The Very Special New Year’s Resolution

By Barry M. Smolowitz

If you are like most of us, this is the time of the year that we all engage in some kind of self promise. These so called resolutions often take the form of a weight and exercise program, education commitment or some other form of self help promise.

I hope that like me, you believe that self help can come in many ways. For one know that the feeling of doing good for others brings a satisfaction to one’s self that is difficult to duplicate. That is why during holiday times there is such a large outpouring of giving.

This year I am asking that each one of our members or Suffolk attorneys, resolve that they will give a small amount of their time, by volunteering to participate in one of our many Pro-Bono programs.

One program in particular that is near and dear to me is the SCBA Pro-Bono Foreclosure Settlement Conference Project, which I currently coordinate. The project was established in April 2009, and was born out of necessity due to the country’s economic meltdown of 2008, the statutory changes to the Civil Practice Law and Rules, and Real Property Law which now require that all residential foreclosures be processed through a mandatory court set-

(Continued on page 23)
The Suffolk Lawyer — January 2011

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

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

Twelve-Step Meeting

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

LAWSYER COMMITTEE HELP-LINE: 631-697-2499

SUFFOLK LAWYER

LAURA LANE
Editor-in-Chief
DOROTHY PAINE CEPARANO
Academy News

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Sending a Message to the Poachers in D-11

By Renee G. Pardo

It finally happened to me and I was ecstatic! After many incarnations of a private criminal defense practice, which first started as a part time way to supplement my family’s disposable income, and now as a single mother, as a way of completely supporting myself for the first time in 14 years, I finally got a call at 3 a.m. from a prospective client that I had never met before. This individual was given an opportunity to call an attorney from the precinct and he had remembered my name from a friend and decided at that moment that I was the one to call.

Now, this may not seem a reason to celebrate but for me on this particular Saturday morning at that obscene hour it was proof that all my hard efforts were paying off. My practice was growing, evolving and I knew now that my name was out there as a result of other clients that were happy with the legal representation I had provided. Normally I would get clients after the arrest, after the arrangement and through some long chain of events or references. In this instance I was getting the call directly and completely out of the blue. I could not believe I was so happy and excited I was not even able to say a coherent sentence when I heard my name from a friend and decided at that moment that I was the one to call.

The firm was heavily oriented toward bar association meetings. I believe it is always useful to meet other attorneys and learn about the business of law on Long Island.

There weren’t any requirements to continue to learn in the profession, right? There was no established or mandatory legal education at the time. The bar raised the standards of all of us and provided a bonding for us. We had a civility and respect for each other at that time.

Isn’t it true that there weren’t many women in the profession at that time?

When I began practicing law there were two large firms that considered hiring me but they didn’t even think about me as a potential hire. As a matter of fact I was not even on their radar screen.

What led you to become an attorney?

I was a part of a law school graduation class of 250 she was one of only five women. It never occurred to me that I couldn’t do it. When I was in law school there was harassment by the teachers and when I wanted to work in the Attorney’s office I was told indirectly that they didn’t hire women. I always believed that you put your head down and work hard.

What was it like being a woman going into law at that time?

I remember when I was out to lunch at a business lunch and my kids were in school and I went out to lunch with a friend and we were talking about the fact that we were having a hard time making ends meet. I was told that I had to have more money in my pocket than in my bank account to be able to get by. It was a tough economy. I understand that there is not a woman on the D-11 bench. I actually had flown like a bat out of hell from home to be there at precisely 9:15 a.m. (Arraignments typically don’t get started till 10 a.m. or 10:30) and yet I was a day late and at 15 an hour for a babysitter at home, I was way more than a dollar short! I gathered myself together so that I could speak to this poacher who had so skillfully taken my client. At this point he was already in the courtroom putting in a slip that he was the attorney of record of my short lived client. “Excuse me” I said to him, “that woman was sent here to represent me.” (Continued on page 17)

Meet Your SCBA Colleague

By Laura Lane

The practice of law was somewhat of a men’s club 40 years ago, but Lynne M. Gordon persevered and was able to have it all. Married with a child, she was hired by Schechter, Schechter & Wishod in 1975. Working at the prestigious firm granted her far more than a great job. Schechter & Wishod were a director from the precinct and he had remembered my name from a friend and decided at that moment that I was the one to call. Working at the prestigious firm granted me the opportunity to meet other attorneys and learn about the business of law on Long Island.

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Meet Your SCBA Colleague

Lynne M. Gordon

a partner at Wickham Bressler Gordon & Geasa, P.C., is a trailblazer. In her 1970 law school graduation class of 250 she was one of only five women.

What would you recommend to others and what advice do you have for women who are interested in law?

Yes I would recommend attorneys join. It’s important to get a handle on what practicing is like in Suffolk County. It is different than going west. Also the CLE’s that the SCBA offers are wonderful. My advice to new attorneys is, remember that there is tremendous stress in law. Try to have fun with it. Lawyers are pretty nice people most of the time.

Note: Laura Lane is the Editor-in-Chief of The Suffolk Lawyer. She is an award-winning writer, former journalist, and currently is the Assistant Director of the HAVA Department at the Nassau County Board of Elections.
By Harry Tilis

In the first nine months of 2010, the Second Department reversed three Suffolk County jury verdicts of guilty on murder in the second degree. In each of the cases, the Second Department found that the evidence of guilt was legally sufficient but not overwhelming so, for in none of the cases did the Second Department reverse based on a review of the evidence. Instead, in each of the three cases, the reversal was on process grounds implicating what Abdul and Slice imply and Gibian says was nonconstitutional error implicating the Defendant’s right to a fair trial.

Together, Abdul, Gibian and Slide stand for the proposition that nonconstitutional error can be the basis for reversal when evidence of guilt is not overwhelming and “it cannot be said that there is no significant probability that the verdict would have been different absent these errors.” In other words, “where proof of a defendant’s guilt is not overwhelming, ‘every error of law (save, perhaps one of the sheerest technicality) is, ipso facto, deemed to be prejudicial and to require a reversal, unless that error can be found to have been rendered harmless by the weight and nature of the other proof.’”

Both Abdul and Gibian involved constitutional grounds for the defense to admit evidence.

Constitutional Grounds for the Defense to Admit Evidence

By Scott Lockwood

In 2006, the United States Supreme Court overruled its prior holding in Ohio v. Roberts, 448 US 56 (1980) and wholly changed the conceptual framework surrounding the admission of hearsay statements under the Sixth Amendment. Under the Roberts formulation, if a witness was unavailable the witnesses’ testimony could be admitted through a third person if it was found to have "adequate indicia of reliability." Generally, this was taken to mean that the statement fell within a "firmly rooted hearsay exception" or had "particularized guarantees of trustworthiness."

In Crawford, the Supreme Court rejected the Roberts formulation and held that "[t]estimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine," Crawford v. Washington, 541 US 36 (2006).

The Supreme Court again revisited the
Salvatore A. Alamia Retires
“Maverick” Judge spent long career helping those that others could not reach

By Renee G. Pardo

After 43 years of a hugely successful and highly productive legal career, the Honorable Judge Salvatore A. Alamia is on the precipice of a well deserved retirement. 17 years after becoming a judge, Judge Alamia has many concerns for the future of the judiciary, the bar and the public that they serve, however, he is not concerned about how he himself will be remembered as a judge. He knows simply that “love him or hate him” he will definitely always be remembered. The reason, he says, is that he was always proactive and being complacent was just not something he would tolerate from himself, his staff, or the attorneys that appeared before him.

“The judiciary is the third branch of government; we are supposed to govern in our own sphere,” he said. “We owe something to the people we govern and we have to do something more than just direct traffic.”

In 1997 until 2004, Judge Alamia was the first Acting County Court Judge to preside over the Suffolk County Drug Treatment Court. While other members of the judiciary had no interest in this type of assignment, Judge Alamia saw a unique opportunity to do what he loves to do best - actively help people make a difference in their own lives and the lives of their families by bringing them back into society after they serve the appropriate penalty. Judge Alamia talks even now about his “great crew in the drug court” and how what they did on a daily basis in his courtroom became known state wide and became a model for other courts.

Very open about his dislike of politics and what he feels is the “overwhelming control” politics now has over the judiciary, Judge Alamia says of his years presiding over the drug court, that he was able to use the statewide politics of the time to be in a position to help more people. Additionally, he says while some used the phrase “problem solving court” and others referred to the drug court negatively as a “social work court” he only saw that

(Continued on page 17)

Suffolk County Supreme Court
Honorable Paul J. Baisley, Jr.

Summary judgment granted; moving defendant did not design, sell, or distribute the allegedly defective product; plaintiff’s continued maintenance of this action after having been apprised that Polder, Inc. was not a proper defendant was “frivolous.”

In Maria Burdish v. Polder Corporation, Polder, Inc., and Polder International, Inc., Index No.: 36440/09, decided on June 7, 2010, the court granted defendant’s motion for summary judgment. The submissions established that Polder, Inc. was a New York corporation engaged in the real estate business and that it had no connection with the design or distribution of stepladders. Defendant’s submissions thus, established, prima facie, that it was not liable for the plaintiff’s injuries as it did not design, sell, or distribute the allegedly defective product. Plaintiff submitted no opposition. The court pointed out that despite having been apprised on several occasions that plaintiff sued the wrong entity, and that a Connecticut corporation also named Polder, Inc. manufactured and distributed such products and was the proper defendant, plaintiff’s counsel failed and refused to discontinue the action against the movant. Defendant was then compelled to interpose an answer and the instant motion for summary judgment. Based upon these circumstances, the court found that plaintiff’s continued maintenance of this action after having been apprised that the New York Corporation Polder, Inc., was not a proper defendant was “frivolous” within the meaning of 22 NYCRR §130-1.1(a).

Motion to vacate judgment denied; movant had not commenced an action with the filing of a summons and complaint.

(Continued on page 19)

What is Your Next Play...

Are You Ready to Hand Off for Elder Law Planning?

◆ Special Needs Settlement Planning
◆ Medicare and Medicaid Liens
◆ Medicare Set Asides
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◆ Special Needs Trusts

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FOCUS ON CRIMINAL PRACTICE & PROCEDURE
SPECIAL EDITION
SCBA Carries on the Sweisgood Tradition

By Laura Lane

It is difficult to ask for help. Father Peter Sweisgood knew this firsthand. A recovered and rehabilitated alcoholic he became the executive director of the Long Island Council on Alcoholism in 1981 and later its president. He was also the founding member of the board of directors of the Freedom Institute, a counseling center that help people combat chemical dependency.

Father Sweisgood received many awards and recognitions in his lifetime and worked very closely with the Lawyers’ Committee on Alcoholism and Drug Abuse at the state and local levels. He received a special award from the Suffolk County Bar’s Lawyers’ Committee on Alcohol & Drug Abuse in 1988. Sadly, he passed away in 1989.

