ABA Meets in Boston for 2014 Meeting

By Scott M. Karson

The 136th Annual Meeting of the American Bar Association was held on August 7-12, 2014, in Boston, Massachusetts.

The Opening Assembly
The Opening Assembly, held at Boston’s Hynes Convention Center, fea-
tured remarks by Massachusetts Governor Deval Patrick, outgoing ABA President James R. Silkenat and Jeh Charles Johnson, the newly appointed Secretary of the U.S. Department of Homeland Security. In his remarks, Johnson stated, “In the name of homeland security, I can build you a perfectly safe city, but it will be a prison... [W]e should not do this at the cost of who we are as a nation of people who respect the law, cherish privacy and freedom, celebrate diversity and who are not afraid. That is our greatest strength as a nation.” The ABA Medal, the ABA’s highest award, was given to 95-year old retired General Earl E. Anderson, who spoke of his 35 years in the United States Marine Corps and his 64 years of active membership in the ABA.

The keynote address at the American Bar Association meeting in August was delivered by United States Chief Justice John G. Roberts, Jr.

Supporting Lawyers In Need

The Lawyer Assistance Foundation sponsored the 14th annual Ira P. Block Memorial Golf Outing at Westhampton Country Club. Story and more photos on page 16.

Mandatory Pro Bono Reporting: An Update

By Bill Ferris

Over a year ago, your Bar Association took the lead in opposing mandatory reporting of pro bono services by attorneys in New York State. According to my recent conversations with Chief Administrative Judge A. Gail Prudenti and Glenn Lau-Kee, President of the New York State Bar Association, there has been progress in resolving the dispute with the Chief Judge over the issue of mandatory pro bono reporting requirements by attorneys in the biennial registration statement. Two issues have been central to our position of pro bono services: we oppose both manda-
tory reporting and mandatory pro bono services and we want to celebrate and acknowledge the numerous pro bono services provided by attorneys. These goals now appear to be attainable.

Background
Effective May 2013, all attorneys in active practice in New York State are required to affirm in their biennial registration report for the reporting period the number of hours of pro bono service performed and/or the amount of money contributed to an organization providing pro bono service to underserved members of the public. At the May 2013 and June 2013 meeting of the Board of Directors, the Board voted to...
From your editor

Like the entire membership of the Suffolk County Bar Association I mourn the loss of Dorothy Ceparano, who died on September 24. It is difficult to remember that she is no longer here to call or even share a few laughs with, she was such a formidable presence.

Not everyone knows how much Dorothy loved The Suffolk Lawyer. Even when she stepped down as the Editor-in-Chief handing the paper over to me, she was always sure to continually include a very informative Academy of Law section for the paper. Dorothy was always available to offer any advice when asked and to help answer any questions as well. When I first became the editor of the paper she sat down with me to be sure I’d be successful at the job. Dorothy really cared. Throughout my years as the editor, she was always there for me.

We are all special in our own way but someone like Dorothy touched many lives in a variety of different ways. Next month the SCBA will dedicate our November issue of The Suffolk Lawyer to Dorothy. Please help us honor her memory by sending in any memories or remarks, 50 words or less, to me at scbanews@optonline.net. If you have any questions please feel free to call me at (516) 376-2108.

– Laura Lane
Editor-in-Chief
The Suffolk Lawyer

Our Mission

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

By Laura Lane

How did an anthropologist lead you to law? I was in the process of getting my master’s degree at the time and unsure of what career I’d pursue. I saw a notice that Margaret Mead was presenting a lecture at Hofstra Law School and decided to go there. There were only 50 of us there and I felt like she was talking directly to me.

What did she say? She was encouraging all of the women in the room to pursue the path they wanted to follow. I was at a law school so the atmosphere was there. I felt like she was encouraging me to become an attorney.

Did you go to law school right away? No. I decided to take a paralegal course and then I sent my resume out to 50 different places. Joseph Stim interviewed me and offered me a job as a paralegal and I worked for him for a year. It was Mr. Stim that encouraged me to go to law school.

What exactly did he say to you? He told me I was doing the work of an attorney anyway so I should become an attorney. I was married with two small sons at the time. I had been going to night school for over 10 years.

