tree ornaments; tiny toy swords (which were temporarily confiscated at show and tell), a statue of Venus; all sorts of rings; gears, and a skull. Many things did not print properly and there was a tremendous amount of trial and error. For example it took 11 attempts to properly print a Hello Kitty model. We never succeeded in printing The Eiffel Tower.

We then graduated from downloading other people's designs to designing our own things. We downloaded free 3D design software called Sketchup. The software is intuitive and within minutes, without any instruction, we had designed our own things, which we then printed. They were simple and pointless and we were amazed. Seeing a 3D printer in action gives you a sense of excitement and a feeling that the world is changing fast.

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

The Interface Between 3D Printing and Intellectual Property

By James J. Lillie

What is 3D printing and how can it be, if at all, protected? In a nutshell, 3D printing is a relatively new approach to an old objective, how to fabricate a three dimensional object. Historically in manufacturing, a product was designed using software by design engineers, and then automated machines, using the methods that traditional machinists or carpenters would have used to create a three dimensional object. The process would start with a block of material having a certain initial volume, e.g., a block of wood or metal, and then via a series of cutting, drilling, and sanding, reducing the volume down to the desired product/object, which can be summarized in layman's terms as a subtraction process. This subtraction process would yield both the product, and waste material. Today the waste material would be recycled to recoup costs.

In great contrast, 3D printing can be summarized as a process of addition, and is analogous of one making a snowman by hand; e.g., wherein an individual (the designer) would create a design such as a snowman having three sections, the base, the abdomen, and the head, arms, facial features, and a hat, etc., and then the worker would collect material - snow, and sticks, shape it, and keep adding material until the original design is completed, wherein this addition process would yield the product without waste.

3D printers use spools of material, typically thermoplastic, which are fed into the printer and heated/melted. The quasi-liquid is then used to populate the design in layers, from the bottom up, hence the description "addition process." The population is performed by using the X, Y, Z coordinates, wherein X is the length, Y is the height, and Z is the depth which is set forth in the design. Designs are available on the internet free of charge or for purchase.

James J. Lillie

Recently, concerns have been raised with the ability to fabricate fire arms via this 3D printing using exclusively non-metal materials, thereby increasing the difficulty in detecting them at security checkpoints.

Once someone has created a design, and then fabricated the design into a product, the age old question becomes, how can the designer, and not necessarily the fabricator, protect their rights? Similar to protecting one's legal rights of a product produced by the "subtraction process," the "addition process" of 3D printing would look to the laws of patents, trademarks, and copyrights.

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Patents provide, inter alia, protection for the utility and design, whereas trademarks primarily function as a source identifier of the product, and copyrights provide protection for the artistic expression. It is not uncommon for a single product to have multiple forms of protection, although it is not always the case.

A utility patent protects how the device is used and works, i.e., functional features, whereas a design patent would protect the ornamental appearance i.e., non-functional features. Both types of patents require the product meet the traditional standards of patentability under title 35 of the U.S.C., namely, Patentability under §101 for Utility and §171 for Designs, and for both, Novelty under §102 (a) and Non-Obviousness under §103. The ornamental appearance for an article includes its shape/configuration or surface ornamentation applied to the article, or both. For discussion purposes, if the snowman product was used as a light fixture, it potentially has some utility. Likewise, it potentially has some ornamental appearance features worthy of design patent protection.

From a trademark perspective, if the product was a logo that was used by the company producing the product, it potentially is trademarkable as a logo. Moreover, it may also be protected as trade dress, wherein trade dress constitutes a "symbol" or "device" within the meaning of §2 of the Trademark Act, 15 U.S.C. §1052.[1] Trade dress originally included only the packaging or "dressing" of a product, but in recent years has been expanded to encompass the design of a product. It is usually defined as the "total image and overall appearance" of a product, or the totality of the elements, and "may include features such as size, shape, color or color combinations, texture, graphics."[2]

Thus, trade dress includes the design of a product (i.e., the product shape or configuration), the packaging in which a product is sold (i.e., the "dressing" of a product), the color of a product or of the packaging in which a product is sold, and the flavor of a product.[3] However, this is not an exhaustive list, because "almost anything at all that is capable of carrying meaning" may be used as a "symbol" or "device" and constitutes trade dress that identifies the source or origin of a product.[4] When it is difficult to determine whether the proposed mark is product packaging or product design, such "ambiguous" trade dress is treated as product design.[5] Trade dress marks may be used in connection with goods and services.

Copyrights protect the artistic expression once fixed in a tangible medium, hence both the original design created via the software, and the embodiment of that design in the 3D object printed via the printer should be ripe for protection, as the products of these processes would appear to be no different than a 3D rendering drawn by the hand of an artist, or a sculpture created manually by the hand of sculptor, wherein both have traditionally been protected by copyright law.

3D printing is becoming more affordable to the average consumer and is only beginning to revolutionize the market as we know it. Whether it is printing replacement parts for consumer goods, printing entirely new products or creating works of art, the current avenues of intellectual

(Continued on page 21)

LOOKING BACK

When a pornography case served as a lesson for a young lawyer

By Stephen Kunken

Stephen Kunken

I have been practicing law for more than 40 years, having been admitted to the New York Bar in January, 1973, after graduating from Boston College Law School.

I began my legal career with the Nassau County Legal Aid Society in Sept., 1972, as an investigator, and then as a trial attorney. At that time, the Nassau County District Court was located primarily in the West Wing Building, located at 252 Old Country Rd, Mineola, NY.

Young legal aid lawyers were encouraged to observe as many criminal hearings and trials as we could, and one of my favorite trials was a pornography case, which was unusual then, and even more unusual now. It wasn't child pornography, or unauthorized video surveillance, but merely possession of adult pornographic films found in the trunk of the defendant's car.

There was no publicity about the case, and we first heard about it when the word went out that the defendant had turned down a plea bargain. That meant that there would be a jury trial, and the films would have to be shown in open court!

We followed the status of the case very closely, and we made sure that our calendars were clear for the day when the trial was scheduled to begin. About one week before the actual trial date, one of the attorneys excitedly announced in the office that he was able to obtain a list of the exhibits which were going to be used at the trial, including the titles of each of the films. We spent the rest of the week carefully analyzing each title, and we had several meetings to discuss the potential contents of each film. I will be happy to share with you those titles. Just contact me at my office.

A normal misdemeanor jury trial would usually have anywhere from zero to 3 or 4 spectators in the courtroom in addition to the participants. For this case, the courtroom was packed, so we made sure to get there early in order to get a seat. There were extra court officers assigned to the courtroom, just in case someone might stand up from the audience during the trial and try to confess (a la Perry Mason). There were three assistant DA's assigned to the case, and they were each fighting over who would be responsible for securing the evidence. In addition to the presiding judge, there were two new judges to the bench who decided that this would be a good case to observe as they started their judicial careers.

The defendant was represented by an attorney who had no clue about handling a criminal case. Sitting in the front row, directly behind the defense table, was an older man who we later learned was a disbarred attorney. He was constantly passing notes to the defense attorney, and trying to tell him when to object to the introduction of evidence.

The presiding judge was Alfred Samenga, who was a commanding presence on the bench, with white hair and a neatly trimmed mustache. He warned the audience at the start of the case that there would be no outbursts or comments on the evidence.

After some preliminary matters, the testimony began, and of course the highlight was the showing of the films to the jury. As the first film began, you could hear a pin drop in the courtroom (the films were silent), and all of a sudden, we heard Judge Samenga narrate what was going on as each film was being played! "Let the record reflect that the man and the woman...." I realized at that time why I had chosen criminal law as a career.

I also observed that juror number three, an older woman sitting in the front row, had her head down and her eyes closed throughout each film. No objection or motion for a mistrial was made.

At the end of the day's court session, about 10 spectators lined up in front of the court reporter to request a copy of the day's testimony - expedited!

I don't remember how the trial ended. As soon as the presentation of the films was concluded, the courtroom cleared out, and I returned to handling my own case files. But I learned a lot from observing that trial, not all of it how to try a case!

Note: Stephen Kunken is a sole practitioner with offices in Commack, NY. He has been practicing law in NY for 41 years, first as a trial attorney with the Nassau County Legal Aid Society, and for the past 27 years, in his own practice. He is a former Suffolk Academy of Law Officer and presently serves on the Advisory Committee. He has been an Adjunct Professor at Touro Law Center since 1983, and serves as the Village Justice of the Village of Huntington Bay (since 1992).

Looking for writers to Look Back

Looking Back is a new column in need of writers. This column will appear monthly in *The Suffolk Lawyer* and will be written by veteran SCBA attorneys and judges.

Like life itself, so much of the practice of law changes over the years. Through the experiences of our members we hope to offer a window into what the practice of law was like in the past and how it has evolved.

We need volunteers to share their experiences. If you would like to contribute an article please contact Laura Lane by email at scbanews@optonline.net or Past President John Buonora at jlgoodhour@optonline.net.

We'd love to hear from you and will even help you craft your column if you wish. You probably have so much to share with us.

PRACTICE MANAGEMENT

Law Firm Editorial Calendars: 6 Steps to Success

By Allison Shields

In the September 2013 issue of *The Suffolk Lawyer*, I wrote about content marketing and why it's important for lawyers. But how do you manage all of that content to ensure that it's consistent and timely – and that it gets created in the first place? Editorial calendars may be the answer.

Editorial calendars can be useful tools for planning and keeping track of who is writing what in the firm and when and can to include guidelines, set reminders, and help identify opportunities. In my November 2013 article on using Evernote as a marketing tool, I mentioned that lawyers may want to keep their editorial calendar within Evernote.

Editorial calendars can also help you jumpstart your content creation. When it's time to write a post or create other kinds of content, rather than wasting time trying to come up with an idea about what to write about, your content will already be planned out. Your topic, and possibly even keywords to include and resources to help you write, will all be gathered in one place so you can get down to the business of writing.

When planning your editorial calendar, keep in mind that you'll still want to cover breaking news, unexpected updates or new information that comes to your attention, so you'll want to be flexible. But having more content than you need – or more ideas about what to cover – is a good problem to have.

It's a good idea to do an overall yearly plan for your editorial calendar, but if that seems overwhelming, do a rough outline of your Editorial calendar for the year and then flesh it out and revise it quarterly.

Whether you use Evernote, Outlook, Word, Google docs, Excel or some other method to keep your Editorial Calendar, you'll want to keep these things in mind:

Allison Shields

Audience

You may have one audience or more than one. For example, clients and referral sources, or clients in different practice areas; each may have different needs and interests, and they may like to receive information in different forms. When you have this intelligence handy, creating your editorial calendar will be much easier to do.

Purpose

As with other marketing initiatives, you'll need to consider not only your audience, but also your purpose for creating content. Your purpose, too, may vary across audiences or platforms; your purpose for participating on Facebook may differ from your purpose for blogging, or for sending a firm newsletter, for example.

Themes

When you organize your content around themes, planning becomes much easier. Some people like to develop one theme per month; others develop a list of themes and then rotate them throughout the year. Your theme can be related to the time of year, or simply a topic that your audience may be interested in.

Once you've developed your list of themes, brainstorm some specific content ideas within those themes. Include potential post topics and titles, along with keywords you would like to target or include, and which audience or audiences you intend to reach with each post.

As you come across interesting articles, blog topics or keywords you want to include in future content, add them to a folder, Evernote notebook, list, or to the editorial calendar itself to help with the creation of your content.

You may also want to develop specific calls to action for each theme, topic or post. Calls to action can be as simple as a reminder to contact your office for a consultation, or they can include a special offer, a free download, a link to subscribe to your firm newsletter, etc.

For example, if you have white papers, checklists or other information available on your website related to the theme or topic of your post, you may want your calls to action for those posts to direct readers to your site to download that information. If your post relates to an area for which you provide a very specific service, you may want your call to action to be a request for readers to call for your free year-end estate plan review, etc.

Content types

Not every piece of content needs to be text-based. Content can also include images, video, infographics, audio or podcasts, and slideshows or presentations.

Even if you decide to stick with text, you can reach your audience in different ways by choosing different types of posts. These might include interviews with experts, "how to," updates on the law, law in the news, a "roundup" of posts written by others on a topic of interest to your audience, a client story, FAQs, events, etc.

As always, you'll want to think about your intended audience and purpose when deciding which type of content to post. Although most of your content should be directed toward your audience, you can also celebrate firm successes, promote firm activities and employees – just make sure you balance those more 'promotional' pieces with valuable content of interest to your audiences. On social media, as opposed to your own blog or website, remember to share others' content in addition to your own (some experts say social media posts should include 80% content created by others and 20% of your own content).

Keep track of your channels

Channels are simply the different places where you distribute content. These could include not only your firm website or blog, but also firm and individual social media profiles. Examples include:

- Website
- Blog
- LinkedIn
- Facebook
- Twitter
- Google+
- YouTube
- Pinterest
- Slideshare
- Tumblr
- Vine
- Instagram
- Law Firm Newsletter

Choose the channels that make the most sense for you and your audience; it is not necessary to be active on every possible platform.

When you create a new article or post on your blog, you will probably post links to it on several different social media channels. But depending on the audience you are trying to reach, and the channel you are posting to, the social media post may have a different 'teaser' with the same link, or you may want to schedule the post for a different time of

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TAX

Foreign Investment in U.S. Real Property

By Louis Vlahos

Nonresident aliens (or NRAs) are buying residences on the east end of Long Island. While many of them will seek out local real estate counsel to assist them with their purchase, they may not be familiar with the potential tax consequences of acquiring and owning U.S. real property.

In most cases, the NRA will be purchasing a single residence for personal use or for rental to a third party. Alternatively, he may be purchasing vacant land for investment or for later personal use. Each scenario presents its own U.S. income, estate and gift tax implications, which should be considered in advance of the acquisition.

Choice of entity

The NRA who plans to lease his property to third parties, or otherwise hold it for investment, must consider how to insulate himself from liabilities that may arise from such activities. A corporation that is properly operated and capitalized can protect the NRA shareholder from such liabilities. An LLC (treated as a pass-through for tax purposes) can likewise protect its foreign members. However, the form of entity selected, and its capitalization, can have significant U.S. tax consequences.

Income taxes

For purposes of the U.S. income tax, an NRA is a noncitizen who is not a lawful permanent resident, and who does not have a "substantial presence" in the U.S. (based on the number of days of physical presence).

Louis Vlahos

The nature of the income tax to be imposed upon an NRA who owns U.S. real property will depend upon whether or not his U.S. real estate activities rise to the level of a trade or business. This requires an examination of the facts and circumstances of the NRA's particular situation; for example, do those activities go beyond mere ownership of property or receipt of rental income? If they do, are they sporadic or irregular (as opposed to continuous or considerable)?

Assume for the moment that the NRA's U.S. real estate activity does not rise to the level of a trade or business. In general, the rental income received by an NRA who directly owns U.S. real property is subject to a flat 30 percent withholding tax on the gross rental income, without deduction for depreciation, property taxes or other expenses associated with the ownership and rental of the property. (A treaty may provide for a lower rate.) However, the NRA may elect to treat this rental activity as a U.S. trade or business. In that case, the NRA will treat his rental income as effectively connected to a U.S. trade or business and, in determining his U.S. income tax liability, will be allowed the deductions related to the real property. He will then be taxed on a net income basis, at graduated income tax rates.

If the real property is held by a U.S. corporation, the corporation's profits will be subject to corporate-level income taxes. The NRA shareholder will then be subject to income tax when the corporation distributes its after-tax rental profits to the shareholder as a dividend. A dividend distribution to the shareholder is generally subject to a flat 30 percent withholding tax, or lower treaty rate. (However, beware of the personal holding company tax.) If the corporation was capitalized, in part, with a loan from the NRA shareholder, the interest payment would be taxable to the shareholder, but it would also be deductible by the corporation.