The SCBA honors his commitment and courage each year at the Peter Sweisgood Annual Dinner, sponsored by the Lawyers Helping Lawyers Committee. Continuing a tradition of providing expert advice which comes from those who have recovered, there were a number of distinguished guest speakers featured at the dinner this year who shared their stories to inspire those who have struggled with alcoholism and addiction and give those who haven’t, a glimpse into the disease that, if untreated, can ruin relationships and careers.

The SCBA Lawyers’ Helping Lawyers Committee is committed to helping members suffering from alcoholism and/or drug addiction by providing direction, encouragement, and the resources available to help attorneys kick their habit and once again lead productive and healthy lives. They carry on Father Sweisgood’s tradition.

Note: Laura Lane is the Editor-in-Chief of The Suffolk Lawyer. She is an award-winning writer, former journalist, and currently is the Assistant Director of the HAVA Department at the Nassau County Board of Elections.

Thank You Foreclosure Settlement Project

The Suffolk County Bar Pro Bono Foreclosure Settlement Conference Project acknowledges with gratitude the following attorneys who have been representing the people of Suffolk County that have been impacted by the foreclosure crisis:

- John Aicher
- Rory Alarcon
- Susan Alarcon
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- Richard Guttman
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- Jerem O’Sullivan
- Ernest Ranalli
- Amanda Reilly
- Joseph Rosenthal
- Eric Sackstein
- Jessica Sparacino
- Peter Tamsen
- Robbie Vaughn
- Aida von Oiste
- Trudie Walker
- Glenn Warmuth
- Paula Warmuth

The SCBA would also like to recognize John Gannon, Raymond Lang, Barry Lites and Karen Napolitano who’ve had five or more court appearances in November. When you see your colleague volunteer attorney in court or at the Bar Center say a special thank you to any one of them who have stepped up to the plate to help the hundreds of citizens in Suffolk County who are struggling in this time of crisis. Thank you to Barry M. Smolowitz, Project Coordinator and Administrator Melissa McManaman who work tirelessly to keep the project running smoothly.

— LaCova

Elder Law, Special Needs & Estate Planning

Nancy Burner & Associates, P.C.

46 Route 25A, Suite 4 | Setauket, NY 11773 | 631.941.3434
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“Psychiatry has failed, medicine has failed, and the clergy have failed in dealing with alcoholism. The only experts we have are the people who have actually recovered from it.”

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— LaCova
On the Move...

Richard G. Chalifoux, of U.S. Trust, Bank of America Private Wealth Management has relocated his office to 300 Broad Hollow Road, Melville, NY 11747. He can be reached by phone at (631) 547-7629 or by fax at (800) 976-2910.

Eric Naiburg, Glenn Obедин & Ira Weissman are pleased to announce that their firms have merged. The new firm will be known as Naiburg, Obедин & Weissman LLP. Offices are located at 320 Carleton Ave. Suite 2500 Central Islip, NY 11722. Mr. Naiburg and Mr. Obедин, at different times, partners with The Honorable Martin Efman Acting Judge of the Court County.

Joseph Dujmic, former Assistant County Attorney in Suffolk County also joined the firm of Bryan l. salamone & Associates, P.C.

Howard E. Gilbert, of the law offices of Howard E. Gilbert has relocated his offices to 532 Broad hollow Road, Suite 107, Melville, N. Y., 11747-3609. His phone number is (631) 630-0100; fax: (631) 630-0101; website: www.gilbertlegal.net and email address is: HEGILBERT@gilbertlegal.net. The practice will continue its concentration in Labor and Employment Law.

Congratulations...

Michael J. Isernia, was appointed by the Board of Education of the Sachem Central School District at Holbrook, to fill a vacant seat on the Board for the remainder of the 2010-2011 term. He was sworn in at their Regular Board Meeting on November 17.

Announcements, Achievements, & Accolades...

SCBA Director Annamaria Donovan has once again been invited to visit the University of Oxford in England in March, 2011 for a five-day program involving Women’s Justice. The session is “Gender and Justice: Religion, Culture and Politics.” The Oxford Round Table session will involve social justice for women worldwide that is primarily dependent on religion, culture and politics, i.e., topics such as, marital property, pro-choice, anti-abortion, adultery,-stoning, educational opportunity, etc., all of which are prominent daily fare in the media of both Eastern and Western societies.

Richard G. Chalifoux was recently certified as an Accredited Estate Planner® (AEFP®) by the National Association of Estate Planners and Councils.

Paul Hyl, a senior associate at Genser Dubos & Cona (GD&C) has been appointed to the Board of Directors of Dowling College Center for Inter-generational Policy and Practice in Oakdale.

Richard K. Zuckerman, of Lamb & Barnosky, LLP, was a member of a panel presenting on “A Review of Recent Decisions at PERB” sponsored by the NYS Bar Association’s Labor and Employment Law Section at it’s 35th Annual Fall Meeting in Longboat Key, Florida on Nov. 1.

Sharon N. Berlin, of Lamb & Barnosky, LLP, spoke at the Suffolk County Bar Association’s Labor and Employment Law Committee meeting on the topic "Social Networking Issues in Litigation" on Nov. 16.

Sole Practitioner Lance R. Pomerantz judged the final round of competition in the 15th Annual Yale Mock Trial Invitational Tournament held at Yale University on December 4th and 5th. The trial showcased strong teams from the University of Michigan and NYU. The competition featured 44 teams from 24 different schools in eleven states and the District of Columbia.

Condolences....

To Past President Harvey B. Besunder, whose mother, Gertrude passed away on December 5. In lieu of flowers, food, etc. the family asks that donations in Gertrude Besunder’s name be sent to either the North Shore Jewish Center or to the SCBA’s Lawyer Assistance Foundation.

New Members...

The Suffolk County Bar Association extends a warm welcome to its newest members: John C. Batanchiev, Juana Cortes de Torres, Jennifer L. DeVenuti, Susan E. Fine, James G. Gibbons, Lauren Kanter, Michael Masri, Kimberly R. McCrossom, Gary R. Novins, Douglas P. Perry, Katherine Rocafor, Angela May Sapienza, Andrea L. Tse and Steven A. Wood, Jr.

The SCBA also welcomes its newest student members and wishes them success in their progress towards a career in the law: Evan Gotlob and Steven Saal.

On the Move – Looking to Move

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

Firms Offering Employment

Attorney with active matrimonial practice in Hauppauge seeking full-time attorney. Reference Law #2.

Paralegal Studies (A.B.A. approved) /C.W. Post seeks an instructor. Seeking résumés from attorneys expert in the area of family law and knowledgeable about the paralegal profession. Experience working with paralegals is required. Law #17.

Members Seeking Employment

Newly Admitted attorney seeking full-time employment. Experience, as legal (Continued on page 19)
MATRIMONIAL AND FAMILY LAW

Has the Bar Been Lowered for Child Support Modifications?

By Lloyd C. Rosen

Unlike child support orders emanating from a hearing or trial decision, child support provisions are set forth in agreements, and later incorporated without merger into orders, have been for many like a ball and chain shackled to their ankle without any hope for reprieve. This had been equally true for both support payees seeking an increase and support payors seeking a decrease in child support. While a support order issued after a hearing or trial can be modified by the court upon a showing of a change of circumstances, modifying a support obligation set forth in a stipulation has proven far more elusive. The recent economic climate has prompted parties to seek upward and downward modifications of child support orders, only to have their petitions dismissed for failure to meet the thresholds long-established by Boden and Brescia.

For many years, practicing matrimonial attorneys have relied upon the leading cases of Boden v. Boden, 42 N.Y.2d 210, 366 N.E.2d 791 (1977), and Brescia v. Fritz, 56 N.Y.2d 132, 436 N.E.2d 518 (1982), in advising clients that a child support obligation negotiated in an agreement and incorporated into an order is very difficult to later modify. These cases state, generally, that before a court should entertain an application to modify an order of child support incorporating, without merger, the terms of a stipulation, the moving party must demonstrate an unanticipated and unreasonable change in circumstances. This threshold has occurred since the date of the order, resulting in financial hardship or insufficient resources to meet the needs of the child. There has also been in effect a little-known loophole carved out in Family Court Act §413-a., which enables a party to obtain a de novo determination of child support, thus entirely avoiding the Boden and Brescia standard of proof if three criteria are met: (1) the support order is based upon an agreement, (2) Support Collections sends out a notice of Cost of Living Adjustment within 35 days of the notice, and (3) any party objects to the automatic Cost of Living Adjustment within 35 days of the notice.

The New York State Legislature has recently modified Domestic Relations Law §236(B)(9)(b)(2) and Family Court Act §451(2), effective October 13, 2010, in a manner which seemingly eliminates the Boden and Brescia thresholds in an additional yet different manner than provided for in Family Court Act §413-a. Perhaps it is the increasing incidence of financial hardship in our present economy that motivated the legislature to make it easier for either parent to seek modification of a child support obligation even if based upon an agreement.

All newly signed stipulations and court orders pertaining to child support are subject to new standards with regard to modification of child support. A party seeking modification of a support order needs now to demonstrate only a substantial change in circumstances to have occurred since the date of the order or the date the order was last modified, even if the support order is based upon an agreement, without having to meet the previously required Boden and Brescia thresholds. Establishing “substantial change in circumstances” is a much lesser burden than the previously required “unanticipated and unreasonable change in circumstances.” The newly enacted legislation, DRL §236(B)(9)(b)(2) and FCA §451(2), also provide two additional thresholds for modification, in relevant part, as follows:

... unless the parties have specifically agreed to retain the following provisions in a validly executed agreement or stipulation entered into between the parties, the court may modify an order of child support where: (i) three years have passed since the order was entered, last modified, or adjusted; or (ii) there has been a change in either party’s gross income by fifteen percent or more since the order was entered, last modified, or adjusted.

The parties can opt out of these thresholds but only by a validly executed agreement in writing.

It is notable that the new laws provide that the courts “may” (rather than “shall”) modify an order of support under these specified circumstances. This language is clearly intended to continue the court’s discretion in whether or not to actually modify the order of support. The legislature has lowered the bar for parties seeking modification, and has seemingly unraveled the complicated web of Boden, Brescia and their progeny, without actually mandating modification when the stated thresholds have been met.

Based upon this development, unless there is an opting out of these new standards, it appears less likely that a negotiated deviation from the Child Support Standards Guidelines cannot be depended upon for any length of time if either party becomes dissatisfied with the agreement. Stay tuned as the courts grapple with these issues in the future.