Did your family support your decision to go to law school at night? My husband did. He had to take over the responsibilities of running the house and the children. We were both working full time but he worked at night. I got home in time before he left for his shift. My mother had always wanted me to be a teacher saying it was something to fall back on. Dad didn’t have an opinion. But they were both very proud of me when I became an attorney.

Were you the first attorney in the family? No one in my family was a professional.

Was it difficult to go to law school at night? I enjoyed it, the learning and the people in my class. When I learned I was second in my class graduating cum laude from St. John’s I was honored.

You became a partner quickly, right? Mr. Stim asked me to be a partner at his firm shortly after I was admitted to the New York State Bar in 1981.

What do you enjoy about being an attorney? I like the idea that the problems are always different and the job never gets stale. I enjoy learning new topics and working with the people both at my firm and my colleagues.

What challenges have you faced? When Mr. Stim died suddenly, it was very difficult. He had mentored my son, Glenn, and me. We always had Mr. Stim’s knowledge to fall back on. Now we were on our own at the firm. We had to take over his cases, which we knew nothing about.

Did his death bring you and Glenn closer professionally? We’ve always had a close relationship personally and professionally. Glenn and I think alike and trust each other.

What did you do once Mr. Stim died? We became very active at the Suffolk County Bar Association. We needed to reach out and make contacts in the legal profession. We started to go to Appellate Practice Committee meetings and then the other committee meetings too. We attended manyCLE’s.

Tell me about your pro bono legal service in the association’s foreclosure settlement project. It was Barry Smolowitz who first talked to me about volunteered for it. Both Glenn and I started to become involved early on. We wanted to help the homeowners.

What did you do once Mr. Stim died? We became very active at the Suffolk County Bar Association. We needed to reach out and make contacts in the legal profession. We started to go to Appellate Practice Committee meetings and then the other committee meetings too. We attended manyCLE’s.

What challenges have you faced? When Mr. Stim died suddenly, it was very difficult. He had mentored my son, Glenn, and me. We always had Mr. Stim’s knowledge to fall back on. Now we were on our own at the firm. We had to take over his cases, which we knew nothing about.

Why do you believe other attorneys should join the SCBA? I wrote an article for The Suffolk Lawyer a few years ago because I wanted to share with others how much the SCBA has given to us both. As two attorneys we could have been isolated. If I don’t know how to handle an issue I have an attorney I can ask at the SCBA. And I have attorneys I can refer people as well. I learn something every time I go to a CLE. And so much of what the SCBA does is fun too, like the Ducks games and wine tastings.

Do you think attorneys new to law should join too? Yes it is important for them to join the SCBA. From my experience in the Appellate Committee the new attorneys don’t know what to do. The other attorneys help them. And as part of the Pro Bono Project I had new attorneys shadow me. I was able to teach them how to handle a foreclosure conference by watching and asking questions. I’d explained to them how to deal with clients and how to act in court. Most attorneys at the SCBA are willing to help new members if they have questions.
By Elaine Colavito

SUDDEN COUNTY SUPREME COURT

Honorable Paul J. Bailey, Jr.

Motion for summary judgment denied; contract existed, however, the contract, and its terms, including responsibility, and liability, if, any, could not be determined.

In Peter Hernandez v. County of Suffolk, Board of Cooperative Educational Services of Western Suffolk County, Board of Cooperative Educational Service Third Supervisory District and Huntington Union Free School District, Index No.: 63645/2013, decided on June 17, 2014, the court denied the motion for summary judgment by defendant Huntington Union Free School District. The district moved for summary judgment dismissing the complaint and all cross claims asserted against it on the grounds that it did not own, operate, maintain, manage or control the BOCES facility, and that at the time of his accident, plaintiff was not under its custody, care or control. In rendering its decision, the court noted that before a defendant may be held liable for negligence, it must be shown that the defendant owed a duty to the plaintiff. The duty owed by a school to its students stems from the fact of its physical custody and control over them. As a school’s duty is strictly limited by time and space, when that custody ceases because the child passed out of the orbit of its authority, the school’s custodial duty also ceases. The court further pointed out that liability for a dangerous or defective condition on property is generally predicated upon ownership, occupancy, control, or special use of the property. Where none of these factors are present, a party cannot be held liable for injuries caused by the allegedly dangerous or defective condition of the property. Here, the court noted that based on the pleadings, a contract existed between the district and BOCES. As the district did not proffer the contract, its terms, including the district’s responsibility, and liability for its students, if, any, could not be determined. Thus, summary judgment in the district’s favor was not warranted.