If the real property is owned by a foreign corporation that is not engaged in a U.S. trade or business, its profits will be subject to U.S. corporate-level income tax (at a flat 30 percent, or lower treaty rate), and its dividend distributions to the foreign shareholder should not be taxable in the U.S. However, if the corporation is so engaged, its dividend distributions may be taxable to the shareholder. If it fails to pay dividends, its after-tax income may be subject to the so-called "branch profits" tax; in general, an additional 30 percent tax on its net income (after U.S. corporate taxes), which is intended to mimic the tax that would have been imposed upon the distribution of such net income to the corporation's foreign shareholder.

If the NRA holds the U.S. real property through an LLC, he will be taxed on his share of the rental income generated as if he held the property directly. The LLC, itself, will not be taxable, but it will be required to withhold tax in respect of the income allocable to the foreign member.

Sale

When an NRA sells U.S. real property or an interest in U.S. real property, the gain recognized on the sale is treated and taxed as having been derived from a U.S. trade or business (the so-called "FIRPTA" tax), even if such property was not, in fact, connected

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TAX/CORPORATE

LLCs and 'S' Corporation: How are They Alike and How are They Different?

By Thomas D. Glascock

When starting a new business, the owner(s) must decide on the form of business entity to use. While frequently this decision comes down to an "S" corporation or a limited liability company ("LLC")[1], it should be influenced by the underlying purpose for the business entity. It is for this reason most often operating entities are "S" corporations, with legal title to the real property underlying business locations held by LLCs.

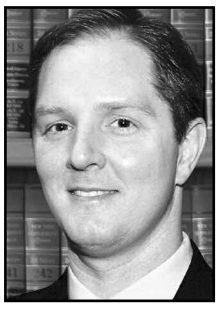
This article will describe some of the benefits and complications offered by each business form, and will then explain why LLCs are favored for holding legal title to real property.

A brief overview

Both "S" corporations and partnerships offer pass-through tax treatment and generally are not subject to an entity level tax.[2] For income tax purposes, an "S" corporation is treated like a sole proprietorship if there is one owner, or in many ways like a partnership if there are two or more owners. Likewise, for income tax purposes, single member LLCs are treated as disregarded entities and multi-member LLCs like partnerships unless affirmatively electing to be treated in a different manner.[3] Because, an LLC never pays taxes, an owner's share of business income, deductions, credits, and other tax items pass through and are reported on his or her tax return. For purposes of this article, it is assumed that the LLC is being treated as a partnership.

Yet, despite many similarities, there are also many differences between the two.

There are strict requirements to qualify for an "S" corporation election, including: (i) all shareholders must be U.S. citizens or resident aliens, certain types of trusts, estates, or certain exempt organizations[4]; (ii) there are no more than 100 shareholders (spouses are not considered separate shareholders); (iii) there is only one class of stock[5]; and (iv) profits and losses distributed to shareholders must match their equity interest in the corporation.



Thomas J. Glascock

Conversely, there are no restrictions on who may be an LLC member, and many different types of membership (equity) interest are permitted. Further, there is total discretion in how profits, losses, income, expenses, and credits are allocated, provided it has "substantial economic effect".[6] Therefore, owners may allocate tax benefits (like depreciation and losses) in a manner different from their pro rata ownership interests.

Self-Employment Tax (an "SE Tax")

One of the chief advantages of using an "S" corporation (rather than LLC) is the tax benefits it offers for excess profits (that is, distributions). The distributions of profits made to shareholders are not subject to SE Taxes, only compensation paid shareholders by the corporation for services rendered, with any remaining profits distributed as dividends not subject to SE Taxes.

With an LLC, all income flowing through to those members involved with the business (at least the first $113,700 as of 2013, whether as salary or distributed profits), will generally be subject to SE Tax at 15.3% for both the employee's and employer's share of FICA (Social Security & Medicare) and FUTA (unemployment) taxes.

Contributions and distributions of property

Provided at least 80 percent of the outstanding shares of the corporation are owned by the contributing persons following their contributions of appreciated property (including real property) in exchange for shares of stock, such a transaction will not trigger the recognition of taxable income. However, this requirement is hard to meet for existing corporations, as the transfer must be made by individuals in control of the corporation. The individual(s) will be taxed for gain on the difference between the contributed property's then fair market value and the individual's (or the individuals') adjusted basis in the property.

Likewise, the distribution of appreciated property from an "S" corporation will trigger the recognition of corporate level gain, which must be allocated proportionately to the "S" corporation shareholders, with shareholders' basis in the property received treated as equal to its fair market value at the time of distribution.

Contributions of appreciated property to an LLC are also generally tax-free, with the LLC taking a carryover basis in the distributed assets. But, unlike with an "S" corporation, there is no ownership or control requirement. Still, those taxes otherwise due on the gain built into the contributed property are only deferred until the time when the property or the LLC interest is sold. Further, any real property subject to debt will require adjustments to the LLC's basis in the property and its members' basis in the LLC as the loans are paid off.

Generally, LLCs can also make tax-free distributions of appreciated assets to its members, provided a member's adjusted basis in the LLC exceeds his or her capital account balance. Transfers of property into and out of an LLC are free of immediate tax consequences, with a member receiving a carryover basis in the distributed assets (not to exceed his or her basis in the LLC).

Given the foregoing, a conversion from an "S" corporation to an LLC will generally create tax issues, but a conversion from an LLC to an "S" corporation will not, with a distribution by an LLC "tax-deferred."

"At Risk" rules

The ability of an LLC member to deduct expenses and losses is limited by the "at risk" rules of Internal Revenue Code

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VEHICLE AND TRAFFIC

Retrograde Extrapolation in Driving While Intoxicated Cases — a New Trend?

By Phillip J. Jusino

I recently represented a client at trial in First District Court in Nassau County before Judge Goodsell wherein, among other charges, he was charged with Driving While Intoxicated in violation of Vehicle and Traffic Law Section 1192.3, as well as Driving Under The Influence Of Alcohol in violation of Vehicle and Traffic Law Section 1192.1.

These charges would normally not raise any eyebrows, except for the fact that after he was pulled over by the Nassau County Police on January 26, 2012 and submitted to a breath test at 6:56 a.m. had a breath alcohol content ("BAC") of .07 which is prima facia evidence of Driving While Impaired, a violation, and not Driving While Intoxicated, a misdemeanor.

Yet, nine months later after being pulled over, the Nassau County District Attorney's Office filed a new charge of Driving While Intoxicated in violation of Section 1192.3 and decided to proceed under the theory of Retrograde Extrapolation arguing that his BAC was higher when he was first pulled over, higher than a point .08 and therefore he was intoxicated. It is important to note that not only did this case not involve a death or injuries, but also it did not even involve a motor vehicle accident. Further, my client had a clean driving license and no prior involvement with the criminal justice system.

Phillip J. Jusino

According to the concept of Retrograde Extrapolation, a BAC concentration derived from the analysis of the subject's breath or blood sample at a particular test time can be extrapolated back to the supposedly higher BAC existing at an earlier incident time[1]. This is accomplished by adding to the BAC at test time the product of the hourly rate of alcohol elimination from blood (commonly termed the B value, as per Widmark) and the number of hours elapsed between incident and test times.

The expert witness called by the Prosecution, Dr. Claussen, who using the theory of Retrograde Extrapolation, testified that at the time my client was pulled over at 4:45 a.m. on January 26, 2012 his breath alcohol content could have been as high as .11.

This opinion assumes that my client was in the elimination phase with respect to the alcohol that was in his system, as opposed to the absorptive phase which means that his reading would be going up and not down.

The expert witness called by the defense, Dr. Dominick A. Labianca, testified that the underlying uncertainty with respect to Retrograde Extrapolation renders the process unreliable concerning driving while intoxicated cases. For instance, on re-direct, I asked Dr. Labianca what my client's breath alcohol content could be, using the figures given to him on cross-examination by the Assistant District Attorney in her hypothetical, but assume that my client was in the absorptive phase and not the elimination phase. Dr. Labianca testified that my client's reading could be as low as .02 to .03.

Dr. Labianca, who testified that Retrograde Extrapolation is fraught with problems mainly because, as stated above, you do not know if the defendant was in the absorptive stage with respect to the consumption of alcohol, or the elimination phase, which is where he would need to be for retrograde extrapolation to work. Dr. Labianca testified that the absorptive phase could last for up to six hours if the defendant had a full stomach and therefore when he took the breath test at 6:56 a.m. he could have been in the absorptive phase and therefore his breath alcohol content would be lower when he was pulled over at 4:45 a.m. than higher.

The jury ultimately returned a verdict of not guilty on the more serious charge of Driving While Intoxicated (a misdemeanor resulting in a criminal record), in violation of Vehicle and Traffic Law Section 1192.3 and found my client guilty of Driving While Impaired (a violation with no criminal record), in violation of Vehicle and Traffic Law Section 1192.1.

I am not quite sure if in Nassau County prosecuting defendants under theory of Retrograde Extrapolation is a trend or an aberration. But if it is an aberration, why would the Nassau County District Attorney's office go through this expense of hiring an expert witness such as Dr. Claussen in a case as mundane as a traffic stop involving a defendant with no priors and a clean driving record and where no accident, injury or damage to property occurred? Stay Tuned.

Note: Phillip J. Jusino of Phillip J. Jusino & Associates is in private practice with an office in Lake Grove, NY and is admitted to practice law in Connecticut and the District of Columbia. Mr. Jusino is a former A.D.A in Suffolk County, New York. See www.jusinolaw.com.

1. January/February 2012 edition of the Champion by Dominick A. Labianca, PH.d.
2. E.M.P. Widmark, Principles and Application of Medicolejo Alcohol Determination (47 1981).

ANIMAL LAW

Negligence Liability for Animal Owners in NY – an Update

By Amy L. Chaitoff

In the December *Suffolk Lawyer* I discussed the drastic change to animal owner liability made with the case of *Hastings v. Sauve*, 21 N.Y.3d 122, 124, 989 N.E.2d 940, 941 (2013), in which the court held that in New York, an owner of a "farm animal" can be held liable on a negligence claim for their own negligent actions where the "farm animal" is allowed to stray from the property where it is kept." See, *Hastings v. Sauve*, 21 NY3d 122, 125.

In addition, if you happen to be in the First Department, the new rule has been expanded by the case of *Doerr v. Goldsmith*, 110 A.D.3d 453 (N.Y. App. Div. 2013), to open up dog owners to the same liability, when through the negligent behavior of the owner, not the behavior of the dog, the owner allows the dog to become a "instrumentality of harm." I emphasized that, it is important to note that the courts in both *Hastings* and *Doerr*, made it very clear that, "an accident caused by an animal's "aggressive or threatening behavior" is "fundamentally distinct" from one caused by an "animal owner's own negligence." See, *Hastings v. Sauve*, 21 NY3d 122, 125; *Doerr v. Goldsmith*, 110 A.D.3d 453. Therefore, the "vicious propensity" of an animal and the prior knowledge of the owner must still be proven when the behavior of the animal itself is at issue. I noted that at least for now, the Second Department, as well as, the Third & Fourth Department, has thankfully not expanded the *Hastings* ruling to dogs and the "instrumentality of harm" theory utilized by the First Department.

The latest case of *Buicko v. Neto*, 112 A.D.3d 1046, 976 N.Y.S.2d 610, 611 (2013), in the Third Department, continues to hold to that a cause of action for ordinary negligence does not lie against the owner of a dog that causes injury, and is worth noting, especially after the above referenced cases.

Amy L. Chaitoff

In *Buicko v. Neto,* 976 N.Y.S.2d 610, 611, the plaintiff was injured when the defendants' dog "Dudley" allegedly ran from the defendants' property into the road and in front of the plaintiff's bicycle, causing the plaintiff to inadvertently strike the dog and fall from her bicycle, sustaining injuries. *Id.* The plaintiff brought suit alleging both negligence and strict liability. Thereafter, plaintiff moved for partial summary judgment on the issue of strict liability, and defendants then cross-moved for summary judgment to dismiss the complaint. *Id.* The Supreme Court denied plaintiff's motion and granted the defendants' cross motion and plaintiff appealed. On appeal, the court noted that, "It is well settled that a cause of action for ordinary negligence does not lie against the owner of a dog that causes injury." *Id., citing*, *Petrone v. Fernandez,* 12 N.Y.3d 546, 550, 883 N.Y.S.2d 164, 910 N.E.2d 993 [2009]; *see also, Bard v. Jahnke,* 6 N.Y.3d 592, 597–599, 815 N.Y.S.2d 16, 848 N.E.2d 463 [2006].

The Third Department held to the rule established in *Collier v. Zambito,* 1 N.Y.3d 444, 446–447, 775 N.Y.S.2d 205, 807 N.E.2d 254 [2004]), and its progeny that, "the sole viable claim against the owner of a dog that causes injury is one for strict liability." *See, Buicko v. Neto*, 976 N.Y.S.2d 610, 611, citing, *Bard v. Jahnke,* 6 N.Y.3d at 596–597, 599, 815 N.Y.S.2d 16, 848 N.E.2d 463; *Alia v. Fiorina,* 39 A.D.3d 1068, 1069, 833 N.Y.S.2d 761 [2007]). The court noted that, in order to establish strict liability, "there must be evidence that the animal's owner had notice of its vicious propensities". *Buicko v. Neto*, 976 N.Y.S.2d 610, 611, citing, *Alia v. Fiorina,* 39 A.D.3d at 1069, 833 N.Y.S.2d 761; *see also, Collier v. Zambito,* 1 N.Y.3d 444, 446–447, 775 N.Y.S.2d 205, 807 N.E.2d 254 [2004]).

In examining the facts of the case in *Buicko v. Neto*, the court noted that, "in the absence of proof that Dudley has a history of chasing bicycles or vehicles or otherwise interfering with traffic, "there is no basis for the imposition of strict liability". *Buicko v. Neto*, 976 N.Y.S.2d 610, 611, see also, *Alia v. Fiorina,* 39 A.D.3d at 1069, 833 N.Y.S.2d 761. The court further acknowledged that, evidence that a dog has a history of running and barking around is insufficient, by itself, to establish a "vicious propensity," as such actions "are consistent with normal canine behavior." See, *Buicko v. Neto*, 976 N.Y.S.2d 610, 611, citing, *Collier v. Zambito,* 1 N.Y.3d at 447, 775 N.Y.S.2d 205, 807 N.E.2d 254.

The court held that, "although the defendants had previously observed Dudley running back and forth within the invisible fence barking at passing cars and bicycles, the defendants' never observed him leave the fenced in area to chase bicycles or cars or to interfere with traffic. This evidence was sufficient to shift the burden to plaintiff to raise a triable question of fact as to whether defendants knew or should have known that their dog had previously interfered with traffic or engaged in conduct giving rise to an inference of vicious propensities." See, *Buicko v. Neto*, 976 N.Y.S.2d 610, 611. The court held that, "[plaintiff's evidence that Dudley would bark at passing traffic and run back and forth in defendants' yard is insufficient to raise a question of fact as to whether he had a propensity to run into the road or interfere with traffic." *Id.*

So what does this mean? Well, it means that the Third Department in the case of *Buicko v. Neto*, thankfully continues to protect the interests of dog owners in New York by holding to the long standing rule in *Collier* and its progeny, and has thus far, refused to follow the First Department in expanding the new rule in the New York Court of Appeals case of *Hastings,* to dogs. Good news for dog owners in the Third Department!