Note: Lloyd C. Rosen, an associate attorney, has substantial litigation and appellate experience and handles all aspects of matrimonial and family law. Mr. Rosen regularly appears and litigates in the Family and Supreme Courts throughout Long Island and the five boroughs of New York City.

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Supreme Court now requires that defendants be advised of immigration consequences of their plea.

Padilla v. Kentucky, 559 U.S. — 2010

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They Say It’s Your Birthday

By Eugene D. Berman

This month we discuss the United States Court of Appeals for the Second Circuit’s decision in Duarte-Ceri v. Holder, No. 08-6128-ag, 2010 WL 4923559 (2d Cir. December 6, 2010) concerning a petition for review from a Board of Immigration Appeals’ (“BIA”) refusal to reopen removal proceedings.

Ramón Antonio Duarte-Ceri (“Duarte”) was born in the Dominican Republic on June 14, 1973. In 1981, when he was eight years old, Duarte was admitted to the United States as a lawful permanent resident. On Duarte’s 18th birthday – June 14, 1991 – his mother was naturalized as a United States citizen.

Thereafter, in 1995, the Immigration and Naturalization Service, by an Order to Show Cause, charged that Duarte was subject to deportation as a non-citizen convicted of a controlled substance offense and an aggravated felony. (Section 237 of the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1227, provides that an alien can be removed if, after admission to the United States, he or she is convicted of an aggravated felony. 8 U.S.C. § 1227 (a) (2) (A) (iii), or a violation relating to a controlled substance, 8 U.S.C. § 1227 (a) (2) (B) (iii).) See 8 U.S.C. § 1227 (a) (2) (A) (iii), or a violation relating to a controlled substance, 8 U.S.C. § 1227 (a) (2) (A) (iii), or a violation relating to a controlled substance, 8 U.S.C. § 1227 (a) (2) (B) (ii).) See 8 U.S.C. § 1101(a)(43), defining “aggravated felony” and 21 U.S.C. § 802(6) defining “controlled substance.”).

Duarte argued that he is not subject to removal because he is a United States citizen by virtue of former INA § 321(a), 8 U.S.C. § 1432(a) (1999), repealed by the Child Citizenship Act of 2000, PL 106-395, October 30, 2000, 114 Stat 1631, 1632. Former § 1432(a) is applicable since it was in effect when Duarte’s mother received her citizenship in 1991. Duarte-Ceri, 2010 WL 4923559*3, citing Ashton v. Gonzales, 431 F.3d 95, 97 (2d Cir.2005) (“To determine whether [petitioner] obtained U.S. citizenship as a result of his mother’s naturalization, we apply the law in effect when [petitioner] fulfilled the last requirement for derivative citizenship.”).

As applicable here, former § 1432 (a) provided that a “child born outside of the United States of alien parents … becomes a citizen of the United States [when the] naturalization of the parent having legal custody of the child … takes place while such child is under the age of eighteen years; and [s]uch child is residing in the United States pursuant to a lawful admission for permanent residence at the time of the naturalization of the parent.” (Emphasis added).

The issue before the Second Circuit was whether Duarte still qualified as “under the age of eighteen years” when his mother was naturalized on the morning of his eighteenth birthday.” Duarte-Ceri, 2010 WL 4923559*3. The court assumed Duarte’s claim – because the BIA conducted no fact-finding on the issue – that he was born in the evening (of June 14, 1973) and his mother was naturalized in the morning (of June 14, 1991). In its split opinion, the court’s majority

(Continued on page 17)

Time to React

Note: The opinions are those of the writer and not of The Suffolk Lawyer or the Suffolk County Bar Association.

By Sarah Valente

Between all the napkins, wrappers, bottles, cans, disposable containers, toilet paper, paper plates, etc., have you ever taken a moment to consider how much trash you produce in a day? In 2009’s Suffolk County Solid Waste Management Report and Recommendations, it was reported that in a five day week in 2006, Suffolk County produced approximately 2,762 tons of trash per day (see chart for breakdown by town)1. Wow, that’s a lot of trash! With these figures it should come as no surprise that New York State produces more tons of garbage per person than most states, and that Long Islanders produce the most garbage within all of New York State, accounting for over 6 million tons per year, as per Vernon Rail2.) still accept waste. In 2009, Long Island landfills disposed of approximately 1.7 million tons of waste.4

If you still do not think this is a problem, take a look at your tax bills. The garbage disposal is a 30 billion dollar industry. In 2006, Suffolk County alone spent over $75,000 in waste management costs (this is excluding sewerage which accounted for over $23,520,000 in costs)5. As a result of the closing of landfills, restrictions placed on waste products accepted by landfills, increased populations, and increased waste, Long Island

(Continued on page 22)
Waters Floors The Crowd With The Wall

By Dennis R. Chase

Following the release of Pink Floyd’s The Wall, 30 years ago, mastermind Roger Waters performed, flawlessly, the entirety of the masterpiece on Nov. 3 at the Izod Center in East Rutherford, New Jersey. Earth shattering upon release, perfectly poignant in performance in 1990 following the fall of the Berlin Wall, and personally relevant for Waters even now, the tour centers on an increased emphasis following the fall of the Berlin Wall, and perfectly poignant in performance in 1990 following the fall of the Berlin Wall, and personally relevant for Waters even now, the tour centers on an increased emphasis in truly three dimensional sound, a feat of center stage, but similar arrays hanging only hanging from both the left and right of the show, the delivery of sound was seamlessly by stagehands and following the end of “Goodbye Cruel World,” the last brick is put in place and the 30 foot high wall is complete. An intermission follows with photos and short bios of members to determine “who let all this riff raff into the room” and prior to launching into “Run Like Hell.” Waters’ production also features much larger than life computer controlled puppets of the production also features much larger than life computer controlled puppets of the production also features much larger than life computer controlled puppets of the production also features much larger than life computer controlled puppets of the production also features much larger than life computer controlled puppets of the production also features much larger than life computer controlled puppets of the production also features much larger than life computer controlled puppets of the production also features much larger than life computer controlled puppets of the production also features much larger than life computer controlled puppets of the production also features much larger than life computer controlled puppets of the 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TRUSTS AND ESTATES UPDATE

Discovery Proceedings

In re Greenspan, the court was confronted by a motion and cross-motion for summary judgment in a proceeding for the turnover of funds in a bank account that the decedent maintained jointly with his spouse, the respondent, the petitioner’s step-mother. The petition alleged that the decedent deposited the funds into the account as a result of the respondent’s fraud, undue influence, and intimidation. The record revealed that the decedent had Parkinson’s disease during his final years and had consequently retired from the practice of medicine as an oncologist. He was confined to a wheelchair and needed the assistance of home health care aides. Although his mobility was limited, he maintained contact with a close friend, who was a weekly dinner guest at his home, and who was also the decedent’s stock broker and financial advisor. The transfers in issue were two weeks apart, and consisted of funds withdrawn from the decedent’s brokerage account into his joint account with the respondent. Each withdrawal of funds was effected by telephone instructions by the decedent to his broker. However, the court noted that the first deposit of funds was via a deposit slip prepared by the respondent; and that it was not clear who prepared the second deposit slip. It was equally unclear who made the subject deposits, though there was no question that the decedent was too physically disabled to have handled these tasks on his own. The court also noted that on the date of the first transaction, the decedent arranged with his broker for a withdrawal of additional funds by way of separate check, which was deposited into his individual account. Further, the court found it relevant that the transfers in issue significantly altered decedent’s testamentary scheme to leave respondent a relatively small bequest. The court also noted that on the date of the first transaction, the decedent made a prima facie showing that the decedent voluntarily and knowingly transferred the funds in question to his joint account. On the other hand, while the court concluded that the petitioners’ had failed to sufficiently plead a cause of action for fraud or to submit adequate proof of duress, it found that a question of fact existed on the issue of undue influence. Significantly, the court opined that while typically the burden of proving undue influence rests upon the party asserting it, the burden shifts to the perpetrator when a confidential relationship between the donor and donee exists. The court recognized that while family relationships are not per se confidential, and thus do not necessarily give rise to a presumption that transfers between family members are unfair, when, as in the case sub judice, the record also shows that the donor is in a weakened and dependent state, that the donee participated in the transaction from which he or she benefited, and there is reason to question whether the gift was made voluntarily, summary dismissal of a claim of undue influence would be unwarranted.


Contempt

In re Briggsett, the executors, who was previously held in contempt for failing to file her account, moved, by order to show cause, to extend her time to do so. The application was opposed by the respondents, co-administrators of the estate of the decedent’s post-deceased spouse. The record revealed that the decedent died in 2004 survived by her spouse, who post-deceased her. Her will was admitted to probate.1134 Lake Shore Drive, Massapequa Park, NY 11762 www.blasielaw.com

COMMERCIAL LITIGATION

The Ultimate Remedy for Willful Failure to Disclose

CPLR 3126(3)

By Leo K. Barnes Jr.

In two opinions issued on the same day this month, the First and Second Departments continued a trend of affirming trial court rulings striking pleadings pursuant to CPLR 3126 once a willful failure to disclose is documented. Although the result is severe, both the trial and appellate courts are universally refusing to perpetually provide “one more chance” to comply with unqualified obligations to disclose. The CPLR 3126(3) motion to strike a pleading is premised upon establishing a willful failure to disclose; obviously, a movant’s regular and documented efforts to coax compliance must found the motion. Opposition to a CPLR 3126 motion is often premised upon a misunderstanding regarding disclosure obligations, arguing that violation of an order to disclose, or violation of a conditional order of preclusion, must serve as a predicate for a 3126 motion. To the contrary, the relevant and controlling authority explicitly confirms that striking a pleading is permissible even when no prior court order is violated. In Wolfson v. Nassau County Medical Center, after an extensive failure to respond to defendant’s first set of interrogatories, defendant moved pursuant to CPLR 3126. Despite the fact that the plaintiff’s failure to respond did not violate any prior court order, the Second Department affirmed the CPLR 3126 dismissal and denied a subsequent motion by Plaintiff to reargue and vacate: A court may dismiss a pleading “willfully fails to disclose information which the court finds ought to have been disclosed” (CPLR 3126). The sanction of dismissal may be warranted even where, as in the present case, the plaintiff committed no violation of a prior court order (see, Goldner v. Lendor Structures, 29 A.D.2d 978, 289 N.Y.S.2d 687; Siegel, Practice Commentaries, McKinney’s Cons. Laws of N.Y. Book 7B, CPLR 3126:6, at 645-646). In the present case, the extensive nature of the plaintiffs’ delay in responding to the defendant’s interrogatories permits an inference that the delay was willful. The plaintiffs’ current attorneys allege absolutely no excuse for this delay and state only that they were not substituted for the plaintiffs’ former attorneys until after, or shortly before, the defendant made the motion pursuant to CPLR 3126. This circumstance neither explains nor excuses the unconscionable delay in prosecuting this action. The default can therefore be considered willful and no error as a matter of law was committed when the Supreme Court imposed the sanction of dismissal. Furthermore, we find that the refusal of the court to exercise its discretionary power to impose a lesser sanction (see, e.g., Applied Elec. Corp. v. City of New York [Museum of Natural History], 101 A.D.2d 795, 476 N.Y.S.2d 323) was neither abusive nor improper [emphasis added]. In that same vein, Justice Kaye, writing for a unanimous majority in Kohl v. Pfeffer,7 (which affirmed the dismissal of a complaint for failure to respond to interrogatories) confirmed as follows: If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity. Indeed, the Legislature, recognizing the need for courts to be able to command compliance with their disclosure directives, has specifically provided that a “court may make such orders * * * as are just,” including dismissal of an action (CPLR 3126). Finally, we underscore that compliance with a disclosure order requires both a timely response and one that evinces a good-faith effort to address the requests meaningfully [emphasis added]. Five years later, again writing for the majority, Justice Kaye ruled in Brill v.