Honorable Daniel Martin

Motion for an order pursuant to CPLR §3126, sanctioning plaintiff denied; failure to disclose certain medical information because defendant did not recall, a question of credibility, not a matter of sanction.

In John Laronga v. Atlas-Suffolk Corp., Crocco Con-tracting Inc., Critics Choice Deli NY, Inc., and 1153 East Jericho Deli Inc., Index No.: 16185/2011, decided on June 20, 2014, the court denied defendants’ motion for an order pursuant to CPLR §3126, sanctioning plaintiff for willfully evading requested medical information and authorizations pursuant to discovery demands. The court noted that the substance of defendants’ frustration was plaintiff’s claimed lack of knowledge or memory concerning prior medical complaints, interventions and treatments. In opposition, plaintiff asserted that his recollections, or lack thereof, of prior medical events was solely an issue of credibility and not an issue, which should be the subject of a sanction motion, especially in light of plaintiff’s full compliance with the defendant’s discovery demands. In

Court of Appeals Weigh in on Warrantless Use of GPS and Criminal Verdict Sheets

By Hon. Stephen L. Ukeiley

In People v. Lewis, the Court of Appeals recently revisited two significant criminal law principles: warrantless use of GPS to monitor suspects and annotations on verdict sheets. The underlying facts involved an elaborate credit card scheme in which defendants unlawfully fabricated the magnetic card strips from credit cards belonging to residents of other states. The case ultimately went to verdict on 26 of the 61 counts set forth in the indictment. Lewis, 2014 N.Y. LEXIS 900 (May 1, 2014).

Prior to trial, the People disclosed that law enforcement had tracked one of the defendants by attaching a GPS device to his vehicle without a warrant. Apparently evidence pertaining to the crimes was obtained on just one of the days in which the tracking took place. The trial court did not address defendant’s motion to suppress the evidence and/or dismiss due to the constitutional violation. The trial judge, however, concerned the jury might be confused by the voluminous number of counts from different dates and locations, inserted on the verdict sheet for each count the date of the offense and either the name of the store where the offense occurred or the name of the issuing bank. Defendant objected to the inclusion of the store locations, specific dollar amounts and dates. Id.

Defendants were convicted on 20 of the 26 counts; namely two-counts of grand larceny in the third degree, three-counts of grand larceny in the fourth degree, eight-counts of criminal possession of a forged instrument, five-counts of identity theft, scheme to defraud and criminal possession of forgery devices. Defendants’ appeal ensued.

Unreasonable search constituting harmless error

It is well established that the use of GPS to monitor a suspect constitutes a search under the Constitution. People v. Weaver, 12 N.Y.3d 433 (2009). Therefore, it was undisputed that the use of the GPS on defendant’s automobile without a warrant was a constitutional violation. Lewis, 2014 N.Y. LEXIS at 900 *12.

The court affirmed the convictions, however, ruling the violation was harmless and in no way prejudicial to the outcome of the case. The court noted law enforcement had gleaned identical information pertaining to the unlawful acts via a lawfully obtained eavesdropping warrant. In addition, investigators were present in the stores and personally observed several of the unlawful purchases.

The court concluded the totality of the evidence, which further included surveillance videos, sales receipts, interviews with store employees and recorded conversations, overwhelmingly demonstrated defendants’ guilt, and, as a result, the convictions were affirmed.

Annotations permissible on verdict sheet to clarify multiple similar counts

The court further upheld the use of annotations on the verdict sheet. CPL 310.20(2) provides in a criminal case where two or more counts under the same article of law are submitted to the jury, the verdict sheet “[m]ay set forth the dates, names of the complainants or specific statutory language ... however, the court shall instruct ... the sole purpose of the instructions is to distinguish between the counts.” The statute was amended in 1996 to allow at the discretion of the trial judge the inclusion of “the dates, names of complainants or specific statutory language.” Id.