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

WHO'S YOUR EXPERT

When a Court Goes too Far

By Hillary A. Frommer

In federal court, there are three rules which principally govern the scope and role of an expert witness: Rule 26(a)(2) of the Federal Rules of Civil Procedure, which pertains to the pre-trial disclosure of expert witnesses; and Rules 702 and 703 of the Federal Rules of Evidence, which address expert witness testimony at trial. Rule 26(a)(2)(A), like its state-court counterpart, CPLR § 3101(d), requires a party to disclose the identity of any expert it seeks to call at trial. However, expert disclosure under Rule 26(a)(2)(B) is far more comprehensive than that under the CPLR. The federal rule mandates that, unless otherwise stipulated or ordered by the court, a party must provide a report from its expert witness which includes the following: (1) a complete statement of all opinions the expert will offer and the bases therefore; (2) the facts or data the expert considered in forming the opinions; (3) exhibits that will be used to support or summarize the opinions; (4) the expert's qualifications and publications for the previous 10 years; (5) a list of others cases in the previous four years in which the expert testified as such at trial or in a deposition; and (6) a statement of the compensation paid to the expert.

Rule 702 sets forth the requirements for an expert's testimony to be admissible at trial. And Rule 703 provides that the testifying expert may base his opinion on facts or data that is reasonably relied on by experts in that particular field, even if the data or facts are otherwise inadmissible, such as hearsay.[1] Some examples of "hearsay" data experts frequently rely upon include, guidelines issued by government agencies[2] and independent studies conduct by others.[3]

Neither the Federal Rules of Civil Procedure nor the Federal Rules of Evidence require that the party submit to the court (or to the opposing party) the actual source materials on which the expert relied which are cited in the expert report. In a recent decision in December 2013, the Court of Appeals for the Second Circuit blocked one court's attempt to such a requirement.

Hillary A. Frommer

In *Indradjaja v Holder*,[4] the petitioner sought political asylum in the United States on the grounds that she feared persecution in her home country of Indonesia because she was Chinese and a practicing Christian. In response to the petition, the United States initiated deportation proceedings because the petitioner had overstayed her non-immigrant visitor's visa.[5] The immigration judge denied the asylum application and the petitioner's request for reconsideration, and granted the government's application for removal/deportation.

The petitioner timely moved to reopen her removal proceedings before the Board of Immigration Appeals in order to provide new and previously unavailable evidence, which consisted primarily of a 26-page affidavit from an expert on human rights in Indonesia. That expert based his opinion on his "comprehensive general knowledge of the politics and society in Indonesia" as well as "his review of political science materials, human rights reports [and] media reports in both English and Indonesian relating to recent events in Indonesia."[7] A single member of the BIA denied the motion to reopen in part, because the petitioner failed to provide the primary source materials which her expert relied on in his affidavit. According to the opinion, because the BIA lacked those materials, it could not "independently assess [the expert's] statements and conclusions," and, thus, gave very little weight, if any, to the expert affidavit.

On appeal to the Second Circuit, the petitioner argued that the BIA abused its discretion by essentially ignoring the expert affidavit simply because it did not include copies of the expert's source materials. The Court of Appeals agreed. It found that the BIA's treatment of the expert affidavit was "inconsistent with the way that expert testimony is generally treated." The court specifically turned Rule 703 of the Federal Rules of Evidence, which allows an expert to base his or her opinion on certain data or facts "without regard to the admissibility of the underlying material and without requiring that such material be submitted."[7] The court concluded that the BIA *sua sponte* imposition of a new expert requirement on the petitioner amounted to an abuse of discretion because the petitioner was not given notice or the opportunity to respond to such a rule. In fact, the court noted that there was no precedent to support the BIA's rule. Finally, the court determined that by improperly discounting the expert's affidavit, due solely to the fact that the expert did not supply copies of the materials, the BIA undermined its own rationale for denying the motion to reopen, and so it remanded the case to the BIA for further consideration.

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

1. *See Strauss v Credit Lyonnais, S.A.*, 06 CV 702 (DLI)(MGD) [EDNY Feb 25, 2013]; *Gil v Arab Bank, PLC*, 983 FSupp2d 523 [EDNY 2012].
2. *See Park West Radiology v CareCore Nat., LLC*, 675 FSupp2d 314 [SDNY 2009] [expert's opinion and analysis was based on guidelines issued jointly by the Department of Justice and the Federal Trade Commission]; *BF Goodrich v Betkoski*, 99 F2d 505 [2d Cir 1996] [expert relied on EPA reports].
3. *See Rondout Valley Cent. School Dist. v Coneco Corp.*, 321 FSupp2d 469 [NDNY 2004]; *Zuchowicz v United States*, 870 FSupp 15 [D Conn 1994].
4. 2013 WL 6410991 [2d Cir Dec 9, 2013].
5. *Id*. at *2.
6. *Id*. at *6.
7. *Id*; *citing Iacobelli Constr., Inc. v County of Monroe*, 32 F3d 19, 25 [2d Cir 1994].

SCBA Sponsors Judicial Swearing-In & Robing Ceremony

Photo by Barry Smolowitz

REAL ESTATE

Top 13 Real Estate Laws of 2013

By Andrew Lieb

Now that 2014 is here, it is important to be aware of changes in the law, in order to properly represent our clients. This is not a list about the best events from 2013, but, instead, a list that highlights the new legal landscape that you face as real estate practitioners. Being familiar with these laws, regulations and opinions may help you to better address your clients' matters, save your license and make you money.

Defense of Marriage Act is unconstitutional

In *US v. Windsor*, the Defense of Marriage Act (DOMA) was held unconstitutional by the US Supreme Court as a deprivation of the equal liberty of persons that is protected by the Fifth Amendment. As a result, married same-sex couples will no longer experience federal taxes incident to real estate transfers, both intervivos and testamentary, between spouses. As Edith Windsor did, same-sex couples that paid estate taxes on the death of a spouse should seek a refund.

Ability-to-repay and qualified mortgages regulations

As promulgated by the Consumer Financial Protection Bureau (CFPB), pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act, Regulation Z, which implements the Truth in Lending Act (TILA), has been amended, at 12 CFR 1026, to require creditors to make a reasonable, good faith determination of a consumer's ability to repay a residential mortgage. Guiding conforming loans into the future is the newly created category of "qualified mortgages," which represents a loan that is presumed to comply with the amended regulation by way of meeting certain product features.

Andrew Lieb

Real estate brokerage advertising regulations

The NY Department of State (DOS) issued revised advertising regulations, at 19 NYCRR 175.25, for the real estate brokerage industry. These expansive regulations define the concept of a "team" in brokerage, contain three pages of requirements for the "content of advertisements," and address "web-based advertising" by licensees. Operatively, the regulations include six prohibited terms in brokerage, including: "licensed sales agent;" "sales associate;" "associate;" "realty;" "group" and finally "broker" if the term "broker" is utilized without identifying that the broker is licensed in real estate as a "real estate broker."

Foreclosure Certificate of Merit Statutes

Pursuant to new CPLR §3012-b and amended CPLR §3408, plaintiffs commencing residential foreclosure actions on or after August 30, 2013 are required to serve and file a certificate of merit, together with copies of relevant financial documents, with the summons and complaint.

STAR registration

The NY Department of Taxation and Finance now requires homeowners to register with the department to receive the exemption in year 2014 and after regardless if the homeowner previously received the exemption. Taxpayers who earn more than $500,000 are not eligible for the Basic STAR exemption. Statewide, homeowners save $700 on average through the STAR program.

Real estate brokerage's use of corporate titles

The NY Department of State (DOS) issued an opinion letter, dated April 26, 2013, that clarifies the agency's interpretation of RPL §441-c(1)(a), which prohibits "dishonest or misleading advertising." Therein, DOS found "that brokerages may not provide corporate titles to agents for marketing or other purposes." Consequently, real estate salespersons and associate real estate brokers may no longer have titles of "President," "Vice President," "Senior Vice President," "Executive Vice President" and "Managing Director" where such titles are expressly reserved for the real estate broker who is affiliated with the brokerage entity.

Making Home Affordable Program extended

The Making Home Affordable Program was extended by the Obama Administration through December 31, 2015 "to provide struggling homeowners additional time to access sustainable mortgage relief." Ironically, the Mortgage Forgiveness Debt Relief Act of 2007 expired at the end of 2013, without similar extension, so any MHA workout that results in cancelation of debt income will likely result in taxable income to the struggling homeowner regardless of MHA having been extended. Therefore, MHA's benefit moving forward is significantly diminished.

Identity of User irrelevant to Land Use determination

In *Sunrise Check Cashing and Payroll Services, Inc. v. Town of Hempstead*, the NY Court of Appeals held that "zoning is concerned with the use of land, not with the identity of the user." However, the Court of Appeals, in dictum, softened its holding by analyzing the correlation between social policy grounds to restrict a particular user, such as adult entertainment, and the resulting secondary negative effects on the surrounding community. Moving forward, it appears that a zoning restriction will only be upheld based upon the identity of the user where the

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CONSUMER BANKRUPTCY

Bankruptcy Issues Concerning Disabled or Incompetent Debtors

By Craig D. Robins

This month was going to be the continuation of my article from last month, "Chapter 7 Trustees Gone Wild?" However, as there are some rapidly evolving cases on this issue, I will present that article at a future date.

I routinely get requests to represent consumer debtors who, for one reason or another, will have difficulty either signing the petition, or attending the meeting of creditors. This month I will address how to address these situations.

Sometimes the debtor is fully competent but can't travel because he or she is hospitalized, severely disabled, or incarcerated. Being attached to an artificial lung machine can make attending a court hearing difficult. Other times a family member tells me the client (or potential client), is incompetent due to senility or even being comatose in a hospital or nursing home and cannot sign any papers or even come to a consultation. I've had several recent clients who were in long-term, out-of-state drug rehab programs which had strict prohibitions about leaving the facilities.

There are solutions for dealing with these situations that will enable a debtor, who legitimately cannot attend the meeting of creditors at the courthouse, to still be examined, or in the case of incompetency, to still obtain bankruptcy relief.

Although there are some statutory provisions that address these issues, the real challenge is navigating through local practice and procedure. This typically involves dealing with the Chapter 7 or 13 trustee, the Office of the U.S. Trustee, and others. By learning how to address these matters now, you will be prepared to handle them later when these issues arise.

Unfortunately, in our jurisdiction, there is no absolute standardized way or official procedure for approaching these situations and the Bankruptcy Code and Rules do not address many of the actual practical issues involved. In addition, it seems that the Office of the U.S. Trustee changes their requirements from time to time, and individual trustees each have their own approaches. Nevertheless, I will attempt to provide some guidance.

Craig D. Robins

Inability to sign the petition

Let's start with incompetent debtors. Family members often recognize a need to resolve an incompetent relative's debt problems, especially if it enables assets to be protected. There is nothing in the bankruptcy code that requires a debtor to be of sound mind or able to physically sign the petition.

With incompetent debtors, I often proceed by utilizing a power of attorney. Bankruptcy Rule 9010(a) states that a debtor may appear by an authorized agent or attorney in fact. It is well-settled that an attorney-in-fact may commence a bankruptcy case in appropriate circumstances. Keep in mind that there must either be an existing power of attorney or the debtor must have a sufficiently lucid moment to competently sign a power of attorney. The attorney-in-fact will ultimately testify at the meeting of creditors and therefore must be knowledgeable about the debtor's finances.

The power of attorney form should ideally indicate that the attorney-in-fact has the power to file a bankruptcy case. The standard New York State Statutory Power of Attorney short form enables the user to describe specialized powers, so you can indicate "bankruptcy filings and all other matters related to bankruptcy."

Although there is no case law in our jurisdiction (the Second Circuit) addressing this, some courts have held that "general authority to litigate" is sufficient whereas other courts have held that the power of attorney must expressly authorize the bankruptcy filing.

The attorney-in-fact should sign the bankruptcy petition as "John Doe, attorney-in-fact for Joe Debtor." Debtor's counsel, upon filing the bankruptcy petition by ECF, should also file a copy of the power of attorney, together with an affidavit signed by the attorney-in-fact, in which he attests to his capacity, and explains why a power of attorney is necessary. I like to attach a doctor's note or affidavit as well. The attorney-in-fact must maintain an original copy of the power of attorney and be prepared to show it.

If there is no power of attorney, and the debtor is too incompetent to sign one, then the only way to proceed would be for the debtor's relatives to bring a guardianship and/or conservatorship proceeding in state court. However, it should be noted that Bankruptcy Rule 7017, which recognizes the value of representation on behalf of persons not in a position to protect their own interests, gives the court wide latitude to fashion sufficient relief for protecting an incompetent – a way to possibly bypass a state court proceeding, although this may be more applicable to adversary proceedings than meetings of creditors.

Inability to appear at meeting of creditors

If a debtor is genuinely unable to travel to the meeting of creditors, and will be unable to do so for an extended or indefinite period of time, there are alternate mechanisms for enabling the trustee to examine the debtor. The most common one is a telephonic 341 meeting.

At one time it was standard practice in our jurisdiction for debtor's counsel to bring a motion seeking authorization to conduct the meeting of creditors by telephone. Now, however, that does not seem to be necessary.

Current practice is to contact the trustee and explain why a telephonic 341 is necessary. Once the trustee consents, some trustees will require debtor's counsel to then seek approval from the Office of the U.S. Trustee, which can be done by sending them a letter with supporting documentation demonstrating the inability to appear. However, some trustees do not require this.

I get the opinion that the U.S. Trustee is delegating authority to the panel trustees to let them decide when telephonic 341s

(Continued on page 21)

VEHICLE AND TRAFFIC

Drinking Driver Program Issues

By David A. Mansfield

After a conviction by a bench or jury guilty plea verdict for a first offense of any subdivision of §1192, the client will usually be eligible for the Drinking Driver Program §1196, 15 NYCRR Part§ 134 administered by the Department of Motor Vehicles. The purpose of this article will be to discuss first offenses.

Defense counsel should be familiar with the basic requirements of the program. You should advise your client when sentenced to a conditional discharge that they may be referred for additional counseling. This is not an issue if the sentence is a term of probation as counseling by an OASAS (New York State Office of Alcohol and Substance Abusive Services) licensed agency is mandated.

The Drinking Driver Program consists of the classroom phase, which is seven weekly classroom sessions resulting in approximately 15 hours of instruction and is usually offered at the State University of Stony Brook.

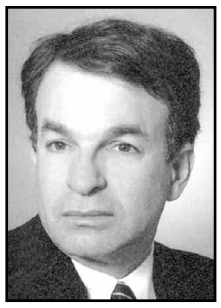
The Program is very strict about attendance.

Some clients may be referred for completion of additional counseling for up to eight months §1196(1) based upon a written self-inventory as to their experiences of three or more alcohol and drug related driving convictions in 10 years.

More troublesome, would be if they were arrested for an alcohol or drug related driving violation while enrolled in the Drinking Driver Program or appear to be enrolled in a class under the influence of alcohol or drugs.

Your client may also request help or an admission that your client is currently in treatment.

If your client is referred for an evaluation, they may choose someone who is on the official Office of Alcohol and Substance Abuse Services or OASAS list at their website at www.oasas.ny.gov/dwi. There is an appeals process. Eventually, your client will be given a Completion Certificate.



David A. Mansfield

If they do not attend class, failed to complete any required evaluation or treatment, failed to satisfactorily participate in the program or did not pay program fees your client might be dropped from the program and have their conditional license revoked. But there is a process to re-enter the Drinking Driver Program. Your client must obtain a written Letter of Consent from the local Drinking Driver Program Director and there is a re-entry fee of $50.

There is no limit to the number of times reentry can be granted into the program, however your client may only be re-issued a conditional license in the first instance.

Should your client fail to complete the Drinking Driver Program as a condition of a conditional discharge or probation, the program will notify the court and your client may be summoned for re-sentencing.

The fee for a conditional license is approximately $85 and the fee for the DDP classes is approximately $225.

The conditional license provided has very strictly limited permission to drive §1196(7a). Not everyone who is required to attend the program will be granted a post-conviction conditional license. First offenders sentenced to a conditional discharge will usually be eligible. Sentences of probation may contain a prohibition against the issuance of a post-conviction conditional license.