(Continued on page 19)
SCBA Rings In The Holidays

Photos by Barry M. Smolowitz
SCBA Rings In The Holidays

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CONSUMER BANKRUPTCY

Non-Filing Spouse Keeps Tax Refund

By Craig D. Robins

Pro-se litigant scores victory against Chapter 13 trustee

When it comes to post-petition tax refunds in Chapter 13 cases, the long-standing practice in this jurisdiction for debtors who propose to pay unsecured creditors less than 100% is to surrender the trustee all tax refunds the debtor received during the pendency of the bankruptcy case. Every experienced consumer bankruptcy practitioner who practices on Long Island is keenly aware of this “no exceptions” rule. However, what happens when only one spouse files for Chapter 13 relief? Does the non-filing spouse also have to surrender his or her tax refund to the trustee?

Recently, Chapter 13 trustee Michael M. Mastro of Melville said yes to this question and threatened to dismiss a confirmed Chapter 13 plan filed only by his wife, unless the non-filing husband cooperated and turned over the entire joint tax refund. The trustee argued that inherent in the debtor’s obligation to turn over all post-petition tax refunds is a requirement that the non-debtor spouse do the same, so that the debtor’s creditors would then receive a distribution from these funds.

The husband refused to do so, went to a law library, and then brought a pro se motion seeking a determination that his share of the tax refund should be protected. He explained, “I’m so concerned about my kids! Writing a letter to the judge expressing frustration over what he perceived to be an extremely unreasonable request from the trustee. In an operation that was barely longer than one page, the Chapter 13 trustee argued that: a) the debtor chose to file a joint tax return; b) there is no mention in the Chapter 13 plan that there can be an exclusion for the non-debtor spouse’s tax refund if the debtor files a joint return; and c) the Bankruptcy Code requires the debtor to pledge all household income to pay unsecured creditors.

The husband and trustee had oral argument before Chapter 13 trustee Judge Robert E. Grossman in August, who reserved decision. The judge determined that inherent in the debtor's obligation is the requirement that a non-filing spouse’s property as being included in the debtor’s property of the estate. The judge noted that there is no provision in the Bankruptcy Code Section 541(a)(2) and 1306(a) that are the relevant statutes that determine what property is property of the estate in a Chapter 13 case. He then found that there is no provision in the Bankruptcy Code to include the non-debtor spouse’s property in the calculation of the debtor’s property of the estate.

Projected disposable income does not include non-filing spouse’s income

Judge Grossman noted that other courts have permitted Chapter 13 trustees to require turnover of post-confirmation tax refunds under the theory that the refunds must be included in the calculation of the debtor’s disposable income. Nothing in the Code obligates anyone other than the Debtor to fulfill the requirements of the confirmed Plan.

The Chapter 13 plan is binding

Although the plan had the typical language that “the debtor shall pay tax refunds to the trustee,” the judge found that this wording could not be interpreted to include the non-debtor spouse’s tax refunds. The judge also remarked that even though the husband signed an affidavit that shows the non-debtor spouse was not cooperating, indicating that he was contributing his income to the plan, it was not binding because it was not mentioned in the Chapter 13 plan.

I actually called the debtor’s husband to get his take on what happened, as scoring a pro se victory over a Chapter 13 trustee is an impressive feat. He said that he felt very firmly that his position was correct and even went to a law library to do his homework.

As for bringing the motion, he said, “I was not afraid to go in and stand up for what’s right. If I lose, I lose. I’m in no worse position than when I started.” No one can argue with that reasoning. As I’ve indicated in some past articles, just because a trustee in a particular position does not mean the trustee is correct. Always consider presenting your case to the court if you believe you have a solid basis for doing so. As the debtor’s spouse said, you have nothing to lose. Congratulations to him!

I was greatly intrigued by one particular statement that Judge Grossman inserted in the decision: “The parties have not raised, and this Memorandum Decision does not address, whether it is appropriate for the Trustee to require the turnover of the Debtor's post-confirmation tax refunds. This leads me to ponder if the Judge questions whether Chapter 13 debtors should uniformly commit their tax refunds to the plan. Perhaps there are some exceptions to our local practice. This would certainly be a major issue, but that is a subject for another day.

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 20 years. He has offices in Coram, Mastic, West Babylon, Patchogue, Commack, Woodbury and Valley Stream. (516) 496-0800. He can be reached at Craig@CraigRobinsLaw.com. Please visit his Bankruptcy Website: www.BankruptcyCanHelp.com and his Bankruptcy Blog: www.LongIslandBankruptcyBlog.com.
MANDATORY IGNITION INTERLOCK DEVICES

By David A. Mansfield

Leandra’s Law requires any defendant sentenced to a conditional discharge, probation, a split sentence of probation and incarceration, or only a term of imprisonment on an alcohol related driving offense under §1192(2-a) or (3) as a felony or a misdemeanor to install (at their own expense), a mandatory ignition interlock on any vehicle they own or operate. The mandatory ignition interlock will have an impact on your practice as a defense attorney.

What does the defense attorney need to know? The ignition interlock device is installed in the vehicle and requires that your client exhale into the device to insure that the machine does not detect more than .025 percentage weight of alcohol before allowing the vehicle to start.

Your client must also pull over and activate the device every 15 minutes or so. Each time the device is activated, a report will be created that will either be transmitted wirelessly or downloaded at another time by the monitor – the Suffolk County Department of Probation. The device also has a timer, that will cause the vehicle’s lights to flash and dim.

There is anecdotal evidence from a colleague, Frank A. DeSousa of Nassau County, that some clients treat this device as the latest option in their vehicle and invite other people to test it out. Please rest assured that every action will generate a report to the monitor, which could result in the issuance of a violation of probation or conditional discharge. Your client should be cautioned that this is not a toy for lack of a better legal expression.

The cost of the device can range from no installation fee to about $100 and there will also be a $500 in monthly maintenance fees. These rates from the approved providers are only good through February 15, 2011. There is no guarantee as to what the cost will be after that date.

Your client upon being sentenced and having a conditional discharge or a period of probation must install the device on any vehicle they own or operate within ten business days of the sentence date. They must also notify the Department of Probation that the installation was within three business days. They will be required to maintain and install the ignition interlock device in vehicles that are owned and operated which is to be determined by an investigation by the monitor or the Department of Probation. There is a possibility that it may be required to be installed on multiple vehicles in a household if an investigation reveals that the sentenced individual customarily operates these vehicles.

Your client will be required to install the device for a minimum of six months up to the term of any conditional discharge is one year for misdemeanors and three years for a felony conditional discharge or up to the term of probation whether three or five years at the discretion of the Department of Probation as the monitor.

Should your client be sentenced to a term of incarceration without probation, §1192(2-a) (3) they will be required to be sentenced to either a term of probation or conditional discharge that the ignition interlock device be installed with ten business days of release P.L. §60.21. Upon release from state prison for a felony DWI or Vehicular Assault or Vehicular Manslaughter, your client must have the ignition interlock device in any vehicle owned or operated within 10 business days of release under Executive Law §259-c (15- a) for the duration of post-release sentence of probation or conditional discharge.

Leandra’s Law has created new Class A Misdemeanors for tampering, hindering or disabling or substituting someone to activate the device under §1198(9). There are very strict terms and conditions of the conditional discharge and of the conditions of probation, which sets forth your client’s obligations. Your client can be charged with a Class A Misdemeanor for operating a vehicle not equipped with an approved ignition interlock device under §1198(9) when required by the sentence of the court.

Should your client be unable to afford to pay, they will have to apply to the sentencing judge by filling out a detailed financial questionnaire, for a waiver or a payment plan, which will have the effect of passing along the cost to the rest of the defendants. Your client will be required to install the device on any vehicle they own or operate even if they are prohibited by the Conditions of Probation from possessing or operating a vehicle without the permission of the court or probation.

If your client does not own or operate a vehicle in their household they will be required to give some sort of proof in the form of a letter or an affidavit to the monitor.

Construing in Terrorem Clauses Prior to Probate

By Robert M. Harper

In Matter of Singer, the Court of Appeals found that the “safe harbor” provisions set forth in S.C.P.A. § 1404 and EPTL § 3-3.5 are not exhaustive and held that a pre-objection examination of a will’s in terrorem clause prior to filing objections was the fact that they might trigger the in terrorem clause in the instrument offered for probate, and (2) an order granting the petitioner the right to depose the nominated successor executor of the probated instrument and the attorney-draftsman of an earlier will prior to filing objections. Acknowledging the respondents’ argument that the in terrorem clause contained in the decedent’s will violated public policy is one that is properly resolved in a construction proceeding. The Second Department reversed. Quoting the Court of Appeals’ 1905 decision in Matter of Davis, the Appellate Division explained that “[p]robate logically precedes construction, for otherwise there is no will to construe.” Thus, the Second Department found that since the will and codicil were not admitted to probate, “the Surrogate had no authority to construe their terms.” Equally instructive is Nassau County Surrogate John B. Riordan’s decision in Matter of Baugher, which was decided earlier this year. There, the respondents in a probate proceeding – who were chil-
The New Year Brings New CLE Opportunities

(Continued from page 26)

The committee met to finalize the curriculum for a Medical Billing CLE, to discuss development of Palliative Care CLE, and to plan mini-CLEs to improve attendance. Dates were selected for the Medical Billing CLE and Palliative Care CLE. The Medical Billing curriculum was outlined and members were given topics.

Surrogate’s Court
Brette A. Haefeli, and John J. Roe, III, Co-Chairs

There was a discussion regarding upcoming meetings for the year. Update from Surrogate’s Court on electronic filing. There was also a discussion on the possibility of CLE credits for committee meetings.