It is well established that legal instructions may not be included on the verdict sheet, and, in fact, “nothing of substance can be included ... that the statute does not authorize” People v. Miller, 18 N.Y.3d 704 (2012). In Miller, the court previously found the verdict sheet to be in violation of CPL 310.20(2) because it erroneously contained legal standards and an instruction regarding burden of proof. Specifically, the verdict sheet had asked if the defendant demonstrated by a preponderance of the evidence that his actions were due to an extreme emotional disturbance? Id.

The court distinguished Lewis because the information pertaining to the stores and/or the names of the issuing banks was not dispositive and could not reasonably be misconstrued as having any particular significance. Instead, as the trial judge reasoned, the annotations were merely included to assist the jurors in distinguishing between the more than two dozen counts. The court further concluded the stores’ names fell within the statute’s definition of “complainant” and the intent of the law was not to “[r]estrict trial courts from providing clarification ... where there are multiple counts of identical offenses alleging similar conduct over a period of time” Id.

Practitioners and defendants should take note that the Court of Appeals has held harmless error may override an unlawful search where the lawfully obtained evidence clearly supports the conviction. Moreover, the use of clarifying language to distinguish similar criminal counts on a verdict sheet lies within the discretion of the trial court.

Note: The Honorable Stephen L. Ukeiley is a Suffolk County District Court and Acting County Court Judge and is the presiding judge of Suffolk County’s Human Trafficking Court. Judge Ukeiley is also an adjunct professor at both the Touro College Jacob D. Fuchsberg Law Center and the New York Institute of Technology and the author of numerous legal publications, including his most recent book, The Bench Guide to Landlord & Tenant Disputes in New York (Second Edition)6. He is also a member of the Board of Directors of the Suffolk County Women’s Bar Association.

*B The information contained herein is for informational and educational purposes only. This column is not intended in any way to be considered the solicitation or offering of legal or other professional advice. If you require legal or other expert advice, you should consult with an attorney and/or other professional.
WHO’S YOUR EXPERT

An Expert in Pop-Culture

By Hillary A. Frommer

We all know someone who claims to be an “expert” in pop-culture. She is up-to-date on the latest fashion trends; knows which musicians, models, and actors are “it” on any given day; and starts every morning by closely reading “Page 6.” We may all agree that this person certainly knows her pop-culture, but we certainly doubt that this knowledge qualifies her as an expert in the legal sense.

In one media-worthy case this summer however, a federal jury heard from a real expert in pop-culture, well, hip-hop culture that is. In June, rapper Ronald Herron, also known as Ra Diggs, went on trial in the EDNY before District Judge Nicholas Garaufis for murder, racketeering, drug dealing, and other criminal acts. The jury heard testimony from the defendant, the defendant’s friends, a known rap star, and an expert in hip-hop culture. The jury also viewed music videos of the defendant, which purportedly referenced violence and gangs, and portrayed the defendant using gang signs and guns (the defendant was alleged to be the leader of the Bloods gang from the Gowanus Houses in Brooklyn).

While the prosecutor sought to admit the videos into evidence (and successfully defended against a motion to preclude them), it wanted to preclude the defendant from offering expert testimony discussing those videos and their role in hip-hop culture. The government moved in limine to preclude Dr. James Peterson, Ph.D., the Director of Africana Studies and Associate Professor of English at Lehigh University, from testifying that “based on the traditions, patterns, roots, and antecedents of hip hop music, including gangsta rap, that song lyrics and expressions by artists in this medium, which are designed to create or develop their image, and/or promote their work, may not be taken as expressions of truth by virtue of being stated or sung by the artist.” The prosecution did not challenge Dr. Peterson’s qualifications. Rather, it argued that under Rule 702 of the Federal Rules of Evidence, Dr. Peterson’s testimony was not the product of reliable principles and methods, would not help the jury, and was beyond the proper bounds of expert testimony. The court rejected each argument, noting that its decision to allow this expert testimony was a novel one.

First, the prosecution asserted that the expert could not opine that categorically, rap lyrics cannot be taken as expressions of truth. However, the defendant argued, and the prosecution essentially conceded, that the expert’s opinion was far more “nuanced,” because he intended to opine that “gangsta rap lyrics are not necessarily statements of truth, and that due to the conventions of the genre, representations or claims to authenticity, while common, are not necessarily...”