A conditional license is not valid for operation of a taxicab or a vehicle for which a commercial driver's license is required.

Your client's conditional license will be revoked if convicted of violating any condition or any moving violation including cell phone, seat belt, or child restraint.

There may be out of state issues. If your client has a New York State license, and was convicted in New York, your client may be able to request approval for an out of state Drinking Driver Program. The out of state location must have both an educational and assessment/evaluation component.

Should you have a New York State license and your client gets convicted out of state and wants to take the Drinking Driver Program in New York. When the revocation order has been received, your client will be informed of their eligibility for the Drinking Driver Program and conditional license.

When your client is licensed out of state, and a conviction was had in New York and they want to take the DDP in New York State, after receiving a notice of eligibility, they may go to New York State Department of Motor Vehicles and enroll in the Drinking Driver Program.

The client is required to present proof of a driving record or abstract from the home state report to the Department of Motor Vehicles to issue a conditional driving privilege.

Should your client have an out of state license or a conviction from out of state and want to take the program in New York State they can do so as a courtesy enrollment. They need to check with the state of residency to determine whether the home state will accept the New York State Drinking Driver Program. They must provide proof of the out of state conviction to the New York State Department of Motor Vehicles office. No driving abstract is needed as a New York State license privilege will not be issued.

These are some of the issues that may arise. An excellent background source used for this article was the official Department of Motor Vehicles publication, The Drinking Driver Program that can be found at htttp://www.dmv.ny.gov/broch/c40.pdf.

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

TAX

Industrial Park Taxes: Town of Smithtown or Town of Islip?

By Douglas W. Atkins

The Hauppauge Industrial Park ("HIP") is a good place to do business on Long Island for obvious reasons such as business-friendly zoning and highway accessibility. Also, it is well known that the great number of commercial properties creates a large tax base over which to spread the municipal levy, namely the Hauppauge School District taxes. That being said, a property's town location, i.e. Islip versus Smithtown, makes a significant difference regarding the property tax bill. All else being equal, the Smithtown side properties are in an advantaged position to their Islip neighbors.

Property taxes relate to the town's valuation of the property. A higher valuation means a higher property tax bill. Tax certiorari lawyers, like myself, often litigate this valuation issue on our client's behalf. Take two hypothetical buildings in the HIP: (1) 1 Smithtown Street, Hauppauge; and (2) 1 Islip Street, Hauppauge. As you may guess, #1 is in Smithtown and #2 is in Islip. Both pay the great majority of their property taxes to the Hauppauge School District. Both properties have assessments (i.e. values by the town) at $3,000,000. Yet #2 has been consistently a few percentage points higher on taxes. What gives?

Douglas W. Atkins

The answer lies in what is called the Homestead Tax System employed by the Town of Islip. In most of Suffolk County, there is one uniform class of taxes and assessments. This means that a $1,000,000 house, office building and restaurant all pay the same property tax bill as long as they are in the same municipal districts (school, town, etc.). The Town of Islip is different because it has elected to use the Homestead System, which is an option available pursuant to the New York State Real Property Tax Law. In short, the Homestead System shifts the tax burden away from residential class and onto the commercial class.

Homestead taxing jurisdictions divide all of the real property into two classes. The first class, called the homestead class, is 1-3 family housing. The second class, naturally called non-homestead, includes everything else: offices, restaurants, retail, high-rise apartments, etc.

In Homestead jurisdictions like Islip, a disproportionate share of the tax burden is shouldered by the non-homestead. The winners in a Homestead jurisdiction are definitely the residential property owners, i.e the voting public. These individuals will pay lower tax bills because of the shift onto the non-homestead class. Thus the losers in a Homestead jurisdiction are businesses. They will often pay a larger tax bill than they would if located in a jurisdiction that did not elect to adopt the Homestead system.

Let's go back to our two hypothetical properties in HIP. Property #1 will enjoy an advantaged position relative to his neighboring, property #2. It may only be a couple of percentage points, but over a number of years, the disparity can easily reach the tens of thousands of dollars.

Is the Homestead system perfectly fair? Probably not. If taxes are supposed to relate solely to value, then there is no reason why small businesses should bear the brunt in favor of residential taxpayers. Then again, what is the alternative for places like the Town of Islip? The elected officials in that town can report something that most of Suffolk Towns cannot: the Town of Islip has chosen to lift some of the property tax burden off of working families and seniors. So who is going to argue with that?

A major problem is that property taxes are a zero sum proposition. If residential taxpayers are given breaks such as the Homestead system and even exemptions (enhanced STAR, veterans, fireman, etc.), then the commercial class must pay more to make it up. The other side of the coin is that if we want to be business-friendly in our property tax laws, this will result in an increased tax bill for residences.

One thing is for certain. All HIP taxpayers should be paying attention to their tax assessment. This number appears on the property tax bill each year. Commercial taxpayers should be reviewing this with their attorney to ensure that they are not being overcharged. Regardless of whether your property is in Smithtown or Islip, having a fair assessment is the most effective way to keep your property tax bill in check.

Note: Douglas W. Atkins is an attorney who concentrates his practice in the areas of tax certiorari, real estate and condemnation. He has experience in tax reduction proceedings for all types of commercial real estate throughout Long Island's counties, towns and villages.

AMERICAN PERSPECTIVES

Could Canada's High Court rules on Prostitution be made under American law?

By Justin Giordano

On December 20, 2013 the Supreme Court of Canada ruled on a case it heard on June 2013, which had been filed by three sex workers. The case revolved around the restrictions that are currently imposed on prostitution in Canada, although there is actually no legal prohibition against prostitution per se in Canada. More specifically, there aren't now, nor have there ever been any laws that disallow the exchange of sex for money under the Canadian law.

The Canadian Supreme Court, which consists of nine justices just as its American counterpart, was unanimous in its 9 – 0 ruling, stating that the bans on brothels and on street solicitation are unconstitutional. The decision was premised on their conclusion that these bans violated prostitutes' safety. However the Canadian high court also included in its holding would not go into full effect for one year. The court stated that it granted this one-year grace period, so to speak, in order to provide the Canadian Parliament an opportunity to come up with other means to regulate the sex trade if it opted to do so. The proviso being that any new legislation may not counter or invalidate the court's ruling.

What brought the case about

Prior to this ruling Canadian law allowed prostitution, as previously indicated, however most of the ancillary or related activities were generally illegal. This included living off the proceeds of someone else selling their services as a prostitute. The Canadian Supreme Court found that provisions such as the aforementioned were overly broad or grossly disproportionate.

Furthermore Canadian Supreme Court Chief Justice Beverley McLachlin wrote that many prostitutes "have no meaningful choice" but to "engage in the risky economic activity of prostitution," and that the law should not make such lawful activity more dangerous. She added, "It makes no difference that the conduct of pimps and johns is the immediate source of the harms suffered by prostitutes. The impugned laws deprive people engaged in a risky, but legal, activity of the means to protect themselves against those risks."

Justin Giordano

The principal argument of the Canadian Federal Government had been that it was prostitution itself that placed those engaged in the sex trades, and most particularly prostitutes, at risk. However, Chief Justice McLachlin in rejecting that argument wrote, "A law that prevents street prostitutes from resorting to safe havens...while a suspected serial killer prowls the streets, is a law that has lost sight of its purpose." The Chief Justice's comments were in no small part intended to be in response to the events that had transpired in Vancouver, British Columbia in 2007 when serial killer Robert Pickton had been convicted of preying on and murdering a number of women, including prostitutes. The case had received a great deal of publicity in the media and served to highlight the issue of safety of prostitutes, or rather the lack thereof.

Lastly her written statement also addressed the role of government, underscoring that it was not the court's intent to exclude it entirely from the field. Therefore in rationalizing why she delayed the implementation of the judgment for a period of 12 months she wrote the following, "How prostitution is regulated is a matter of great public concern, and few countries leave it entirely unregulated."

Justice McLachlin explained that her ruling "does not mean that Parliament is precluded from imposing limits on where and how prostitution may be conducted." In support of that statement she noted that various provisions were intertwined and expanded on her reasoning by writing that "Greater latitude in one measure — for example, permitting prostitutes to obtain the assistance of security personnel — might impact on the constitutionality of another measure — for example, forbidding the nuisances associated with keeping a bawdy house (brothel)."

The Constitution and prostitution in America

America's northern neighbor and closest ally adopted its Canadian Charter of Rights and Freedoms in 1982 and its development and provisions have much in common with the United States Constitution. Some legal scholars have commented that Canada actually sought to improve or at least rectify any deficiencies it perceived existed in their American counterpart. Overall it's fairly evident that the framers of the Canadian Charter sought to incorporate what is generally seen as the country's more progressive flavor in their nation's governing legal document. A salient example is that there is no equivalent provision to the U.S. Constitution's Second Amendment in the Canadian Charter.

In terms of making the case for legalizing prostitution in the United States, the issue is whether to mandate the states to allow it since constitutionally speaking every state has full and exclusive authority to permit, prohibit or regulate it within the confines of its borders. The Tenth Amendment of the Constitution leaves it to the states to regulate so termed "moral" issues, which encompasses gambling and prostitution. However although commercial sex is the states' domain Congress does have the right to regulate it if impacts on interstate commerce, which falls under the federal jurisdiction. The major act that Congress passed pertaining to prostitution is known as the Mann Act, named after Congressman James R. Mann of Illinois. The act was passed in 1910 and originally made it a felony for anyone to engage in interstate or foreign commerce transportation of any woman or girl for the purpose of prostitution, debauchery, or any other immoral purpose.

Currently the only state that allows prostitution is Nevada, which permits brothels in a most of its rural counties (only eight actually have brothels, although other counties can but opt not to) but not in the counties of its major cities such as Las Vegas and Reno. However prior to the twentieth century prostitution and brothels were quite common across the country. For example lower Manhattan had some more 200 brothels in the 19th century. Technically speaking under the then vagrancy laws prostitution was illegal. Nonetheless said laws were far from being rigorously enforced by the authorities given that many of them were bribed by brothel owners and madams. The few attempts to regulate prostitution that were made were generally struck down on grounds that they would go against the "public good."

Could a credible case, if but hypothetically, be made under American law

Framers set the constitution as an amoral document although it could be more than reasonably argued that they were in the main guided by a strong sense of morality. Nevertheless being keen students of history they did not want to forge the foundational legal document that mandated that their interpretation of morality

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LETTER TO THE EDITOR

To the Editor:

This letter is in response to an article written by attorney Craig D. Robins that appeared in The Suffolk Lawyer in January, 2014. The title of the article is "Chapter 7 Trustees Gone Wild?" I have been a Chapter 7 Panel Trustee for the Eastern District of New York at Central Islip for more than twenty years. There are currently seven other Chapter 7 Trustees who serve in Central Islip with substantial experience in the area of Bankruptcy law. The article written by Mr. Robins at best is insulting to every Trustee who works so diligently at his or her profession.

As stated in the Handbook of the Chapter 7 Trustees as prepared by the United States Department of Justice, "The Trustee is a fiduciary charged with protecting the interests of all estate beneficiaries. This group includes all creditors of the bankruptcy estate. To properly represent the estate, the Trustee must secure for the estate all assets properly obtainable under applicable provisions of the Bankruptcy Code…"

The article by Mr. Robins clearly implies that because of changes in the law, that Trustee such as myself are "motivated with a pay day" for pursuing new, novel, and different areas to recover assets for the benefit of the creditors of the estate. He further implies that the Trustee's motivation for doing so is simply to create commissions and legal fees upon the recovery of proceeds on behalf of the creditor body.

At best, Mr. Robins' comments are disingenuous, unsubstantiated, and are completely contrary to the responsibilities of a Trustee as a fiduciary of the creditors.

The fact that Trustees adapt and pursue novel issues in an effort to recover assets on behalf of the creditors, should not in any way imply wrongdoing.

To the contrary, the Trustees in this District are highly experienced, dedicated professionals who pursue their responsibilities in compliance with the guidelines of the Department of Justice.

The notion that Trustees have "gone wild" is so far overreaching and unfair that it is surprising that an attorney such as Mr. Robins whose firm appears before the United States Bankruptcy Court could even begin to justify such a frivolous remark.

In addition, we are forewarned in this article that the author would cite to another Trustee in the next article criticizing the Trustee's efforts to recover property on behalf of bankruptcy estate.

The author seems to forget that the fact any action or position adopted by the Bankruptcy Trustee does not deny a debtor and his counsel due process and an ultimate determination as to fairness and reasonableness before a Judge of the United States Bankruptcy Court.

For Mr. Robins to use terms in his article as a Trustee's attempt to "shake down and extort funds from the Debtor" and the tone of his article is truly an injustice to all the Chapter 7 Trustees and the practitioners who appear before the United States Bankruptcy Court.

Richard L. Stern, Esq.
Partner
MACCO & STERN, LLP

Trusts and Estates *(Continued from page 5)*

wise required in the Supreme and County Courts, was not a prerequisite to seeking court intervention in the Surrogate's Court on an issue of discovery. Accordingly, the court granted the application of the spouse to the extent of directing the production of documents responsive to her Third Notice of Discovery and Inspection.

In re Modell, N.Y.L.J., Oct. 11, 2013, at 44 (Sur. Ct. New York County) (Sur. Anderson).

Unitrust

Before the Surrogate's Court, Nassau County, was an unopposed application by the income beneficiary of the trust created under the decedent's will that it be converted retroactively to a unitrust pursuant to the provisions of EPTL §11-2.4.

The record revealed that the subject trust was created under the will of the decedent for the benefit of her daughter, the petitioner, with the direction that the trustees pay or apply the net income thereof to or for the benefit of her daughter for her lifetime. Upon the death of the decedent's daughter, the trustees were directed to pay the income to the daughter's issue, per stirpes, and upon the death of the survivor of the decedent's daughter and her children living on the date of the decedent's death, to pay the principal, to the daughter's then living issue per stirpes, or if none, to the decedent's then living issue, per stirpes.

In support of her request, the petitioner claimed that the distributions to her from the trust had decreased steadily over the years, and that given her advanced age, the increasing cost of her healthcare, and her living expenses, it was difficult for her to maintain herself. The petitioner further alleged that when she questioned the trustee about her reduced income stream, it indicated that its current policy was to utilize its power to adjust in order to provide her with a rate of return of 2.75 percent, though it would be willing to increase the rate to 3 percent, upon the consent of the petitioner's daughters.

In assessing the issue, the court noted that the provisions of EPTL 11-2.4 supply a nonexclusive list of relevant factors to be considered in determining whether the statute should apply. These factors include the intent of the creator of the trust, the nature, purpose, and expected duration of the trust, the identity and circumstances of the beneficiaries, including needs for liquidity, regularity of payment and preservation and appreciation of capital, and the nature of the assets held by the trust.

Based upon these factors, the court held that the unitrust conversion was appropriate under the circumstances. The court concluded that it was clear that the trust was intended to benefit the decedent's daughter, and that the conversion would provide her with the income needed to satisfy her increased expenses. Moreover, the court opined that given the size of the trust corpus ($6 million), and the age of the petitioner, the increase in income payable to her, would not result in a rapid depletion of the trust principal for the remaining duration of her life.

Accordingly, the court granted the application, and, in the exercise of discretion, directed that the effective date of the conversion be January 1, 2013.

In re Smithers, NYLJ, Sept. 23, 2013, at 32 (Sur. Ct. Nassau County).

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

Installation of Judges *(Continued from page 1)*

Supervising Judge of the District Court Glen A. Murphy administered the Oath of Office to District Court Judges Chris Ann Kelley, Karen M. Wilutis, elected First District Court Judge, President of the Board of Judges and District Court Judge Gaetan B. Lozito.

society on a daily basis.

Despite the relative brevity of the remarks by the sponsors and judges, those in attendance got glimmers of the moving, humorous, enlightening, inspirational, and day-to-day events that had fashioned the lives of the seven inductees who would assume the bench and the duty of dispensing justice in Suffolk County.