Insurance & Negligence - Defense Counsel
Robert E. Schleier, Jr., Chair

Ideas were shared regarding building interest in the committee and various topics involving insurance coverage were discussed.

The committee agreed that it would be beneficial to have various speakers come in to discuss relevant topics. The possibility of putting together a CLE presentation was also considered, but it was agreed that there is a need to get the committee off the ground first.

Elder Law
Steven A. Kass and Kim Smith, Co-Chairs

The committee met to discuss and educate members regarding annuities in Medicaid Planning and the effect of the DRG to 55% on planning methods for Medicaid.

Neil Katz will speak at the next meeting regarding any change in the estate tax laws and estate planning tax savings strategies.

District Court
Hon. Joseph A. Santorelli, and Harry Tito, Co-Chairs

The committee met to discuss new issues of concern regarding practice in the District Court and discussed plans to work on topics of ongoing concern.

Members of the committee will form a subgroup to explore the costs and benefits of alternatives that would enable hearings and trials to move forward on a more reasonable schedule. Those interested in contributing and serving should contact Harry Tito at h.tito@nyscourts.gov.

The committee recognized the hard work of Bryan Cameron and Judge Joseph Santorelli for their work on the October 26 CLE about annuities, and arraignments in District Court. Ideas were brainstormed regarding new CLE programs that could be based on the results of the arraignments program by featuring other nuts and bolts practice and ethics programs. It was agreed that the committee will be recommending a CLE program and establishing a working group to explore calendar issues.

SCBA Charity Foundation
Joseph A. Hansie, Managing Director
Lynn Poster-Zimmerman, Assist.
Managing Director

It was decided that the meetings will relocate to the CI Court Attorney Lounge for the convenience of the attorney participants.

There is a plan to implement the Children School Supply needs when full board is seated and qualified. It was suggested that an E-Blatt be sent to enlist members on the Board.

Solo & Small Firm Practitioners
Allison Shields, Chair

The purpose of the meeting was to discuss issues and topics of concern to solo and small law firms, to explore the idea of having expert speakers present at future meetings, and if so, to develop a list of topics, building on the new program before the potential of doing a practice management CLE program in conjunction with the Academy of Law.

There was a lively discussion about networking, building business and building relationships. A decision was made to get a speaker to discuss credit cards, electronic payment options, etc. The Chair also plans to share with the group some information from recent presentations from the ABA General Practice, Solo and Small Firm Division meeting and in a private webinar on cash flow.

The committee is continuing to put together a committee roster of contact and practice information. Committee members may send this information to the Chair at allison@legaleaseconsulting.com if they wish to be included.

New Lawyer Training

Those admitted under two years should take the Academy’s 16-credit Bridge the Gap “Weekend,” planned for Friday, March 11, and Saturday, March 12. Day one comprises transactional practice, and day two focuses on litigation. The faculty of skilled practitioners and jurists, with Stephen Kunken and William Ferris serving as program chairs, provides advice on ethics and professional responsibilities as well as broad practice areas, navigating the court system, and much more. The program fulfills a year’s worth of MCLE requirements for the newly admitted.

End for CLE

For the convenience of End for CLE constituents, the Academy has arranged to present some of its popular programs at the Four Seasons Caterer in Southampton. On the evening of Thursday, March 3, Landlord-Tenant Trials, coordinated by Hon. Stephen Ueker, will provide a forum for advocates and litigants to gain insights into relevant statutory law. On Thursday, March 24, East End judges will present “Views from the Bench” – complete with courtroom nuances and case studies, and overviews of interesting cases – in a program developed by Brian Doyle and Academy Dean Richard Stern. Finally, a reprint of “Evidence—What You Thought You Learned in Law School” – the extremely well received program presented at the SCBA Center by Hon. Mark Cohen, William Ferris, and Brian Doyle, will be presented on a February evening to be announced.

More information on the Academy’s Winter 2011 programs is available in various publicity mailings or by calling the Academy at 631-234-5588. The CLE spread in this publication provides a registration form for early winter offerings.

Note: The writer is the executive director of the Suffolk Academy of Law.
Sending a Message to the Poachers in D-11 (Continued from page 5)

he was put in a position to actively help mankind. 

"Do you know how many times I heard the expression the only good addict is a dead addict?" Judge Alamia said shaking his head. "That's ridiculous. You get an opportunity to help another human being, you have to take it."

As any practitioner who has had the opportunity to appear before Judge Alamia knows, even if his intention is to be helpful in the larger outcome of the lives of the defendants that appear before him, he can be quite intimidating, loud, tough and seemingly intolerant to the vices that have brought people in front of him. Nevertheless, Judge Alamia says of his demeanor in court, "In many ways I am a father figure or grandfather figure to the people that have appeared before me. I never hit my children, but my girls knew when I was upset with their conduct and judgment. And I hope that they knew they were expected of them and how to behave. Many of the people that appear before me never had any kind of father figure and never learned how to handle it."

Judge Alamia's accomplishments, on and off the bench, are known in Suffolk County and beyond. An adjunct professor of Touro Law School, a former Suffolk County Assistant District Attorney from 1972-1979 and a former Chief of the Frauds Bureau, Judge Alamia did not start his career as a judge. He was a graduate of Manhattan College (Class of 1963) where he studied electrical engineering. He received his law degree from New York University in 1967. Judge Alamia is also an avid skier, painter and world traveler. He is looking forward to doing more of all that and spending time with his wife Susan and their daughters.

Note: Renee G. Pardo is a former Tarrant County, Texas and Suffolk County, New York Assistant District Attorney. She is now in private practice with an office in Central Islip. Ms. Pardo is a criminal defense attorney who is fluent in the Spanish language, a board member of the Suffolk County Criminal Bar Association and a former lecturer for Hofstra University's Continuing Education Legal Program. She can be reached at (631) 277-2200.

Note: Renee G. Pardo is a former Tarrant County, Texas and Suffolk County, New York Assistant District Attorney. She is now in private practice with an office in Central Islip. Ms. Pardo is a criminal defense attorney who is fluent in the Spanish language, a board member of the Suffolk County Criminal Bar Association and a former lecturer for Hofstra University's Continuing Education Legal Program. She can be reached at (631) 277-2200.

They Say It's Your Birthday (Continued from page 9)

(Judges Chin, the decision’s author, and Hall) viewed “under the age of eighteen years” to be ambiguous. “On one hand, it could refer to an applicant who has not yet reached the eighteenth anniversary of his birth. … On the other hand, it could refer to an applicant who has not yet lived in the world for eighteen years.” Id. Duarte’s claim would fail under the first interpretation, and succeed under the second, under which “he had lived approximately seventeen years, 364 days, and twelve hours.” Id. Agreeing with Duarte, and based on the assumed facts, the court found that Duarte had not lived for 18 years when his mother was naturalized.

In explaining its holding, the majority cited the Supreme Court’s opinions in Town of Lowndes v. Pontchateau Savings Trust Bank of America, 104 U.S. 469 (1881) and Taylor v. Brown, 147 U.S. 640 (1893), to support its view that “[t]he legal fiction that a day is indivisible is a fiction of ease only and necessity, and that is satisfactory only as long as it does not operate to destroy an important right.” Since application of that legal fiction would result in Duarte’s deportation as well as forfeiture of his right to be a United States citizen, the majority “conclude[d] that the circumstances of this case and principles of statutory construction require us to adopt the interpretation that preserves rather than extinguishes citizenship.” Duarte-Ceri, 2010 WL 4923559*3.

Judge Livingston cited various statutes to demonstrate her view that a person turns 18 at the first minute of his or her birthday. In New York, for example, a person who has turned eighteen – from the very first minute of that significant birthday – can be employed serving alcoholic beverages, get married without his parents’ consent, work as a teacher in a public school, enter a nude dancing establishment, serve on a jury, operate a powerboat unaccompanied in New York waters, be sold ‘dangerous fireworks,’ apply for any class of family assistance. For purposes of federal law, they would use even if he had spoken to you this morning.” “I am Spanish!” I stup-

motivational speaker comes to scba (Continued from page 1)

Positive Ways to Thrive During Waves of Change... you mark that time I have had wonderful conversations with many of you who have read The Shark and the Goldfish, conversations which have often expanded into insightful and heartwarming dialogues about things that really matter and how all of us can help one another, and the book’s relevance to our membership is undeni-

As you start the New Year, and as a gift to yourself, make plans to attend our Membership Appreciation Event, our way of saying thank you to you this year. Whether you are a member, a non-member or a new non-member, you are invited to attend this celebratory event on February 1.

We will have a special guest speaker who will be sharing his insights on current issues and trends within the legal profession. The speaker will also provide valuable tips and strategies to help you succeed in your practice.

The event will be held from 11:30 a.m. to 2:30 p.m. at the Courthouse Hotel in downtown Melville. Refreshments and a light lunch will be served, and there will be plenty of networking opportunities to make new connections.

Don’t miss this opportunity to connect with your colleagues and learn from an expert in the field. Register now to reserve your spot at this exciting event. There is no cost to attend, but space is limited, so sign up today to ensure your place.

About the Speaker

Renee G. Pardo is a former Tarrant County, Texas and Suffolk County, New York Assistant District Attorney. She is now in private practice with an office in Central Islip. Ms. Pardo is a criminal defense attorney who is fluent in the Spanish language, a board member of the Suffolk County Criminal Bar Association and a former lecturer for Hofstra University’s Continuing Education Legal Program. She can be reached at (631) 277-2200.

Look forward to seeing you there – Sheryl L. Randazzo.

They Say It's Your Birthday (Continued from page 9)

that time he had already spent over 13 suc-

what they use would even if he had spoken to you this morning.” “I am Spanish!” I stupidly replied because I was so angry that this poacher would have the audacity to insinuate that I was a stupid white girl who cannot communican in Spanish. (O.K., maybe that’s my own insecurity, but you get the point!) He gives me a shrug and moves away, on to talk to the next client of some unsuspecting attorney that hadn’t bothered to get to D11 before 9 a.m.

I tell this story not because I am looking for sympathy, not because I am looking for some way of get these attorneys in trouble. Rather, I tell this story because I realize that I am not the only one that believes there has to be some sort of line that is never crossed by our fellow criminal defense practitioners. I underst-

So please, if you get a call at 3 a.m. make sure you tell your potential client not only that you’ll be there for him or her but that there may be other attorneys standing around waiting for them too. Remind them that they are not going to a flea market and that the hallway in front of D-11 is not a suitable place to change your representation. Also, if you want to know how to say all that in Spanish, or if you need someone to cover your arraignment for you, call me. After all, I take any opportunity to be in D-11 legitimately, but I’ll never be a poacher!