(Continued on page 25)
Attorneys Censured

Patricia Byrne Blair: By decision and order of the court, the Grievance Committee was authorized to institute a disciplinary proceeding against the respondent and the matter was referred to a Special Referee. The referee sustained three of the five charges, and the Grievance Committee moved to confirm in part and dismiss in part. The respondent, by her attorney, similarly moved. The charges against the respondent included allegations of fraud committed against her employees in connection with contributions to their IRA accounts and monies withheld from their wages. Based upon the record, the court held that the Special Referee properly sustained three charges against the respondent, but should have also sustained the fifth charge. In determining the appropriate measure of discipline to impose, the court noted that the escrow violation was isolated in nature, and no client was ultimately harmed. Nevertheless, the court noted that the respondent had failed to cooperate with the Grievance Committee, which, in itself, was prejudicial to the administration of justice. In addition, the court noted that his failure to maintain the funds of a client intact reflected adversely on his fitness as a lawyer. Accordingly, the respondent was publicly censured.

Edward J. Toscano: By decision and order of the court, the Grievance Committee was authorized to institute a disciplinary proceeding against the respondent and the matter was referred to a Special Referee. The referee sustained all four charges against the respondent relating, inter alia, to his failure to preserve client funds entrusted to his charge as a fiduciary. The Grievance Committee moved to confirm the report and have the court impose such discipline as it deemed just. The respondent opposed the motion, and cross-moved to dismiss the report, or in the alternative impose a public censure. The application by the Grievance Committee was granted by the court in view of the respondent’s admissions, and the evidence adduced. In determining the appropriate measure of discipline to impose, the court noted that the escrow violation was isolated in nature, and no client was ultimately harmed. Nevertheless, the court noted that the respondent had failed to cooperate with the Grievance Committee, which, in itself, was prejudicial to the administration of justice. In addition, the court noted that his failure to maintain the funds of a client intact reflected adversely on his fitness as a lawyer. Accordingly, the respondent was publicly censured.

Attorneys Suspended:

Rudolph R. D’Amato: The Grievance Committee moved to suspend the respondent and for authorization to institute disciplinary proceedings against him based upon allegations that he misused client funds as an attorney-in-fact, and as the executor of her estate. The respondent answered and alleged that the propriety of his conduct was the subject of a proceeding pending in the Surrogate’s Court. The matter was held in abeyance pending a determination in the Surrogate’s Court, which ultimately resulted in the revocation of his appointment as fiduciary. Thereafter, the respondent failed to cooperate with the Grievance Committee. Accordingly, the motion of the Grievance Committee was granted, and the respondent was suspended from the practice of law.

Mitchell S. Ross: The Grievance Committee moved to suspend the respondent and for authorization to institute disciplinary proceedings against him based upon allegations that he failed to cooperate with the Grievance Committee regarding a claim of professional misconduct in connection with a real estate transaction. The respondent neither
Congratulations…

To the law firm of Fumuso, Kelly, DeVerna, Snyder, Swart & Farrell, LLP, which has been selected as the John T. Mather Memorial Hospital’s 2014’s Community Honoree.

Congratulations to Victoria Messina, senior at St. Anthony’s High School who sang so beautifully in the church choir at the Red Mass on October 1, 2014. The tradition of the Red Mass is to celebrate a great tradition of invoking the guidance of the Holy Spirit on the deliberations of the Courts and on the endeavors of all members of the legal profession. Victoria is the daughter of SCBA Director Vincent Messina.

Announcements, Achievements & Accolades…


Lisa Renee Pomerantz presented “Avoiding and Resolving Disputes in the Outsourcing Context” at the Annual Conference of the Association for Conflict Resolution in Cincinnati from October 8-11, 2014. She will speak on this topic at the New York State Dispute Resolution Association Annual Conference on October 27, 2014 in Syracuse. On October 23, 2014, she will be joined by Sharon Barkum to present the workshop “Protecting and Profiting from Your Intellectual Property” at the Stony Brook University Small Business Development Center.

Melissa Negrin-Wiener, partner at the Melville-based elder law firm Genser Dubow Genser & Cona (ODGC), received a plaque recognizing the firm as a finalist of the HIA-LI Business Achievement Award at a gala held on September 16. The firm was chosen for its commitment to Long Island, industry leadership, employer/employee relations and revenue and profitability trends over the last three years.