Following a break in tradition, Presiding Justice Hinrichs called up New York State Senator John J. Flanagan, who had to catch a plane back to Albany, to sponsor newly elected Karen M. Wilutis, First District Court Judge, President of the Board of Judges**.** Judge Wilutis would take her Oath of Office with the District Court Judges later in the program.

Taking the oath of office as Supreme Court Justices were re-elected Justice Arthur G. Pitts (sponsored by Jack Braslow, Esq.) and newly elected Supreme Court Justice David T. Reilly (sponsored by his father John J. Reilly, Esq.). Newly elected Family Court Judge Deborah Poulos (sponsored by Supreme Court Justice Carol MacKenzie). Presiding Justice Hinrichs administered the Oath of Office to the Supreme Court Justices and Family Court Judge Poulos. Justice Reilly's robe was presented by President Elect Bill Ferris and First Vice President Donna England had the privilege of robing her dear friend Judge Deborah Poulos.

Presiding Justice Hinrichs called up Edward Wiggins who stood in for District Court Judge Carl Joseph Copertino's sponsor Anthony Pancella III who could not attend the ceremony. It was a poignant moment when Presiding Justice Hinrichs called up retired Associate Justice, Appellate Division, Second Judicial Department, John Copertino to administer the Oath of Office to his son, the honorable Carl Joseph Copertino.

Re-elected District Court Judges Chris Ann Kelley (sponsored by Paul Molloy) and Gaetan B. Lozito (sponsored by Senior Court Clerk Kevin P. Barrett) and Judge Karen M. Wilutis were sworn in by the Supervising Judge of the District Court the Honorable Glen A. Murphy.

The ceremony's theme described by sponsors and inductees was one of gratitude to their political leaders, mentors, parents, spouses, children and friends, and all were proud to serve the public and their communities.

The ceremonies surrounding the actual inductions made the morning extra special for all. At the beginning of the proceedings, SCBA member John Zollo shared his talents with a moving rendition of "The Star Spangled Banner."

In his concluding remarks Justice Hinrichs thanked the justices and judges who took time from their daily schedules to attend the ceremony and support their colleagues. He wished all a happy New Year and adjourned the proceedings.

Note: Jane LaCova is the Executive Director of the Suffolk County Bar Association.

Foreclosure Law Program *(Continued from page 3)*

bono hours designing, promoting, and managing the program through the SCBA. In 2009, MR. Smolowitz developed the project's on-line case management system, aptly named "FAST" (Foreclosure Appointment Status Tracker), on which all case assignments, scheduling, communications between project attorneys, and document sharing are done electronically. Each of the project's attorneys has access, allowing the attorneys to assign themselves to client meetings and settlement conferences based on their availability. Client documents and case notes collected and prepared by one attorney are uploaded to FAST, allowing other project attorneys later assigned to the same client immediate access to the prior attorney's work. Court forms and case law are also available on the system.

The project has grown considerably since its inception in 2010 and continues to assist a high volume of clients. While proud of the project's successes, Mr. Smolowitz, who continues to actively assist in oversight of the project, says he looks forward to the day he can disband the program, "when there's no longer a need for our services."

For more information about the Suffolk County Foreclosure Settlement Conference Project and other Long Island pro bono opportunities, contact Maria Dosso, Esq., Director of Communications and Volunteer Services, Nassau/Suffolk Law Services, (631) 232-2400.

Note: Ellen R. Krakow, Esq. is the coordinator of the Suffolk County Pro Bono Project at Nassau/Suffolk Law Services.

Bench Briefs (Continued from page 4)

court further stated that it was well settled that tax returns are generally not discoverable in the absence of a strong showing that the information was indispensible to the claim and could not be obtained from other sources. Finally the court concluded that absent a clear showing that the documents had a bearing on the issues in the case, documents relating to plaintiff's matrimonial action were protected from disclosure.

Motion to vacate default judgment granted; defendant did not receive actual notice of the commencement of this action and that there was no evidence that the defendant deliberately attempted to avoid notice of the action; also, potentially meritorious defense.

In *Gregory Linakis v. Plover Lane East Homeowners Association, Inc.,* Index No.: 5516/2011, decided on September 18, 2013, the court granted defendant's motion to vacate a default judgment. Briefly the history of the case was as follows: Plaintiff filed an action to recover damages for personal injuries. Service of the summons and complaint was affected through the Secretary of State pursuant to Not-For-Profit Corporation Law. When the defendant failed to appear, plaintiff moved for a default judgment, which was granted. After an inquest, a judgment of $225,000.00 was awarded to plaintiff. In support of its application to vacate the default, defendant claimed that it did not receive the summons and complaint that was served on it though the Secretary of State and that it did not learn of the action until December 13, 2012, after a judgment was rendered. Pursuant to CPLR§ 317, a defendant who has been served with a summons other than by personal delivery may seek relief from a default upon a showing that it did not receive actual notice of the summons in time to defend and that it has a meritorious defense. Here, the court found that the affidavit in support of defendant's application was sufficient to show that the defendant did not receive actual notice of the commencement of this action and that there was no evidence that the defendant deliberately attempted to avoid notice of the action. Moreover, the court noted that the affidavit along with a map of the property sufficiently established the existence of a potentially meritoriously defense that the defendant did not own, manage, possess or maintain the area of plaintiff's accident.

Motion to amend summons and complaint to add additional defendants granted; relation back theory applicable; claims arose out of the same conduct, transaction or occurrence, the relationship among the entities is such that the proposed additional defendants could be charged with notice of the action, and there was n evidence that they would be prejudiced in maintaining their defense on the merits in adding them as defendants.

In *Theresa Maca, and Administratrix of the Goods, Chattels and Credits of Jimmy Gergard Maca, deceased v. Boardy Barn Corp. and Hamptons American Grill, LLC,* Index No.: 3178/2011, decided on February 6, 2103, the court granted plaintiff's motion to the extent that it sought an order pursuant to CPLR §§305(c) and 3025(b) amending the summons and complaint to ad defendants Ghetto Kids, Inc and Shields and Galgano as named defendants. Plaintiff commenced the instant matter on January 28, 2011 to recover damages for the alleged wrongful death of the decedent. It was alleged in the complaint that at the time of his death, an infant daughter survived the decedent. It appeared therefore by the allegations in the complaint that the two-year statute of limitations under EPTL §5-4.1 was tolled by the infancy of the decedent's distribute until two years following the issuance of the letters of administration. In deciding the motion, the court noted that leave to amend pleadings should be freely given absent prejudice or surprise resulting directly from the delay. In this case, the court found that there was no evidence that the granting of the motion would unduly prejudice the defendants. The court noted that it must be considered whether the claims against the proposed defendants should relate back to the complaint filed in 2011. In deciding that issue, the court stated that the relation-back doctrine, codified in CPLR §203(b) allowed the addition of a party after the expiration of the statute of limitations under three conditions: (1) both claims arose out of the same conduct, or occurrence; (2) the new party is united in interest with the original defendant and by reason of that relationship can be charged with notice of the institution of the action such that it will not be prejudiced in maintaining a defense on the merits; and (3) the new party knew or should have known that, but for a mistake by the plaintiff concerning the identity of the proper parties, the action would have been brought against the additional party as well. The court concluded that the claims arose out of the same conduct, transaction or occurrence, the relationship among the entities is such that the proposed additional defendants could be charged with notice of the action, and there was n evidence that they would be prejudiced in maintaining their defense on the merits in adding them as defendants.

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

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

Choosing A Smartphone (Continued from page 6)

There are only two methods for transferring files onto an iPhone or iPad – through iTunes, one file at a time (no folders) or through an individual app's WiFi Drive feature, which can be slow and unstable. Most Android devices, on the other hand, can connect to your computer like a flash drive, and freely transfer audio, video, and documents over USB.

Unique hardware features

Some phones have exclusive hardware features that might be critical based on your personal needs. To name a few:

Apple iPhone 5s – a hardware switch that mutes all phone sounds (invaluable in court and depositions)

Samsung Galaxy S4 – expandable memory via MicroSD and removable battery

Samsung Galaxy Note 3 – large display and a built-in stylus with handwriting apps

HTC One – loud, clear front-facing **"**BoomSound" speakers and Ultrapixel camera sensor

Bonus: making a case for non-premium

Here, we add a new criterion: replaceability. Affordability is finally finding a place in the smartphone market. Smartphone users are no longer saddled with an $800 off contract phone when the screen cracks.

Google recently released their Nexus 5 – manufactured by LG and sold directly by Google. This phone is decidedly non-premium, encased exclusively in soft-touch plastic, sporting a (relatively speaking) unimpressive camera and a mono speaker that can only be described as "garbagey." That being said, I have been using this device for a month, and I love it.

What the Nexus 5 lacks in laser-chamfered titanium, it makes up for in speed and usability. It offers a 5-inch Gorilla Glass 3 display, 2GB of RAM, Snapdragon's most current processor, and the "lightest" version of Android available. It performs well in all our criteria, in some cases outperforming the competition. The killer feature, however, is its price – for $300 off-contract, the Nexus 5 is *replaceable* with almost no compromise.

Wrap-up

The breadth of smartphone options can be staggering. There is no clear winner or loser, but there are important differences between these various devices and the software they run. To be sure, some of these devices be better suited to your individual practice than others. This, I submit to you, is a choice worth making.

Note: Guido Gabriele III, of Gabriele & Marano, LLP, was an A.D.A. at the Nassau County District Attorney's Office for over 4 years. He's handled cases involving allegations of identity theft, grand larcenies of over one million dollars, tax evasion, and other white collar crimes. Mr. Gabriele's technological expertise was put to use in investigations and prosecution of computer-related crimes. He has also received training in computer investigations from the Secret Service, the Department of Homeland Security, and other law enforcement organizations.

Student Loans (Continued from page 5)

How much student loan debt is repaid and how much is forgiven?

Of the 37 million borrowers with outstanding balances, 14 percent (5.4 million) have at least one past due student loan account. Of the $1 trillion in outstanding debt, approximately $85 billion is past due.[5] Only 37 percent of borrowers made timely payments without deferment or becoming delinquent between 2004-2009. Two out of five borrowers (41 percent) are delinquent at some point in the first five years of repayment.[6]

Basically, all this debt forgiveness at death or during life means that the government is subsidizing law schools who continue to charge astronomical tuition, essentially because the government continues to give free money without placing any restrictions on the educational institutions. This means that there is added pressure on the lawyers entering the legal profession who are saddled with debt or who paid retail prices for tuition price tags driven solely by the availability of government loans and not as a result of any true rational cost. The true creditor in this bottomless student debt pit is the taxpayer – our colleagues and our clients – who all bear the burden of carrying loans that they are not responsible for nor benefit from.

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

1. Consumer Finance Protection Bureau.
2. Julie Margetta Morgan, *What Can We Learn from Law School?*, December 2011 available at http://www.americanprogress.org/issues/2011/12/pdf/legal_education.pdf, citing FinAid.org analysis of National Postsecondary Student Aid Survey, 2008. According to American Bar Association figures for the 2009-2010 academic year, the amount borrowed for law school averaged $68,827 for public law school graduates and $106,249 for private law school graduates.)
3. Office of Management and Budget (OMB), "2014 Midsession Review," available at http://www.whitehouse.gov/sites/default/files/omb/budget/fy2014/assets/14msr.pdf, last accessed January 7, 2014.
4. Federal Reserve Board of New York, http://www.newyorkfed.org/research/staff_reports/sr479.pdf.
5. FRBNY.
6. Institute for Higher Education Policy.

Bankruptcy Issues Concerning Disabled or Incompetent Debtors (Continued from page 16)

are appropriate. I tried confirming this with the local UST office, but because of rigid UST requirements, they can't make any direct comments as all inquires must go through the main Washington D.C. office.

Even though the debtor cannot appear at the 341 meeting room, debtor's counsel must appear. The trustee will then call the debtor from the hearing room.

I have found that it is easier to work with some trustees than others when it comes to scheduling. Some trustees will give counsel several possible dates, whereas others are not so flexible. Some trustees prefer conducting telephonic 341 hearings before their regular calendar. That could mean doing it at 8:30 a.m.

A witness must be present with the debtor at the time of the telephonic meeting. The U.S. Trustee has a standard form entitled, "Declaration Regarding Confirmation of Identity," which they require the witness to execute at the time of the telephonic meeting. This form, which must be notarized, states that the witness personally verified the identity of the debtor by checking the same type of government-issued photo ID that trustees typically require debtors to produce at the meetings of creditors in the courthouse.

If counsel knows that his client will not be able to appear, counsel should contact the trustee as soon as possible and not wait until the last minute.

I have had several cases in which I represented clients in nursing homes who were not only unable to appear, but unable to testify as well. In those cases I filed the petition with a power of attorney, and the attorney-in-fact testified at a regularly scheduled 341 hearing on behalf of the debtor. In both cases the trustee required me to bring a motion excusing the debtor's attendance, which was routinely granted.

In order to totally excuse the debtor's appearance, complete mental or physical incapacity is necessary. For example, in another case of mine, the debtor-husband had a post-petition stroke, was hospitalized, and could not testify. I brought a motion seeking to waive his appearance, which was granted, and just the wife testified.

I have also had several cases with debtors who were incarcerated. Telephonic 341 hearings for all of them worked out, but not without frustrations. Be prepared that it can take a good amount of time and effort to work with prison authorities to make suitable arrangements. Sometimes it is very difficult to get the prison to enable the debtor to be present in a room with a phone, and with a witness, at a designated time.

If a debtor should die after a bankruptcy case is filed, the case can still continue according to Bankruptcy Rule 1016, in which event an individual with knowledge of the debtor's finances can testify.

Moving out of state or traveling out of the country for a period of time is generally not an accepted reason to request a telephonic 341 unless the debtor is in the military on active duty or has an extraordinary reason for being unable to travel back to New York.

If it appears that the debtor's inability to appear is temporary, such as the case where the debtor is hospitalized, but is scheduled to be released in the near future, or was called out of town for a family emergency, arranging for a telephonic 341 may be inappropriate. In these instances, merely contacting the trustee, explaining the situation, and requesting an adjournment will usually be sufficient. If there is good reason for why the debtor cannot appear, most trustees will agree to adjourn the 341 hearing several times, usually in two-week increments.

When the debtor cannot appear at the meeting of creditors, additional work is always necessary. Accordingly, counsel should factor this is in when determining the legal fee.

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

Practice Management (Continued from page 10)

day or day of the week. On some channels, you'll want to post the same content multiple times. For example, many experts say you should post links to each new blog post at least 4 times on Twitter, at different days and different times, so that you reach different audiences when they are looking at Twitter.

As you might imagine, it's helpful if your editorial calendar keeps track of what you post, where, and when. This is also helpful when you want to get more traffic to older content that is still relevant.

Create the Schedule

The editorial calendar itself is simply a schedule to plan and keep track of your content. It should include:

- Who will post (if the channel has multiple authors, managers or administrators, such as a law firm blog or website, firm social media pages, etc.)
- How frequently you will post (daily, weekly, monthly, etc.)
- When you will post (specific day and/or time)
- Themes
- Post topics
- Post titles
- Images associated with the post
- Post keywords
- Post categories or tags
- Post audience
- Post deadline
- Actual post date
- URL of the post
- Content type
- Channel(s) to post to

Although the editorial calendar is a useful planning tool and a helpful guideline, as you can see, it can also be used to keep track of what has actually been posted. This will help you to identify topics, posts, or themes that you 'missed,' either due to a failure to post or because a more pressing issue arose which 'bumped' your original plan.

There are many tools available to help you create and implement a successful content marketing plan using your editorial calendar. For example, scheduling tools like Buffer or Hootsuite will let you write posts in advance and schedule them when you want them to appear online. If you use WordPress, you can try the WordPress Editorial Calendar plugin, which will give you an overview of your blog and scheduled posts. You can drag and drop to change post publication dates, and edit posts directly from the calendar.