Note: Renee G. Pardo is a former Tarrant County, Texas and Suffolk County, New York Assistant District Attorney. She is now in private practice with an office in Central Islip. Ms. Pardo is a criminal defense attorney who is fluent in the Spanish language, a board member of the Suffolk County Criminal Bar Association and a former lecturer for Hofstra University’s Continuing Education Legal Program. She can be reached at (631) 277-2200.

Since June, I have picked up and shared other books by Jon Gordon, most notably The Energy Bus: 10 Rules to Fuel Your Life, Work and Team with Positive Energy and Soup: A Recipe to Nourish Your Team and Culture. Each has its own valuable message and insightful simplicity as to how it is related, and all have been relevant and important to my life in some way. It is based upon the relevance of Mr. Gordon’s various messages that we are so fortunate to be a part of this journey available to all of us.

Looking forward to seeing you there – Sheryl L. Randazzo.
Constitutional Grounds for the Defense to Admit Evidence (Continued from page 4)

fessions others made to the crimes for which the defendants stood trial. In Gibian, the Second Department discussed the issue of whether evidence that was obtained from the defendant’s mother’s confession to the crime in admission of certificates without live testimony. Our Supreme Court held that the admission of certificates was in violation of the defendant’s right to confrontation. The court disallowed efforts to impeach the confessor as a witness, and the confessor’s testimony introduced into evidence for its truth.5

Adbul, by recognizing that the co-defendant’s confession was admissible as a statement against penal interest, found that all elements of this hearsay exception were satisfied. As to the second level of hearsay, though, the only requirement that the Second Department finds necessary to consider is whether sufficient indicia of trustworthiness exist to admit the statement. To reach this seemingly minimal foundation for the defense to admit the totem pole hearsay, the Second Department relied, in part, on People v. Settles where a nonverbal police summary of a confession was ruled admissible. In that level, the second level of hearsay was the summary as (opposed to transcript) of the first level, and the Second Department ruled that the summary could have been admitted upon proper foundation having been laid.5 Settles supports the Abdul decision on state law evidentiary grounds.

Additional support, relied on in both Gibian and Abdul, comes from Chambers v. Mississippi? a far broader case because Chambers holds that a Constitutional basis exists for a defendant to admit secondary forms of evidence like hearsay even when those secondary forms of evidence would be excluded by the rules of evidence. The Chambers Court, by recognizing that the co-confessed defendant’s hearsay, was admissible, made the defendant tell the confessors or witnesses to the crime even though the defendant did not commit the crime for which the defendant was accused. The state court disallowed efforts to impeach the co-confessor as the witness with the confession under the state’s evidence code. Further, the state court disallowed testimony from other witnesses who heard the co-confessor make the confession because the state did not recognize the statement against penal interest exception to the hearsay rule. The United States Supreme Court held that “exceptions to the hearsay rule” tailored to allow the introduction of evidence which in fact is likely to be trustworthy have long existed.10 In addition, in Chambers, “that testimony also was critical to Chambers’ defense. In these circumstances, where constitutional rights (due process and confrontation and calling witnesses in one’s own defense) affecting the ascription of guilt is implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice.” The Chambers fair trial rule is the defense’s Constitutional route to exclude evidence otherwise admissible on a hearsay analysis. Defense counsel should be relying on both state evidentiary principles and Chambers.

Note: Harry Tilis has been in private practice for over 20 years since he graduated from New York Law School. Originally a business lawyer with Proskauer Rose, Mr. Tilis has continued to serve business clients while expanding their representation to include all aspects of “real people” law including criminal law in all Suffolk County’s courts, real estate, family law and wills and estates.

Correction

In the last paragraph of last month’s article, The Suffolk Lawyer regrets the error.

1 People v. Side, 76 AD3d 1106 (2d Dep’t 2010); People v. Gibian, 76 AD3d 583 (2d Dep’t 2010); People v. Abdul, 76 AD3d 563 (2d Dep’t 2010). In addition, the Second Department reversed a plea to attempted murder in the second degree charge; People v. Santiago, 71 AD3d 703 (2d Dep’t 2010).


3 People v. Abdul, 76 AD3 at —.

4 Ibid.


7 Id at 147.

8 Id at 410 US 284 (1973).

9 Id at 302.

10 See, e.g., People v. Osley, 64 AD3d 1078 (2d Dep’t 2009)(trial court erred by excluding hearsay testimony that the defendant confessed to the crime even though it is undisputed that such confession was made for a statement against penal interest because the declarant was available.)

11 See, e.g., People v. Green, 70 AD3d 39 (2d Dep’t 2009)(defense failure to provide alibi notice, if required, does not require exclusion of alibi witness when lesser sanctions were available.)
CPLR 3126(3) -- The Ultimate Remedy for Willful Failure to Disclose

(Continued from page 11)

City of New York1 that statutory deadlines, like court orders, cannot be ignored without significant consequence.

The Spring 2010 Directives

The opinion in Fish & Richardson P.C. v. Schindler2 rejected the “one more chance” argument as a basis for an abuse of discretion reversal.

Defendant argues that it was an abuse of discretion for the court to strike the answer in the absence of a conditional order or a specific warning by the court that he faced imminent dismissal. Defendant points to no authority holding that a court must issue such a “last chance” warning or order in all cases before exercising its discretion to strike a pleading. CPLR 3216 permits the court to “make such orders ... as are just,”3 and it may, in an unopposed motion, determine that the pattern of noncompliance is so significant that a severe sanction is appropriate. Such a determination should not be set aside lightly. The Supreme Court’s opinion of the Fish & Richardson case is instructive.4

The Second Department’s opinion in Van Lehn v. Fish & Richardson5 was premised upon a CPLR 3216 motion after plaintiff’s spoliation of evidence violated several orders to disclose (ruling that the Supreme Court improperly exercised its discretion in denying that branch of the defendant’s motion which was to dismiss certain other personal injury causes of action after the plaintiff willfully defied discovery orders by deleting from her computer’s hard drive materials that she had been directed to produce). The court found that plaintiff failed to establish any entitlement to the attachment demanded. There had been no show-cause evidentiary hearing which the court noted precluded a finding that plaintiff’s failure to comply with the court’s direction was not due to substantial and reasonable cause. Had there been such a hearing, the court’s finding that plaintiff failed to establish any entitlement to the attachment demanded is subject to reversal.

Compensation Should Start at Engagement

It is good practice to ready the client for disclosure obligations at the time that counsel is engaged by the party for representation. An overview of the anticipated discovery proceedings (documented in a follow up letter) will avoid unnecessary delays. Explain to the client that inasmuch as certain deadlines for production will be imposed by the court, counsel must impose ancillary obligations upon the client so that production obligations are achieved on a timely and proactive basis.

After the Supreme Court struck the defendant’s answer in Fish & Richardson, the defendant attempted to turn the table on his former counsel by blaming the former counsel for the disclosure failure. To his credit, former counsel successfully avoided criticism for failure to disclose because counsel documented his effort to encourage the client to comply with the disclosure obligations.

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

In Robert McGavy v. Director of Child Support Enforcement Bureau, Index No.: 4938/08, decided on April 8, 2010, the court denied plaintiff’s motion for an order pursuant to CPLR §211(b) vacating a judgment entered against the movant on May 23, 2008. The court noted that the movant had not commenced an action to vacate the judgment by the filing of a summons and complaint. As such, there was no action pending over which the court had jurisdiction to render the relief sought.

Motion for an order adjudging defendant/debtors in contempt for failure to comply with subpoenas/subpoenas duces tecum granted; motion was served more than 30 days prior to the return date but the defect was deemed waived.

In Peter Makris v. Port Richey Mobile Home Park, Inc., a Florida Corporation, Harold E. Fisher, Dennis Contigian a/k/a Dennis Costagan, Christopher L. Amandola and William Mortgage Corp., a Florida Corporation, Index No.: 23735/09, decided on June 7, 2010, the court granted the unopposed motion of plaintiff/judgment creditor to vacate a default judgment obtained from other sources. In addition, the notice of subpoena duces tecum shall among other things describe each item or category of items demanded with reasonable particularity. Failure to note the need for the subpoenas in the face of the subpoena or disclosure renders the subpoena facially invalid and unenforceable. Here, the court found that the subpoenas were facially invalid and unenforceable for want of compliance with CPLR §3104(a)(4).

Bench Briefs

(Continued from page 5)

In In the Matter of the Application of Jerome Federman and Andre Resnick v. Town of Islip Zoning Board of Appeals, Richard I. Scheyer, Chairman; Albert R. Morrison, Vice Chairman; and Kurt Paltchik, Barbara O’Connor and James H. Bowers, Members; and Barry Wetherall and Harriet Wetherall, Index No.: 37362/08, decided on April 28, 2010, the court denied plaintiff’s motion to dismiss the petition on the basis that 198 R. 9-1(a), which permits the court to compel subpoenas/subpoenas duces tecum by a party seeking the attendance of witnesses and/or the production of documents for “nail and mail” service.

Honorable Thomas F. Whelan

Motion for an order of attachment; plaintiff failed to establish any entitlement to the attachment.

In James R. Duffy, Sr. v. Loretta Staron, Honorable Thomas F. Whelan, Index No.: 24444/10, decided on September 3, 2010, the court denied plaintiff’s motion for an order of attachment.

The court noted that the motion failed to establish any entitlement to the attachment demanded.

Amended motion for an order of attachment was also denied.

In In the Matter of the Application of the Family Court located in the County of Suffolk, Index No.: 11088/08, decided on November 12, 2008, the court denied plaintiff’s motion for an order of attachment.

The court noted that the motion failed to establish any entitlement to the attachment demanded. There was no show-cause evidentiary hearing which the court noted precluded a finding that plaintiff’s failure to comply with the court’s direction was not due to substantial and reasonable cause.
The Suffolk Academy of Law, the educational arm of the Suffolk County Bar Association, provides a comprehensive curriculum of continuing legal education courses. Listings include January seminars, Winter (January-March) updates and conferences, and ongoing series. Watch for additional program details or announcements.

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, see the listings in this publication or check the SCBA website (www.suffolk-law.net – Internet CLE).

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

WINTER CLE

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 publication information.

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

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

INQUIRIES: 631-234-5588.
## UNCONTENDED MATRIMONIAL ACTIONS

**Monday, January 31, 2011 – Lunch ‘n Learn**

*(Live & Webcast)*

Gain practical how-to guidance at this succinct lunchtime program. The management analyst for the Matrimonial Part of the NYS Supreme Court, Suffolk County, will explain the nuances that can make the difference between having your papers rejected and having them accepted the first time around. Helpful checklists and useful forms will be distributed.

**Faculty:** Frederick J. Crockett III (NYS Supreme Court (Suffolk) Management Analyst, Matrimonial Part);

Hon. John Kelly (Family Court)

**Time:** 12:30–2:45 p.m. (Sign-in from noon)

**Location:** SCBA Center

**MCLE:** 2.5 Hours (professional practice)  [Non-Transitional and Transitional]

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## JANUARY 2011 REGISTRATION FORM

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

Circle course choices & mail form with payment. (charged Registrations may be faxed (631-234-5589) or phoned in (631-234-5588).

Register on-line (www.scba.org) and take a $5 discount per course.

Sales Tax Included in recording & material orders.

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## SERIES

- **TRUSTS**
  - Irrevocable Life Ins. ☐
  - Dynasty ☐
  - Charitable ☐
  - Lifetime Trusts for Minors ☐
  - $55 per session ☐
  - $45 per session ☐
  - $75 per session ☐
  - Yes ☐
  - 1 use each ☐
  - 2 cpn ea. ☐
  - 2 cpn ea. ☐
  - $95 ea ☐
  - $85 ea ☐
  - $20 ea ☐

## CONFERENCES

- **Law in the Workplace**
  - $175 ☐
  - $50 ☐
  - $175 ☐
  - Yes ☐
  - Yes ☐
  - 5 cpn ☐
  - 5 cpn ☐
  - $185 ☐
  - $175 ☐
  - $50 ☐

## SEMINARS

- **E-Discovery**
  - $95 ☐
  - $65 ☐
  - $115 ☐
  - Yes ☐
  - Yes ☐
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- **Anatomy of a Medical Bill**
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  - $50 ☐
  - $95 ☐
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  - $35 ☐

- **Fiduciary Selection, Liability, Etc.**
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- **Top Ten Bankruptups De's & Don'ts**
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  - 2 cpn ☐
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  - $90 ☐
  - $25 ☐

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Name: ______________________

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TOTAL TUITION $ ______________________ + optional tax-deductible donation $ ______________________ = $ ______________________ TOTAL ENCLOSED

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cannot process all of the trash it produces; this results in over 78,000 tons of Suffolk County’s trash being long-hauled out of state per year, appropriately 300 tons per day, requiring on average 65 transport trucks per day. Not only does this increase taxpayer expenses for exportation of garbage, which also increases air pollution, providing supporting evidence for the American Lung Association’s finding that Suffolk County’s air quality is “360 times above national levels for diesel soot emissions,” says Vernon Rail.7 It does not seem like a leap to assume a connection between the overwhelming pollution and the sky high cancer rates in New York (over 100,000 New Yorkers diagnosed with cancer each year).8 The “United States Environmental Protection Agency (EPA) estimates that shifting percent of long-haul freight from highway to rail [transportation for out of state exportation of waste] would decrease annual greenhouse gas emissions by more than 12 million tons.9"

So what is the answer? Continue to consume all we want, produce as much waste as we want, and disregard all signs pointing to environmental disaster? No! Although there must be change on a larger scale, until that happens, we must each do our part by taking steps to decrease the amount of waste we generate – whether that means using reusable, eco-friendly shopping bags, reusable water containers, composting, etc., it must be done.

Fortunately, Suffolk County has made several initiatives toward decreasing waste generation, including Waste Reduction and the Pay Per Bag System. The Solid Waste Management Act of 1988, which pushed the “Waste Reduction” initiative by means of disseminating information and efforts to educate the population about the effects of pollution and failure to recycle and reduce waste, proved to be some of what effective, decreasing per capita waste generation in Suffolk County by 3.1% from 1990-20067; this however is not nearly enough. The Pay Per Bag System has been adopted by the Town of Shelter Island, Town of Southampton, and Town of Southold.11 This initiative assigns the cost of waste management directly to the individual generating the waste as opposed to funded waste management costs through property taxes. For example, in the case of Southold, there is a large disposal bag, which is 48 gallons, capable of holding up to 75lbs costs $2.25 to dispose of. Although this system may seem appropriate for only smaller communities, it incentivizes waste reduction on an individual level (which is the goal).

Suffolk County should not stop here, it must continue to find alternative ways to reduce waste in order to reduce costs to its constituents as well as decrease their health risks. Long Islanders pay some of the highest property taxes in the United States; it seems unfair that those paying so much are exposed to such detrimental environmental health conditions. The time to be proactive is long past, we must now reactive.

Note: Sarah Valente is a third year part time evening student at Touro Law Center with an undergraduate degree in elementary education from St. John’s University. She is currently the secretary of the Environmental Law Society and hopes to pursue a career in education law. Ms. Valente can be reached at sarah.valente1@gmail.com.


### 2006 Suffolk County Solid Waste Generation

<table>
<thead>
<tr>
<th>Town</th>
<th>Population (Approximate)</th>
<th>Waste Per Person Per Day (in lbs)</th>
<th>Total Waste Per Year (in tons)</th>
<th>Total Waste Recycled Per Year</th>
</tr>
</thead>
<tbody>
<tr>
<td>Babylon***</td>
<td>217,081</td>
<td>3.81 lbs/pp/pd</td>
<td>337,285</td>
<td>40%</td>
</tr>
<tr>
<td>Brookhaven***</td>
<td>485,295</td>
<td>5.67 lbs/pp/pd</td>
<td>209,829</td>
<td>33.3%</td>
</tr>
<tr>
<td>East Hampton****</td>
<td>21,399</td>
<td>2.11 lbs/pp/pd</td>
<td>45,876</td>
<td>119,605</td>
</tr>
<tr>
<td>Huntington</td>
<td>202,767</td>
<td>5.67 lbs/pp/pd</td>
<td>209,829</td>
<td>33.3%</td>
</tr>
<tr>
<td>Islip</td>
<td>332,484</td>
<td>5.71 lbs/pp/pd</td>
<td>346,453</td>
<td>40%</td>
</tr>
<tr>
<td>Riverhead</td>
<td>33,098</td>
<td>3.61 lbs/pp/pd</td>
<td>21,781</td>
<td>13.6%</td>
</tr>
<tr>
<td>Shelter Island</td>
<td>2,483</td>
<td>4.22 lbs/pp/pd</td>
<td>1,911</td>
<td>44%</td>
</tr>
<tr>
<td>Smithtown****</td>
<td>119,605</td>
<td>2.11 lbs/pp/pd</td>
<td>12,176</td>
<td>45.6%</td>
</tr>
<tr>
<td>Southampton</td>
<td>58,876</td>
<td>1.13 lbs/pp/pd</td>
<td>6,546</td>
<td>45.6%</td>
</tr>
<tr>
<td>Southold</td>
<td>30,000</td>
<td>4.89 lbs/pp/pd</td>
<td>20,186</td>
<td>56.4%</td>
</tr>
</tbody>
</table>

* This weight is calculated per person per day in a five day week
** 2006 solid waste management data unavailable (most recent available data is from 2003)
*** Brookhaven is Long Island’s largest town by area
**** 2006 Solid waste management data unavailable (most recent available data is from 2004)
***** 2006 solid waste management data unavailable (most recent available data is from 2003)

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### Discovery Proceedings

(Continued from page 11)

to probe several years after her death, and letters testamentary issued to her niece, S. G. Landis, as the executor. Following the issuance of letters testamentary, the fiduciaries of the estate of the post-deceased spouse petitioned for a compulsory accounting, which application was granted. The executrix was ordered to account within 30 days of service upon her of a certified copy of the court’s order. When no account was filed, the fiduciary moved to hold the executrix in contempt, which application was granted upon the default of the executrix, and the court authorized the issuance of a warrant of commitment pending the outcome of the application. The court declined to grant another stay.

In opposition to the relief requested by the executrix, the respondents maintained that she transferred to herself all estate assets consisting of the decedent’s residuary estate, without notice in the event the executrix failed to purge herself of the contempt within thirty days of service upon her of the court’s order with notice of entry.

Thereafter, a warrant of commitment issued and the executrix was brought before the court by the Sheriff of the City of New York. At that time, counsel for the executrix stated that the their client’s fee to account was attributable to their law office failure rather than her willful disregard of the court’s order. Based on counsel’s representations, the court temporarily vacated the order of commitment, provided that in the event the executrix failed to account by a date certain, the warrant would once again issue. A warrant of commitment was again issued as a result of the executrix’s failure to account, and yet another stay was granted until a date certain.

However, in lieu of filing her account, the executrix moved to vacate the order of commitment, cause for an extension of time to file her account and for another stay of the warrant of commitment pending the outcome of the application. The court declined to grant another stay.

The court opined that although a warrant of commitment remained extant, the remedies afforded by the provisions of SCPA §2205 were likely to prove more fruitful than the imprisonment of the executrix for failure to comply with the court’s order. Accordingly, the court denied the request for the executrix for another extension of time to account, suspended the letters testamentary issued to her, directed that a hearing be held on the issue of whether the executrix’s letters testamentary should be revoked and one of the respondents be appointed in her place and stead, and ordered that on the hearing date the parties be prepared to discuss a turnover of the books and records of the estate, and whether a trial date should be fixed for the succession fiduciary to take and state the account of the suspended executrix.


### Attorney Malpractice

In an action brought by the plaintiff, individually, against her attorneys for, inter alia, breach of fiduciary duty, the court dismissed the complaint pursuant to CPLR 3211(a)(7) and (7) on the grounds finding that the scope of counsel’s employment was limited to representing plaintiff in her fiduciary capacity, rather than her individual capacity. The record revealed that the defendants had been retained to represent the plaintiff as co-executor of her late father’s estate. The plaintiff was the subject of a pending suit to recover monies due on notes that she executed before her father died. The plaintiff alleged that the defendants had failed to inform her about the circumstances surrounding the execution of those notes and had failed to question their validity. The defendants submitted a copy of their retainer with the plaintiff which reflected that she understood and accepted its terms before engaging counsel to represent her, and the limited nature of counsel’s representation; i.e. as co-executor of her deceased father’s estate.

On the foregoing, the Supreme Court dismissed the complaint, and the Appellate Division affirmed, holding that the language of the retainer agreement conclusively established a defense to plaintiff’s claims of malpractice. Specifically, the court concluded that plaintiff’s individual liability on the notes was outside the scope of defendant’s representation of the plaintiff in her capacity as co-executor of the estate. The court also found that the complaint failed to establish that the plaintiff’s alleged damages were proximately caused by any acts or omissions of the defendants.


Note: Irene Sherwyn Cooper is a partner with the law firm of Farrell Fritz, P.C., where she concentrates in the field of trusts and estates. In addition, she is immediate past President of the Suffolk County Bar Association and a member of the Advisory Committee of the Suffolk Academy of Law.
The Very Special New Year’s Resolution

(Continued from page 1)

tlement procedure. These conferences are now a required predicate before any resi- dential foreclosure matter can proceed to an IAS Judge for possible litigation or the issuance of an Order of Reference.