If you've never tried using an editorial calendar before, give it a try and see how much easier – and less stressful – it can make the content creation process.

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

3D Printing and Intellectual Property (Continued from page 8)

property protection are in place to protect the fruits of the creator's labor.

Note: James J. Lillie, a former engineer, is a patent attorney and the founding member of LILLIE LAW, LLC, which has entered its 12th year of business. In 2004, he began teaching courses at St. Joseph's College that address Intellectual Property Law, which include Business Law, and Constitutional Law. He also works with various non-profits, including the BSA and local sports programs. He can be contacted at jlillie@lillielaw.com.

1. *Wal-Mart Stores, Inc. v. Samara Bros.*, 529 U.S. 205, 209-210, 54 USPQ2d 1065, 1065-66 (2000).

2. *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 764 n.1, 23 USPQ2d 1081, 1082 n.1 (1992).

3. *Wal-Mart* ., 529 U.S. at 205, 54 USPQ2d at 1065 (design of children's outfits constitutes product design); *Two Pesos,* 505 U.S. at 763, 23 USPQ2d at 1081 (interior of a restaurant is akin to product packaging); *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 34 USPQ2d 1161 (1995) (color alone may be protectible); *In re N.V. Organon*, 79 USPQ2d 1639 (TTAB 2006) (flavor is analogous to product design and may be protectible unless it is functional).

4. *Qualitex,* 514 U.S. at 162, 34 USPQ2d at 1162.

5. *Wal-Mart* , 529 U.S. at 215, 54 USPQ2d at 1066.

Top 13 Real Estate Laws of 2013 (Continued from page 16)

particular user is expressly identified in the municipal ordinance with an express statutory purpose that demonstrates that the subject user adversely affects the surrounding community and where such correlation actually is generally accepted.

New York Rising program to recover from Superstorm Sandy

Created by Governor Cuomo in the aftermath of the devastation felt by Hurricane Sandy, this NYS Program, which is administered by the Office of Storm Recovery, includes: (1) the Housing Recovery program; (2) the Small Business program; and (3) the Community Reconstruction Program. NY Rising provides grants and low-interest loans for recovery from the storm, increases resiliency to future storms and helps those most affected receive buyouts for their lost homes.

Real estate appraiser assistant regulations

The NY Department of State (DOS) issued revised scope of practice regulations, at 19 NYCRR 1101.4, for real estate appraiser assistants. The revised regulations provide that a supervisor must have been certified for a minimum of three years to qualify in supervising assistants.

Breach of real estate contract damages

In *White v. Farrell*, the NY Court of Appeals held that where a purchaser breaches the contract of sale and there is not a liquidated damages clause in the contract, the measure of damages is defined by the time-of-the-breach rule. Pursuant thereto, damages are defined as "the difference, if any, between the contract price and the fair market value of the property at the time of the breach." The fair market value represents a question of fact where the resale value is only but one factor in the determination by a trier of fact and is not dispositive.

Municipalities cannot require offsite mitigation incident to Land Use Application

In *Koontz v. St. Johns River Water Management Dist.*, the US Supreme Court held, pursuant to the Unconstitutional Conditions Doctrine, that a municipality could not deny a land use permit where an applicant refused its demands to expend monies on offsite properties that were not owned by the applicant and had no nexus or rough proportionality to the proposal. In so holding, municipalities have been limited in their efforts to extort monies from applicants seeking permission to build.

Loss mitigation regulations

As promulgated by the Consumer Financial Protection Bureau (CFPB), pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act, Regulation X, which implements the Real Estate Settlement Procedures Act of 1974, has been amended, at 12 CFR 1024, to require servicers to evaluate borrowers' applications for loss mitigation options as well as providing borrowers with continuity of contact with personnel throughout the process. Additionally, the amended regulation protects borrowers in connection with force-placed insurance and requires servicers to properly address errors asserted by borrowers.

This list only provides a small blurb on each new law, regulation and opinion. There may be further discussion on these topics going forward as they get fleshed out in the Courts. So stay tuned.

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

SUFFOLK ACADEMY OF LAW

OF THE SUFFOLK COUNTY BAR ASSOCIATION

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

FEBRUARY & MARCH CLE

The Suffolk Academy of Law, the educational arm of the Suffolk County Bar Association, provides a comprehensive curriculum of continuing legal education courses. Programs listed in this issue are some of those that will be presented during February and March 2014.

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

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

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

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

NOTES:

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

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

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

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

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

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

Tax-Deductible Support for CLE: Tuition does not fully support the Academy's educational program. As a 501©)(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.

UPDATES

Matinee

ANNUAL ELDER LAW UPDATE

Friday, February 14, 2014

This update by SCBA's own "elder law guru" will update your knowledge and provide you with new insights into advising aging clients and their families. Everything you need to know about estate planning, Medicaid and Medicare, the effects of the ACA, nursing home planning, powers of attorney, health care proxies, and much more will be addressed.
Faculty: **George Roach, Esq.** (Grabie and Grabie)
Time: 2:00–5:00 p.m..
Location: SCBA Center – Hauppauge
Refreshments: Valentine snacks (from 1:30 p.m.)
MCLE: 3 Hours (2.5 professional practice; 0.5 ethics) [Transitional or Non-Transitional]

ANNUAL LANDLORD-TENANT UPDATE

Tuesday, February 25, 2014

This detailed update, from a skilled panel, covers key developments and practices in landlord-tenant law. Planned topics include:

- recent developments regarding commercial and residential properties
- housing discrimination
- predicate notice
- settlement and negotiation strategies
- lease negotiations
- practical tips for practitioners whether representing the landlord or the tenant. We are also contemplating discussing lease negotiations
- more!

Faculty: **Hon. Stephen Ukeiley** (Suffolk County District Court Judge); **Hon. Scott Fairgrieve** (Nassau County District Court Judge); **Hon. Andrea Schiavoni** (Southampton Town Justice); **Victor Ambrose, Esq**. (Nassau Suffolk Law Services Committee); **Warren Berger, Esq.; Marissa Luchs Kindler, Esq.** (Nassau Suffolk Law Services Committee); **Michael McCarthy, Esq.**; **Patrick McCormick, Esq**. (Campolo, Middleton & McCormick LLP); and **Deputy Sheriff Sargent David Sheehan** (Suffolk County Sheriff's Department).
BONUS: A limited number of Hon. Stephen Ukeiley's *The Bench Guide to Landlord & Tenant Disputes in New York* (Second Edition) will be available for purchase by seminar registrants. Judge Ukeiley will sign the books during the registration-light supper period that precedes the program.
Program Coordinator: Hon. Stephen Ukeiley (Academy Advisory Committee)
Time: 6:00 – 9:00 p.m. **Location:** SCBA Center – Hauppauge
Refreshments: Light supper from 5:30
MCLE: 3 Hours (professional practice) [Transitional or Non-Transitional]

ANNUAL MATRIMONIAL LAW UPDATE

Monday, March 10, 2014

A highlight of the Academy's March Mondays, the Matrimonial Annual Update covers all the new statutory and case law developments in maintenance, child support, equitable distribution, custody and visitation etc., etc. The presenter, whose inaugural update last year was very well received, is back by popular demand.
Faculty: **Vincent Stempel, Jr., Esq.**
Program Coordinator: **Arthur E. Shulman** (Past SCBA President // Former Academy Dean)
Time: 6:00 – 9:00 p.m. **Location:** SCBA Center – Hauppauge
Refreshments: Light supper from 5:30
MCLE: 3 Hours (2.5 professional practice; 0.5 ethics) [Transitional or Non-Transitional]

ANNUAL BANKRUPTCY LAW UPDATE

Tuesday, March 11, 2014

A prestigious faculty covers developments affecting bankruptcy practice, with an emphasis on consumer bankruptcy. Learn about developments in the law and trends in the EDNY Bankruptcy Courts.
Faculty: **Hon. Alan S. Trust** (United States Bankruptcy Court, EDNY); **Hon. Robert E. Grossman** (United States Bankruptcy Court, EDNY)**; others TBA.**
Program Coordinator and Moderator: **Richard L. Stern** (Macco & Stern // Former Academy Dean)
Time: 6:00 – 9:00 p.m. **Location:** SCBA Center – Hauppauge
Refreshments: Light supper from 5:30
MCLE: 3 Hours (professional practice) [Transitional or Non-Transitional]

SEMINARS & SERIES

Series

FROM THE TRENCHES: Law Secretaries' Perspectives on Winning Maneuvers

Tuesday, February 4; Tuesday, February 11, 2014

Two programs remain In this series, which began in January. In all of the presentations, members of the courts' law departments discuss the actions, papers, and motions that come into their purview and dispense advice for gaining the best results in the matters you handle. The January programs – Commercial & Civil and Matrimonial & Criminal – are now available as recordings.
Seminar Three: Surrogate's Court and Article 81s – Tuesday, February 4
Faculty: Surrogate's Court – **Brian P. McBride, Esq.; Brette Haefeli, Esq.; Linda Moran, Esq.; Mary Kane, Esq.**
Article 81's – **Burt Zweroff, Esq.; Jeffrey Grabowski, Esq.**
Seminar Four: Civil Motion Practice & More – Tuesday, February 11
Topics: Motion Practice; TROs; Injunctions in Limine; Substantive Law (e.g., Labor Law, No Fault)
Faculty: **Evan Zuckerman, Esq.; Carol Moore, Esq.; Howard Heckman, Esq.; Ann Boucher; Diane Farrell, Esq.; Glenn Mikelsen, Esq**

Each Program:
Time: 6:00 – 9:00 p.m.
Location: SCBA Center – Hauppauge **Refreshments:** Light supper from 5:30
MCLE: 3 Hours (professional practice) [Transitional or Non-Transitional]

Lunch 'n Learn
First Annual Adolph Siegel Memorial Real Estate Seminar –

BOILERPLATE: UNDERSTANDING WHAT YOU CAN'T CHANGE

Wednesday, February 5, 2014

After this program, you will never again tell real estate clients to "just sign" something without explaining the purpose and potential ramifications of what they are signing. A panel of experienced real estate attorneys will discuss a variety of boilerplate documents generated by lenders, title companies, and the government. The panelists will, among other things, address the contents and consequences of non-negotiable documents as well as the exclusions of a standard title policy. Course materials will include up-to-date common closing forms, including the new Loan Estimate form under the CFPF's *Know Before You Owe* initiative.
Faculty: **Joel Agruso, Esq.; Vincent Danzi, Esq.; Peter Tamsen, Esq.**
Coordinator: **Lita Smith-Mines, Esq.** (Academy Officer)
Time: 12:30–2:10 p.m.
Location: SCBA Center – Hauppauge
Refreshments: Lunch from noon
MCLE: 2 Hours (professional practice) [Transitional or Non-Transitional]

East End

BROKERAGE CONTRACTS & DISPUTES

Thursday, February 27, 2014

Developed with the East End practitioner in mind, this CLE will deal with the kinds of brokerage issues that confront many real estate attorneys. Topics include:

- types of listings
- customary terms and negotiating listing agreements
- when commission is earned
- procuring cause
- proof of essential terms
- recent case law.

Faculty: **William Fleming, Esq.; Ed Reale, Esq.; Brian Doyle, Esq.**
Time: 5:15-7:15 p.m..
Location: Bridgehampton National Bank
Refreshments: Light supper
MCLE: 2 Hours (professional practice) [Transitional or Non-Transitional]

Series

MATRIMONIAL MONDAYS

Mondays, March 3,17, 31, 2014

This year's matrimonial series comprises three advanced seminars, each on an important issue for those who practice in the field. You may enroll in any individual program or SAVE by subscribing to the full series.
SEMINAR 1: Advanced Custody Issues
Monday, March 3, 2014
Expert faculty addresses complex issues regarding custody and visitation.
Faculty: **Hon. James Quinn; Jeffrey Horn, Esq.; Rachel Camillery, Esq.; Gayle Rosenblum, Esq.**
Coordinator: **Debra Rubin, Esq.**
SEMINAR 2: Advanced Business Valuation for Purpose of Equitable Distribution, Maintenance, and Child Support
Monday, March 17, 2014
Two hypothetical mid-sized businesses will be analyzed and evaluated through lecture and trial demonstration.
Faculty: **Louis Cicone and Paul Berland from Brisbane Consulting; Robert Cohen, Esq.; Others TBA**
Coordinator: **Arthur E. Shulman, Esq.**
SEMINAR 3: Advanced Evidence in Matrimonial Matters
Monday, March 31, 2013
Various kinds of evidence will be discussed and demonstrated in this in-depth exploration of the topic.
Faculty: **Stephen Gassman, Esq.**
Coordinator: **Arthur E. Shulman, Esq.**

SUFFOLK ACADEMY OF LAW

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

Each Program:
Time: 6:00–9:00 p.m. (Sign-in from 5:30)
Location: SCBA Center **Refreshments:** Light supper
MCLE: 3 credits (2.5 professional practice; 0.5 ethics)

Early Evening
NEW CHANGES TO ESTATE AND TRUST TAXATION
Wednesday, March 5, 2014

An experienced guest faculty will discuss new changes to estate and trust taxation under the American Taxpayer Relief Act of 2012 ("ATRA"). Lecture topics will include:

- The New Estate and Trust Tax Rates under ATRA
- The 3.8% Medicare Surtax
- Portability
- Credit Shelter Trusts
- Renunciations/Disclaimers
- Income Tax versus Estate Tax Implications in Estate Planning
- New York Estate Tax Implications
- Distributable Net Income and Capital Gains in the Estate and Trust World

Faculty: **Robert Barnett, CPA, JD, MS (Taxation)** (Partner, Capell Barnett Matalon & Schoenfeld LLP – Jericho)
Elizabeth Forspan, Esq. (Capell Barnett Matalon & Schoenfeld LLP – Jericho)
Coordinator: **Eileen Coen Cacioppo, Esq.** (Academy Curriculum Chair)
SAVINGS: Take this program as part of the Academy's March Elder Law Trio and gain a tuition discount.
Time: 5:30–7:30 p.m. **Location:** SCBA Center – Hauppauge
Refreshments: Light supper
MCLE: 2 Hours (professional practice) [Transitional or Non-Transitional]

Early Evening
PRESERVING LIFE INSURANCE ASSETS EARMARKED FOR THE NEXT GENERATION: What the Attorney Needs to Know
Tuesday, March 18, 2013

This program will look at life insurance policies through the lens of Income and Estate Tax gifting provisions and benefits to individuals as a means of passing wealth from one generation to the next. Focus will be on some of the problems and issues that may arise, including:

- The effect of prematurely expiring life Insurance on charitable bequests already in existence.
- The fiduciary responsibility of trustees.
- Real life situations – for example, disputes between family members as a result of a private trustee who wasn't aware that the life Insurance contract had to be actively managed and, as a result, may be in process of prematurely expiring.
- The general climate of the life insurance industry wherein $1 trillion dollars of current life insurance proceeds are in danger of expiring prematurely, thereby denying beneficiaries and charities the tax free dollars that were previously earmarked for them.
- Strategies to prevent the further erosion of these life insurance assets, including utilizing policy performance evaluation techniques.