Our project is unlike any other in the State of New York. While some foreclosu-re programs give homeowners general advice on how to apply for a mortgage modification or related legal infor-mation, our project invites EVERY home- owner that is subject to a residential fore-closure filing to contact us and receive a FREE legal consultation. In addition, if after the consultation it appears that the homeowner is in need of future legal representation at the settlement con- ference level, they will be provided a pro-bono lawyer at each settlement conference that the homeowner attends. The home- owner need only request the representa-tion, and determines on a case-by-case basis if continuing pro-bono representation is warranted.

By way of comparison, prior to the eco-nomic crisis, the average number of foreclosu-re filings per year in Suffolk were about 1,500. Since 2008 that number has increased to approximately 18,000 filings per year. Since the programs inception, we have helped over 1,800 homeowners. The set-tlement conference process has been suc- cessful in about 33 percent of the cases (a successful outcome is deemed to include a successful mortgage modification or any other disposition that allows the matter to be settled prior to going into an IAS part). Between May 2010 and November 2010 the project has opened 620 new cases, and has covered 422 court settlement confer- ence calendars.

Becoming a volunteer in this project is easy and has additional benefits. You will meet other attorneys and be a part of an ongoing dialogue regarding foreclosures. This project will begin to prepare to undertake and fully litigate a foreclosure matter (as of December 20, 2010 attorney fees can now be awarded to a successful homeowner litigant).

In addition to the satisfaction of helping your many neighbors, you will also earn 5 CLE credits upon completion of the free training program and completing at least four appearances.

Volunteer attorneys who continue to serve will also receive a CLE coupon good towards one CLE credit for every additional two appearance dates they perform. For example if you volunteer for 6 additional appearances, at either a court settlement conference or client consultation, you will receive 3 coupons which would be good for any 3 credit Suffolk Law Academy of Law CLE program.

Access to a special website which includes forms, laws, CLE material, on-line appointment scheduling, and an attorney forum.

Every volunteer attorney is afforded legal liability coverage which is being pro- vided through the Nassau Suffolk Law Services policy.

This project is a pro-bono unbundling program. This means that you are not the attorney of record, but only the attorney of the day when representing a client.

Currently, the project has over 160 attor- neys who have volunteered, many of whom have been very generous in donat-ing their time and talents, but the workload is just too great. We wish to keep this pro-ject active and successful, but we need your help. Won’t you consider joining our project? Call our Suffolk County Pro Bono Coordinator, Linda Novick at (631) 234-5111, ext. 233. The work is not difficult and is extremely rewarding.

To the 160 plus Suffolk lawyers who have and continue to donate their time, please allow me to thank you all. Of all us have made a positive impact, and each of you can be proud of the work you do!

Note: Barry M. Smolowitz is an attorney practicing in Kings Park, Past SCBA President, SCBA Director of Technology, and Coordinator of the SCBA Pro Bono Foreclosure Settlement Conference Project.
The New Year Brings New CLE Opportunities

By Dorothy Paine Ceparano

By the time readers receive this publication, the new year undoubtedly will have dawned and holiday celebrations will be a recent – and, it is hoped, happy – memory. As work schedules return to normal, one of the things lawyers might want to do is to think about ways to extend their practices and expand their existing skills. Continuing legal education, of course, is dedicated to those goals, and this winter the Academy offers a number of new and interesting CLE offerings. Whatever your field or future ambitions, you will probably find worthwhile and professionally enabling opportunities in the Academy’s winter syllabus.

An overview of what is scheduled from January through March (plus a few spring ambitions, you will probably find worth-while and professionally enabling opportunities in the Academy’s winter syllabus). The new year undoubtedly will have

Litigation

The new year kicks off with a cutting-edge seminar on E-Discovery, scheduled for the evening of Wednesday, January 12. The expert faculty assembled for the program will cover what attorneys must know about the new e-discovery State requirements. Last summer, Chief Judge Jonathan Lippman altered the Uniform Rules of Trial Courts to stipulate that attorneys “must be sufficiently versed in matters relating to their clients’ technology systems to discuss competently all issues relating to electronic discovery” at preliminary conferences. In this program, you will learn how to build an EDD (electronic data discovery) process that is defensible in court, that contributes to your overall litigation strategy, and that will help you to avoid possible sanctions. Presenters are Hon. Emily Pines; Maura Grossman of the New York City firm Wachtell, Lipton, Rosen & Katz; and computer experts Yalkin Demirkaya and Sal Llanera of Cyber Diligence, Inc., an e-discovery, computer forensics, and information technology investigative services firm. SCBA Director Cheryl Mintz and Academy Officers Allison Shields and Hon. James Flanagan are the program coordinators. Later this winter, a CLE entitled “Evaluation of a Negligence Case” will provide valuable insight to personal injury lawyers with requisite information for case evaluation, suggestions to increase case value or improve defense positions, forms for intake and pre-trial discovery, and insight into the pitfalls of material deviation pursuant to CPLR section 5501. The program will be presented on the evening of Wednesday, March 16, and will feature Hon. James Flanagan with an expert panel representing perspectives of the bench, plaintiff’s bar, and defense.

Criminal Practice

If you missed the information-packed Criminal Law Update presented by Hon. Mark Cohen and Kent Moston in the fall, another opportunity to gain their keen insights on the practical ramifications of U.S. Supreme Court and NYS Court of Appeals decisions awaits. A video replay will be presented in the SCBA Great Hall on Tuesday, January 18 (4:00 – 7:00 p.m.). William Ferris will provide in-person commentary. Those who handle criminal matters will also want to look for publicity announcing the specific date of a February evening seminar on Handling DUI and DWI Cases. Subject matter will include the new intoxicator law and the special considerations of DUI matters involving prescription drugs. Scott Lockwood, an Academy Officer and the program coordinator, will assemble a knowledgeable faculty to address these and other issues.

Bankruptcy Practice

As some businesses do well in a poor economy, some legal practice areas see spikes in the demand for services during financial downturns. One such area is bankruptcy practice, and the growth in client and potential client bases has triggered a consequent demand for CLE courses. In an attempt to meet the needs of constituencies, the Academy has presented a number of programs on bankruptcy and related topics of late, with three new ones are on the horizon. On Thursday, January 20, Bankruptcy Judge Alan Tait and Academy Dean Richard Stern, a bankruptcy lawyer with Macco & Stern, will present a lunchtime program entitled “Debts & Don’ts in Consumer Bankruptcy Cases.” An interactive discussion will focus on procedural and practical issues affecting those who practice before the Bankruptcy Court, and new lawyers and paralegals are strongly urged to attend.

Then, on Tuesday, February 15, the focus of another lunchtime program will be Chapter 13 Plans. This seminar will feature Chapter 11 Trustees Marianne DeRosa and Michael Maccio, who will explain Chapter 13 and review do’s and don’ts, common errors, and practical issues.

Finally, a Bankruptcy Update has been scheduled for a two-part series. The evening of Thursday, April 14, a panel of judges and experienced practitioners will review changes, trends, and potential developments that affect bankruptcy practice.

Elder Law & Estate Practice

Those whose practices comprise elder law or estate matters will find abundant offerings in the Academy’s Winter Semester.

The Trusts developed by Ralph Randazzo continues this winter with Irrevocable Life Insurance Trusts, presented by Richard Weinblatt, scheduled for lunchtime on February 2, and Grantor Retained Annuity Trusts (GRATS), presented by Paul Dorr, scheduled for lunchtime on March 1. (Another component of the series, Lifetime Trusts for Minors, which was originally scheduled for January, has been postponed to June 7.)

A relevant adjunct to the Trusts Series is a new announced lunchtime program entitled “Fiduciary Liability & the Prudent Investor Act.” Also coordinated by Mr. Randazzo, this program will feature subjects on the ancient fiduciary duty and new fiduciary standards.

Openings on Academy Committee

The Academy’s Nominating Committee will meet twice in early 2011: first, to nominate a new Dean as Richard Stern completes his second term in office (mandatory limit according to Academy Bylaws) and, second, to select a slate to fill five vacancies occurring on the Academy Board as Nancy Ellis, Diane Farrell, Richard Filiberto, Allison Shields, and John Zaher complete their terms (the mandatory limit for service as an Academy Officer). Academy bylaws state that the Dean must be a former or current Academy Officer or Trustee (Academy trustees are the members of the SCBA Board of Directors) and must meet all the criteria for election to the SCBA Board of Directors (one of the positions on the SCBA Board is occupied by the Academy Dean).

New Officers, as per Academy Bylaws, must be in active practice and have been active in Academy work and who have attended some Academy meetings. The openings are for one-year terms, upon completion of which application may be made for a subsequent three-year term.

SCBA members who are interested in applying for a spot on the Nominating Committee should contact Dean Richard Stern, who serves as chair of the 2011 SAL Nominating Committee, or Academy Executive Director Dorothy Paine Ceparano. Please send a resume addressing Academy and/or SCBA service by mail (560 Wheeler Road, Hauppauge 11788) or e-mail (dorothy@scba.org).

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.

January
7 Friday Meeting of Academy Officers & Volunteers. 7:30–9:00 a.m. Breakfast buffet. All SCBA members welcome.
12 Wednesday E-Discovery. 6:00–9:00 p.m. Sign-in and light supper from 5:30 p.m.
13 Thursday Anatomy of a Medical Bill (Health & Hospital Law). 6:00–9:00 p.m. Sign-in and light supper from 5:30 p.m.
15 Tuesday Chapter 13 Plans. 12:30–2:00 p.m. Sign-in and lunch from noon

February
2 Wednesday Trusts Series: Irrevocable Life Insurance Trusts. 12:30–2:15 p.m. Sign-in and lunch from noon
4 Friday Law in the Workplace Conference. 9:00 a.m.–4:00 p.m. Sign-in from 8:30 a.m. Continental breakfast and lunch buffet.
7 Monday State of the Estate Tax. 6:00–9:00 p.m. Sign-in and light supper from 5:30 p.m.
9 Wednesday Family Court Update. 6:00–9:00 p.m. Sign-in and light supper from 5:30 p.m.
10 Thursday Meeting of Academy Officers & Volunteers. 7:30–9:00 a.m. Breakfast buffet. All SCBA members welcome. (Note change from customary first Friday of the month schedule.)
14 Monday Elder Law Update with George Roach. 2:00–5:00 p.m. Sign-in from 1:30 p.m. Valentine’s Day snacks.
15 Tuesday Chapter 13 Plans. 12:30–2:00 p.m. Sign-in and lunch from noon

More Academy News on pages 21; CLE Course Listings on pages 20-21