Faculty: **David DePinto, Esq.; Henry Montag, CFP, CLTC**
Coordinator: **Eileen Coen Cacioppo, Esq.** (Academy Curriculum Chair)
SAVINGS: Take this program as part of the Academy's March Elder Law Trio and gain a tuition discount.
Time: 5:30–7:30 p.m.
Location: SCBA Center – Hauppauge
Refreshments: Light supper
MCLE: 2 Hours (professional practice) [Transitional or Non-Transitional]

Sunset Seminar
PLANNING FOR THE ELDERLY & DISABLED
Wednesday, March 26, 2014

Rendering planning advice is a fundamental responsibility for the lawyer whose practice involves representation of the elderly or disabled. This important program will provide cutting-edge strategies that take into account new legislation and trends. The featured speaker is the founder and Past President of the National Academy of Elder Law Attorneys and the immediate past chair of the NYSBA Elder Law Committee. With his knowledgeable colleague, he will cover:

- **Medicaid Planning** (including transitioning from traditional home care Medicaid to Medicaid Managed Long Term Care (MLTC), requiring individuals to select one of several MLTC providers)
- **Planning for the Disabled**
- **Asset Protection Planning**

Faculty: **Anthony Enea, Esq.** (Enea, Scanlan & Sirignano, LLP // NAELA Past President // Past Chair, NYSBA Elder Law Section)
Sara E. Meyers, Esq. (Enea, Scanlan & Sirignano, LLP)
Coordinator: **Eileen Coen Cacioppo, Esq.** (Academy Curriculum Chair)
SAVINGS: Take this program as part of the Academy's March Elder Law Trio and gain a tuition discount.
Time: 4:00–7:00 p.m. **Location:** SCBA Center – Hauppauge
Refreshments: Snacks
MCLE: 3 Hours (2.5 professional practice; 0.5 ethics) [Transitional or Non-Transitional]

Four-Credit Evening Seminar
A TO Z OF NEGLIGENCE PRACTICE
Thursday, March 27, 2014

This information-packed primer will provide tips for handling personal injury and other negligence cases - from client intake through settlement or trial. You will learn how to assess a potential case, set up a client file, arrange for appropriate medical examinations, handle pre-trial issues, complete forms and pleadings, assess settlement offers and/or prepare for trial. The experienced presenter will cover: automobile cases; premises Cases; Labor Law; dog bite cases; products liability; Workers' Compensation; actions against municipalities; New York State cases ; special service provisions; joint and several liability; vicarious liability; and more. The program is intended for new lawyers and lawyers who wish to expand their practices into the negligence area.
Presenter: **Samuel Felberbaum, Esq.**
Time: 5:00–9:00 p.m. (Sign-in from 4:30)
Location: SCBA Center **Refreshments:** Light supper
MCLE: 4 credits (2 professional practice; 2 skills)

Transitional Training for New Lawyers
BRIDGE-THE-GAP "WEEKEND"
Friday, March 28, and Saturday, March 29, 2014

This two day training program provides a full year's worth of credits for newly admitted attorneys. Key bread-and butter practice areas are covered by a skilled, accessible faculty of judges and practitioners. Enrollment in the full program is recommended, but either day may be taken alone. The full program provides the 16 required credits plus 1.5 credits to carry forward.

DAY ONE (FRIDAY) – EMPHASIS ON TRANSACTIONAL PRACTICE

TOPICS: Everyday Ethics; **The Grievance Process; Residential Real Estate; Foreclosure Basics; Small Business Formation; Wills, Trusts & Estates; Elder Law**
Time: 8:00 a.m. – 4:45 p.m. (Sign-in from 7:45 a.m.)
Location: SCBA Center
Refreshments: Continental Breakfast & Lunch Buffet
MCLE: 8.5 credits (2.0 ethics; 3.5 professional practice; 3.0 skills)

DAY TWO (SATURDAY) – EMPHASIS ON LITIGATION
TOPICS: Introduction to the Courts; Handling a Civil Case; Introduction to Federal Practice; Uncontested Matrimonial Actions; New York Notary Law; Handling a Criminal Case
Time: 8:30 a.m. – 4:30 p.m. (Sign-in from 8:15 a.m.)
Location: SCBA Center
Refreshments: Continental Breakfast & Lunch Buffet
MCLE: 9.0 credits (1.0 ethics; 5.0 professional practice; 3.0 skills)
BTG Planning Committee: **Stephen Kunken**; **William Ferris**; **Barry Smolowitz**

FEBRUARY 2014 REGISTRATION FORM

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

COURSE	SCBA Member	SCBA Student Member	Non-Member Attorney	Season Pass	12 Sess. Pass	MCLE Pass	New Lawyer MCLE Pass	DVD	Audio CD	Course Book
ANNUAL UPDATES										
Elder Law	$125	$75	$150	Yes	Yes	3 cpn	3 cpn	$125	$100	$30
Landlord-Tenant	$100	$75	$110	Yes	Yes	3 cpn	3 cpn	$100	$ 95	$30
Matrimonial	$125	$75	$150	Yes	Yes	3 cpn	3 cpn	$125	$100	$30
Bankruptcy	$125	$75	$150	Yes	Yes	3 cpn	3 cpn	$125	$100	$30
SEMINARS & SERIES										
From the Trenches Series ☐ Surrogate's & Article 81s ☐ Civil Motion Practice	$75 each	$50 each	$90 each	Yes	Yes - 1each	3 each	3 each	$95 each	$85 each	$20 each
Dolph Siegel Memorial Seminar: Understanding Boilerplate	$50	$35	$75	Yes	Yes	2 cpn	2 cpn	$80	$75	$20
East End: Brokerage Contracts & Disputes	$65	$40	$75	Yes	Yes	2 cpn	2 cpn	N/A	N/A	N/A
Matrimonial Mondays ☐ Full Series ☐ Seminar 1: Custody ☐ Seminar 2: Business Valuation ☐ Seminar 3: Evidence	$235 $95 each	$110 $50 each	$280 $110 each	Yes	Yes - 1 each	Series = 8 3 each	Series = 8 3 each	$100 each	$90 each	$20 each
Estate & Trust Taxation*	$65	$40	$75	Yes	Yes	2 cpn	2 cpn	$90	$80	$20
Preserving Life Insurance Assets*	$55	$35	$65	Yes	Yes	2 cpn	2 cpn	$80	$70	$20
Elder & Disabled Planning*	$90	$50	$100	Yes	Yes	3 cpn	3 cpn	$100	$95	$25
* TRIO of Elder Law Programs	$165	$105	$195	Yes	Yes - 1 each	Trio = 6 cpn	Trio = 6 cpn	N/A	N/A	N/A
A to Z of Negligence Practice	$85	$50	$100	Yes	Yes	4 cpn	4 cpn	$100	$95	$25
Bridge-the-Gap for New Lawyers ☐ Day 1 - Transactional ☐ Day 2 - Litigation	$195 Single Day - $125	$195 Single Day - $125	$195 Single Day - $125	Yes Yes	4 uses 2 uses	14 cpn 8 cpn	12 cpn 7 cpn	N/A	N/A	N/A

Name: _____
Address: _____
Phone: _____ E-Mail _____
TOTAL TUITION $_____ **+ optional tax-deductible donation $**_____ **= $**_____ **TOTAL ENCLOSED**
METHOD OF PAYMENT _____ Check **(check payable to Suffolk Academy of Law)** _____ Cash
Credit Card: ☐American Express ☐MasterCard ☐VISA ☐Discover
Account # _____ Exp. Date: _____ Signature: _____

ACADEMY OF LAW NEWS

CLE Course Listings on pages 22-23

ACADEMY Calendar of Meetings & Seminars

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

FEBRUARY

4 Tuesday ***From the Trenches: Advice from the Law Secretaries*–Surrogate's Court and Article 81.** 6:00–9:00 p.m.; light supper from 5:30 p.m.

5 Wednesday **First Annual Adolph Siegel Real Estate Seminar: The Importance of Boilerplate.** Lunch 'n Learn. 12:30–2:10 p.m.; lunch from noon.

6 Thursday **Rescheduled: Reverse Mortgages after teh Reverse Mortgage Stabilization Act.** 12:30-2:10 p.m; lunch from noon.

7 Friday Meeting of Academy Officers & Volunteers. 7:30–9:00 a.m. Breakfast buffet. All SCBA members welcome

11 Tuesday ***From the Trenches: Advice from the Law Secretaries*–Civil Motion Practice.** 6:00–9:00 p.m.; light supper from 5:30 p.m.

14 Friday **Annual Elder Law Update** (George Roach)**.** Matinee. 2:00–5:00 p.m. Valentine's Day snacks from 1:30 p.m.

25 Tuesday **Annual Landlord-Tenant Practice Update.** 6:00–9:00 p.m.; light supper from 5:30 p.m.

27 Thursday ***East End:* Brokerage Contracts & Disputes.** 5:15–7:15 p.m. at Bridgehampton National Bank.

MARCH

3 Monday **Matrimonial Series: Advanced Custody Issues.** 6:00–9:00 p.m.; Light supper from 5:30 p.m.

5 Wednesday **Changes to Estate & Trust Taxation.** 5:30–7:30 p.m. Light supper from 5:00 p.m.

7 Friday Meeting of Academy Officers & Volunteers. 7:30–9:00 a.m. Breakfast buffet. All SCBA members welcome

10 Monday **Annual Matrimonial Update** (Vincent Stempel). 6:00–9:00 p.m.; light supper from 5:30 p.m.

11 Tuesday **Annual Bankruptcy Law Update.** 6:00–9:00 p.m.; light supper from 5:30 p.m.

17 Monday **Matrimonial Series: Valuation of a Mid-Size Business (for Equitable Distribution, Maintenance, and Child Support).** 6:00–9:00 p.m.; light supper from 5:30 p.m.

18 Tuesday **Preserving Trust-Owned Life Insurance Assets: Fiduciary Responsibilities.** 5:30–7:30 p,m. Light supper from 5:00 p.m.

20 Thursday **18b Training: Family Court.** 6:00–9:00 p.m.

26 Wednesday **Planning for the Elderly & Disabled.** 4:00–7:00 p.m. Coffee and snacks from 3:30 p.m.

27 Thursday **A to Z of Negligence Practice** (Four-Credit Program). 5:00–9:00 p.m. Light supper from 4:30 p.m.

28 Friday **Bridge-the-Gap Training for New Lawyers** (Transactional Practice)**.** Full Day. Continental breakfast and lunch buffet

29 Saturday **Bridge-the-Gap Training for New Lawyers** (Litigation)**.** Full Day. Continental breakfast and lunch buffet.

31 Monday **Matrimonial Series: Advanced Lecture & Demonstration on Evidence in Matrimonial Matters** (Stephen Gassman)**.** 6:00–9:00 p.m.; light supper from 5:30 p.m.

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

Academy Revamps New Lawyers' Bridge-the-Gap Program

By Dorothy Paine Ceparano

New lawyers must complete a minimum of 32 transitional MCLE credits during the two years following admission. Since the rule went into effect in the late 1990's, the Academy has offered a 16-credit training program meant to fulfill the first year's requirements. Often, however, lawyers who attend the program call the Academy in their second year of admission to ask if they can re-take the program to earn the rest of their credits. Under the rules, they cannot, and the best the Academy has been able to do is to direct them to other CLE's that provide transitional, as well as non-transitional, credit. The Academy did not have a formal "Year Two" program.

Not so anymore. The Academy's Bridge-the-Gap Committee, headed by Bill Ferris, Steve Kunken, and Barry Smolowitz, has revamped the entire new lawyer program. The revised program is divided into two parts (16 credits in each), with Parts "A" and "B" to be presented in alternating years. Now, new lawyers may earn all of their 32 transitional credits from the Academy. Moreover, in keeping with suggestions from past attendees, some new topics have been added and long-standing topics have been allotted more time to allow for more expansive treatment.

Significantly, new lawyers may enroll in whichever Bridge-the-Gap program the Academy is offering in they year they graduate. Both "Part A" and "Part B" are basic treatments of bread-and-butter practice areas, and each stands on its own without prerequisites. Each is presented over the course of two days, a Friday and Saturday.

This year's Bridge-the-Gap program is scheduled for Friday, March 28, 8:00 a.m. to 4:45 p.m., and Saturday, March 29, 8:20 a.m. to 4:35 p.m. The Friday program, which emphasizes transactional practice, will be organized as a mock "firm meeting" in which "new associates" (the audience) are instructed by "senior partners" (the faculty) on a number of hypothetical matters the "firm" will handle. Topics include residential real estate, foreclosure, formation of a small business, wills and estates, elder law, and ethics (the Rules of Professional Conduct, time management, and the grievance process). The Saturday program stresses litigation, with presentations on the court system; handling a civil case; handling a criminal case; family court practice; and notary law. Both days include complimentary continental breakfast and buffet luncheon.

Next year's Bridge the Gap program will cover negligence, matrimonial practice, landlord-tenant disputes, an introduction to federal practice, bankruptcy law, environmental law, criminal defense, legal writing, negotiations, and ethics (client communications and ethics and technology). Decisions on the format and how the topics will be divided over the two presentation days will be made after the completion of this year's program.

The Bridge-the-Gap faculty (to be announced shortly) is drawn from among practitioners and judges with significant expertise in the given areas. In addition to possessing laudable knowledge, all of the instructors have the ability to break down complexities and make the intricacies of their fields accessible for novice lawyers.

SCBA members are asked to let their newly admitted colleagues know about the Academy's Bridge the Gap training. Registration for this year's program may be accomplished through the CLE spread in this publication or by calling the Academy at 631-234-5588.

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

March Mondays Are Reserved for Matrimonial Lawyers

For at least two decades, the Academy has devoted the Mondays of March to programs on matrimonial practice. Attorneys in the field look forward to these programs and know that enrollment will not only fulfill a full year's worth of MCLE requirements, but will make them better practitioners, able to take on more matters with more confidence.

This year is no exception. The 2014 matrimonial programs, scheduled for March 3, 10, 17, and 31, comprise an advanced three-part series on important issues that confront and sometimes confound matrimonial lawyers and a thorough update on all that is new and significant in the practice area.

The series, organized by Arthur Shulman and Debra Rubin, covers three important topics: **Advanced Custody Issues** (March 3); **Advanced Valuation of a Mid-Size Business for Purposes of Equitable Distribution, Maintenance, and Child Support** (March 17); and **Advanced Lecture and Demonstration on the Use of Evidence in Matrimonial Matters** by Stephen Gassman (March 31). Any of the programs may be taken as a single entity, but a savings results from enrollment in the trio.

The **Annual Update,** once again featuring the always well received Vincent Stempel, will be presented on March 10 and will cover recent developments in statutory and decisional law that affect matrimonial practice.

Each of the programs runs from 6:00 to 9:00 p.m., with sign-in and light supper from 5:30. Each provides three MCLE credits, including a half credit in ethics.

Enrollment may be accomplished through the CLE Spread in this publication or by calling the Academy at 631-234-5588. – D. Ceparano

New East End Veterans Court in Southampton

Suffolk County District Administrative Judge C. Randall Hinrichs and Supervising Judge of the Town and Village Courts Glen Murphy announced the formation of the East End Veterans Court, which convened on Nov. 20, 2013. This court is modeled after the Suffolk County Veterans Court presided over by Judge John Toomey in Central Islip.

Eligibility for the East End Veterans Court will be determined by the presiding judge, prosecutor, defense attorney and the Treatment Team headed by Project Director Edward Gialella. It is anticipated that like those participating in the Suffolk County Veterans Court, most will complete the program successfully and go on to lead productive, crime free lives.

LLCs and 'S' Corporations *(Continued from page 11)*

Section 465, which are designed to prevent deductions for expenses and losses in excess of economic risk in the activity. A member is considered "at risk" for the amount of money and appreciated property contributed to the LLC, and for any debt for which there is personally liable.

Real Property and the "At Risk" rules

Despite many similarities, there are also significant differences between the tax attributes of an "S" corporation and those of an LLC, which differences can cause very negative tax consequences if not recognized and managed.

A key example of this is the difference in how debt is treated in connection with the "at risk" rules. Significantly, "S" corporation shareholders only get basis in their shares for personal loans made to the corporation, and none for any other type of entity level debt, even when personally guaranteed. As such, the basis of an "S" corporation can be increased only by (i) the amount of funds or the basis of property contributed or (ii) the amount of personal loans made to the corporation.

Conversely, with LLCs, member-level tax basis adjustments are permitted for all liabilities, and for the tax basis of the LLC's assets upon the sale of a member's interest. Both recourse and non-recourse debt are considered capital in a tax partnership. Therefore, the LLC is generally preferable where the entity will own real property subject to substantial debt, as it allows deductions for the entity's tax losses as they occur.

Moreover, for tax partnerships, qualified nonrecourse financing secured by real property used in the activity of holding real property is excepted from the "at risk" requirements. Qualified nonrecourse financing is debt (i) for which no one is personally liable and (ii) borrowed from a qualified lender. For this exception, taxpayers are considered "at risk," even with personal liability and is allocated basis equal to their percentage of the profits multiplied by the amount of recourse debt. This permits a member's adjusted basis in the LLC to be increased, and both the amount of claimed losses and received tax deferred distributions. In addition, a member who personally guarantees a debt of the LLC will be considered "at risk," whereas (as stated above) an "S" corporation shareholder would not be.

Therefore, LLC members may therefore enjoy cash flow which is greater than their taxable income, and may claim tax losses and receive distributions in excess of capital contributed without incurring a current tax cost. Provided the negative amount does not exceed the member's adjusted basis in the LLC, a member's capital account balance may be negative without any tax consequences until the property is sold.

Note: Thomas D. Glascock is an attorney associated with the law firm Forchelli, Curto, Deegan, Schwartz, Mineo & Terrana, LLP, and can be contacted at 516-248-1700 or e-mail TGlascock@ForchelliLaw.com.

1. Pursuant to I.R.C. § 1361(b), an "S" corporation must be valid corporation under state law before electing treatment as "S" corporation.

2. There are generally 2 situations where an "S" corporation may be subject to an entity level tax. If the "S" corporation was an active "C" corporation when it made the "S" election, it will be subject to a tax on gains of property held by the "C" corporation if the property is disposed of within 10 years of the "S" election. An "S" corporation that has net passive income and accumulated earnings and profits as a "C" corporation may also be subject to an entity level tax. I.R.C. §§ 1374 and 1375.

3. An LLC can opt for corporate tax treatment, but this is rarely done.

4. Shareholders may not be other corporations ("C" corporations or other "S" corporations), LLCs, nonresident aliens, or other entities. I.R.C. §§ 1361(b)(1)(B) and (C) and 1361(c)(2).

5. Each share of stock must be like every other when it comes to dividends, distributions, and other economic rights. However, differences solely in voting rights (that is, some shares being voting and others non-voting) are allowed. I.R.C. § 1361(b)(1)(A) and (D).

6. The "substantial economic effect" test is intended to require that allocations bear a strong correlation to the LLC's economic activities. For an allocation to have substantial economic effect, 3 conditions must be met: (i) capital accounts must be maintained for each member and the allocation of taxable events be reflected in these capital accounts; (ii) LLC assets must be distributed to members upon liquidation of the LLC on the basis of these capital accounts; and (iii) any member with a deficit in his or her capital account must be required to contribute additional capital to make up this deficit. I.R.C. § 1361(b)(2).

President's Message (Continued from page 1)

In early October, Chief Administrative Judge A. Gail Prudenti arranged for Dennis R. Chase and William T. Ferris, as President and President Elect, respectively, of the SCBA, to meet with Chief Judge Jonathan Lippman to address the issue of mandatory pro bono reporting. During this meeting, we expressed our opposition to this requirement. We informed both Chief Judge Jonathan Lippman and Chief Administrative Judge A. Gail Prudenti that we would be reaching out to bar association leaders throughout New York State to request their comments on this issue.

Accordingly, we are writing to you as bar leaders to request your input with regard to the following: 1) Do you oppose or support the mandatory reporting of pro bono service by attorneys on their biennial registration form? 2) If you oppose mandatory reporting of pro bono service on the attorney biennial registration form, is there some alternative method for reporting pro bono service to the OCA that you would suggest? 3) Do you have any suggestions for proposals to change and/or expand services performed by attorneys who would or should be included in the definition of pro bono service? and; 4) Do you have any other suggestions and/or proposals relating to pro bono service and reporting of pro bono service to OCA? Please submit your comments to the SCBA electronically to this group by email jane@scba.org by January 31, 2014, and we will tabulate the responses and distribute them to you prior to submission to the Chief Administrative Judge. We also intend, with the assistance of Judge Prudenti, to present this proposal to the Presiding Justices of each of the four judicial departments.

Why go to all this trouble? At the last meeting of the House of Delegates ("HOD") of the NYSBA Past-President Robert Ostertag stood in opposition to the adoption of content referable to the changes made to Rule 6.1 of the Rules of Professional Conduct. Mr. Ostertag spoke, at length, (with great passion and clarity) in favor of tabling the adoption of *any* content referable to the aforementioned rule change since he believed the new mandatory pro bono reporting requirements are coercive in nature and should be further addressed by the NYSBA's governing body, the HOD. The vast majority of the delegates rose in support of tabling any such amendments to the Rules until the issue of mandatory reporting is fully addressed. In response thereto, Mr. Ostertag, not unlike the SCBA, forwarded the following email to the leaders of the 62 county bar associations also seeking to elicit the each respective bar association's position on the issue:

> I am a past president of the NYSBA (1991-1992), but I write solely on my own behalf. As a past president, I am a lifetime member of the Association's HOD. I attended the House's last meeting in November at which a motion was made to amend the aspirational provisions of our new Rules of Professional Conduct to conform them to Rule 6.1 which last year was amended to increase every New York attorney's aspirational commitment to provide pro bono service to the poor from a minimum 20 hours per year to a minimum 50 hours. The rule also provides for an additional aspirational commitment of financial contribution to organizations that provide legal services to the poor. The rule also provides that it is not intended to be enforced through the disciplinary process, and that the failure to fulfill its aspirational goals should be without legal consequence.
>
> Along with the 50 hour amendment, the Administrative Board now mandates that we attorneys report to OCA on our biennial registration forms both the number of our legal service hours to the poor and the amount of our financial contributions to agencies that provide legal services to the poor as a condition of registration or re-registration. Moreover, Chief Judge Lippman has indicated his intent to reserve the right to report those numbers to our local news media, presumably for public consumption, if he considers them insufficient. At our last House meeting, I objected to the motion to conform the aspirational provision of the rule to the language of the rule itself. I moved that it be tabled. It was, by the overwhelming vote of the membership, so that now the rule provides for 50 hours while the aspirational comment provides for 20. Most of those relative few who opposed my motion did so not because they favored the hourly increase from 20 hours to 50, but because they felt it technically inappropriate to have differing numbers as between the rule and the aspirational comment.
>
> The aspirational comments are strictly those of our Association and have not been adopted by the Administrative Board. Only perhaps four or five, perhaps fewer, voiced their view that we should be obliged to commit to 50 hours. Those supportive of my motion to table spoke long and loudly in opposition to what has been imposed upon us. My long years of activity with the NYSBA have been primarily on behalf of solo and small firm practitioners. While virtually no one takes exception to the concept of providing legal service to the poor, 50 hours annually is an extraordinary number for solos and smalls to have to commit to. And while the Administrative Board considers our 50-hour commitment as purely voluntary, it is, in my judgment and in the judgment of the very many attorneys I have spoken with on the subject, coercive by reason of the reporting mandate and the threat to publicize deficient numbers to the public. I recognize that I may be incorrect on this issue, though the reaction of the hundreds I've spoken with about it are virtually unanimous in their opposition to the rule change, the reporting mandate and the threat of publication, as well as to the manner it was imposed upon us without opportunity for comment by our representative State Bar. Solos and smalls comprise some 63% of our privately practicing bar, many or most of who, particularly outside metropolitan NYC, simply can't afford the time or large financial contributions that have involuntarily been coerced upon us.
>
> I therefore need to hear from you on the subject as to the reaction of the members of your county bar associations. I have directed this email to people whose names appear on a list of county bar executives, or recent bar executives, or incoming bar executives according to dates appearing on the list. I've tried to avoid employees of the court system who might be conflicted. What I'm looking for is not so much your own opinion, but your take on your members' reaction to what has been done here. Frankly, I don't want to make an ass of myself. Our next House meeting is just three weeks away. May I please have your response quickly? Many, many thanks. – Bob Ostertag

While the SCBA and Mr. Ostertag have not as yet heard from *all the respective bar leaders*, neither has elicited a response from any bar leader whose bar association supports the mandatory reporting of pro bono activities of any kind. In anticipation of the next HOD meeting on January 31, 2014, we are scheduling a conference telephone call designed to allow bar leaders to participate in a discussion of the issue so that we may present to the NYSBA a united front. As is traditional, the Chief Judge shall be in attendance at said meeting offering the HOD his annual State of the Judiciary speech. While the Chief Judge has not always remained for the balance of the meeting following his speech, this year the Chief Judge may, indeed, find a genuine reason to hear what leaders from across the state have to say regarding mandatory reporting.

Could Canada's High Court rules on Prostitution be made under American law? (Continued from page 18)

be the dominant dogma to be imposed on the nascent nation's citizens. In other words, they were determined not to imitate the European powers of that era under any circumstances.

Therefore a constitutionally based argument that could be made to the U.S. Supreme Court for mandating prostitution would have to revolve around the principle of the right to work interwoven with interstate commerce and other related provisions. More specifically, if engaging in commercial sex for remuneration is to be deemed equivalent to any other type of work then it should follow that an individual should not be denied his or her right to earn a living in that manner, based on the sole reason that said work choice is considered morally repugnant. Naturally as in other professions or certain lines of work, the state may and should require that particular requirements be met for the purpose of protecting society at large and individuals that make up that society. After all plumbers, electricians, lawyers, doctors, etc. are all required to be licensed in order to work in their chose field. The safety of the individual, be it the provider or recipient of the service, must be insured by the state as it has traditionally been its charge under the American legal system. Therefore those that would engage in the sex trade should not operate outside those norms. That is currently the case in Nevada as the brothels and those that work in these establishments are subject to regulations that protect them and their clientele.

The counter-argument that providing sex is not safe can be addressed in several ways. The danger of sexually transmitted diseases is real, but it can be substantially curtailed by various available methods and hygienic standards that can be mandated and enforced through regulations and laws. Again the Nevada approach seems to be essentially effective if not foolproof. Furthermore the counterargument that particularly women potentially face an inordinate level of danger from engaging in this type of occupation, the answer is that women (as well as men), already engage in many other lines of work that pose as much if not more physical harm. For example women and men can be licensed to box and other combat sports such as mixed martial arts, stunt work, auto racing and he list goes on. The danger, those opposing national legalization of commercial sex say, goes beyond the sexually transmitted disease concern to the potentially violent client. This has indeed has historically been a real issue. However, this danger is almost entirely eliminated by legalizing brothels or similar venues where the providers as well as the clientele can engage in a safe environment. The Canadian Supreme Court in issuing their decision in fact addressed this, as Chief Justice McLachlin made amply clear.

Realistically speaking, it is highly doubtful that the U.S. Supreme Court is in any way disposed to hear a case that would mandate that states allow commercial sex as a right to work, individual right of freedom of expression, or under any other rationalization that could pass constitutional muster. Although the Supreme Court was set up as a wholly independent body and has acted accordingly for the two centuries plus of its existence, it is also fairly evident that the court has not needlessly chosen to take up cases that go directly counter to the more traditional values that the general population espouses. Of course there has been exception, but those involved societal issues with pronounced consequences. For example, the civil rights cases, *Roe v Wade* and such. In the hypothetical case discussed herein, it's a rather safe assumption that it will remain just that and in the final analysis that is probably for the best and is what differentiates us not only from our neighbors to the north but also a good number of other European allies and other nations across the world.

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

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Foreign Investment in U.S. Real Property *(Continued from page 10)*

to a trade or business. Thus, the NRA will be taxed in the same manner as a U.S. taxpayer. In addition, the purchaser generally must withhold 10 percent of the purchase price toward satisfaction of the tax.

A U.S. real property interest includes not only a direct interest in such property, but also an interest in a U.S. corporation if at least 50 percent of the corporation's fair market value is attributable to U.S. real property. An interest in a U.S. LLC may also be a U.S. real property interest. The sale of such stock or LLC interest would be subject to the FIRPTA tax.

If an LLC sells the U.S. real property, the foreign member's share of the gain recognized will be treated and taxed as if it were effectively connected to a U.S. trade or business.

If the real property is held by a U.S. or foreign corporation, the gain recognized by the corporation on the sale of the property will be subject to corporate-level U.S. income tax, although the foreign shareholder should not be subject to additional U.S. tax on the corporation's liquidating distribution.

Estate and gift tax transfers

If a foreigner (a noncitizen who is not "domiciled" in the United States; "domicile" differs from income tax "residence") owns a direct interest in U.S. real property at the time of his death, the fair market value of such real property will be subject to U.S. estate tax. If the foreigner owns the real property indirectly through a U.S. corporation, the value of his shares shall be subject to U.S. estate tax. If a foreign corporation holds the U.S. real property, the shares owned by the foreigner at his death shall not be included in his U.S. gross estate, unless the corporation is properly disregarded for U.S. tax purposes. Surprisingly, it is unclear whether a foreigner's interest in an LLC that holds U.S. real property will be subject to the estate tax, though the risk of taxation likely increases where the LLC is engaged in a U.S. trade or business.

If a foreigner makes a gift of a direct interest in U.S. real property, the transfer will be subject to U.S. gift tax. (If the property is subject to a mortgage, the transfer will be treated, in part, as a sale.) On the other hand, a gift transfer of stock in a foreign corporation that owns U.S. real property will not be subject to gift tax (provided the corporation is not disregarded for tax purposes). Similarly, a transfer of an interest in an LLC that owns U.S. real property should not be subject to U.S. gift tax.

Reporting

A foreigner who makes a gift of a direct interest in U.S. real property must report the value of the gift to the IRS on Form 709. The value of the gift is subject to gift tax, up to a marginal rate of 40 percent.

The estate of a foreigner who dies owning U.S. real property (or shares of stock in a U.S. corporation owning such property) must file an estate tax return on Form 706-NA, and is subject to U.S. estate tax, up to a marginal rate of 40% of the value thereof, though the estate is allowed a $13,000 credit. (No similar credit is provided for purposes of the gift tax.)

In the case of an NRA whose ownership of U.S. real property does not rise to the level of a U.S. trade or business, the rental income from such property must be reported to the IRS on an income tax return, Form 1040NR, only if the income tax liability with respect to such income was not fully satisfied by the withholding of tax; even if it had been, it may behoove the NRA to file a "protective" return nonetheless, in order to start the running of the limitations period on assessment of additional tax and to preserve his ability to claim deductions in the event it is later determined that he was engaged in a U.S. trade or business.

If the NRA's real estate ownership and related activities rise to the level of a U.S. trade or business, or if the taxpayer has elected to treat such real estate activity as a trade or business, then the NRA must file Form 1040NR to report the rental income and the related expenses.

Any gain realized on the NRA's sale of U.S. real property must also be reported on Form 1040NR.

If the foreigner is relying upon a treaty to reduce his U.S. tax liability, he must also file Form 8833.

Other reporting requirements may also apply, depending upon the entity, if any, through which the NRA owns the U.S. real property. For example, if a U.S. corporation is used, it will have to file its own income tax return, on Form 1120. In addition, if the corporation will be at least 25% foreign-owned, it will have to file Form 5472 to disclose certain information regarding its foreign shareholder.

A foreigner individual seeking to acquire U.S. real property should not be dissuaded from doing so by the various tax implications and reporting requirements described above. Indeed, the foreigner considering such a purchase probably has good personal or investment reasons for the acquisition, and taxes should be secondary. However, he must be informed and mindful of the U.S. tax consequences. If he plans accordingly for taxes, his ownership of the property will prove less costly.

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.