Irene Sherwyn Cooper, a partner at Farrell Fritz, and a past SCBA president, was recently appointed to the New York Bar Foundation’s (“The Foundation”) Planned Giving Task Force. Earlier this year, Ms. Cooper was appointed co-chair of the Fellows of the New York Bar Foundation for the 10th Judicial District.

Hon. W. Gerard Asher completed the Great Cow Harbor 10K Run on September 20. Justice Asher is one of just three runners who have completed the race every year it has been held. This year’s was his 35th.

Condolences…

To the family of Dorothy Paine Ceparano, the Executive Director of the Suffolk County Bar Association Academy of Law, who passed away on Sept. 24, 2014. Dorothy’s passing is a great loss to the Association and she will be missed by everyone.

To SCBA member Michael B. Solomon on the recent passing of his wife Michele.

To Karen and Ethan Halpen on the passing of Karen’s mother Angelina Angerman.

New Members…

The Suffolk County Bar Association extends a warm welcome to its newest members: Peter Bartsch, Julia E. Binger, Danielle Coys, Joan Narie Dorrzio, Cindy Elan-Mangano, Jacob R. Fleitman, Brenda Furshpan, Bryan Huebner, Veronica Kapka, Aaron S. Kaufman, Tommaso Marasco, Jr., Andrea C. Mims, Cory Morris, Angela P. Pensabene, Maurice K. Williams and Crystal Young.

The SCBA also welcomes its newest student members and wish them success in their progress towards a career in the law: Katherine Bergold, Alyson Bisacco, Hana Boruchov, Julia Castore, Pei-Ching Chang, Kathleen Coggins, Patricia DeSalvo, Christine DiGregorio, Kyle Durant, Christina Ford, Lauren Gallo, Lauren Golombek, Catherine Gretschel, Taisa Gurshumov, Stephanie Hibbert, Maribeth Hunt, Jenna Jonassen, Joseph Kaplan, Jessica Kiersy, Dorothy Kong, Dana M. Licandro, Jacob Lisogorsky, Bilal Malik, Ashley Maruzzi, Krystal Matos, Kathleen Miller, Krista C. Miller, Denise Mira, Lorraine J. Morrissey, Jessica Muscarino, Don Nenninger, Daniel Olsen, Yamile Prendes, Andrew J. Puppo, Jose Rojas, Isaac Rosen, Clifford Ryan, Omid Sahiholamal, Debbie Schleider, Bradley J. Schloss, Mary Seiffert, John Sepulveda, Doreen Shaupair, Monica Sharma, Kimberly Siegel, Anil Singh, Gary Singh, Rochelle Sorensen, Thomas Tlockowski, Ashley Valla, William Vega, Jessica Vogele, Alyssa Wanser, Lauren Wittlin, Jonathan Wulwicti and Dzheyn Yakubova.
The Dreikhausen Effect — a Challenger’s Duty to Preserve the Status Quo on Appeal

By Robert J Flynn, Jr.

Preserving the status quo on an appeal where you represent the challenger to a land use grant is essential if you expect the court to reach the merits of the appeal; failing to preserve the status quo might result in a court never reaching the merits of the appeal because the case is moot. This was the rule of the case in Matter of Dreikhausen v. Zoning Board of Appeals of the City of Long Beach, 98 NY2d 165 [2002]. The rule is as strong as ever today.

Dreikhausen was an Article 78 proceeding arising out of a use variance issued by the Zoning Board of Appeals of the City of Long Beach to the applicant, Bay Club of Long Beach, wherein the applicant was permitted to construct 20 condominiums and 20 boat slips on its property. Petitioners — four surrounding landowners — commenced an Article 78 proceeding challenging the board’s decision as illegal, arbitrary and capricious, but requested no preliminary injunctive relief. The proceeding was dismissed. At the time of the dismissal, work on the project was underway, the existing marina demolished, the bulkhead repaired and foundation permits issued.

Petitioners filed their notice of appeal with the Appellate Division, Second Department, and there, for the first time, sought injunctive relief to enjoin construction pending the outcome of the appeal. While moving affirmatively for injunctive relief, the petitioners resisted having to post an undertaking. Petitioners contended that the respondents should have included the foreseeable costs of delay in the purchase price and that they were unaware whether they could afford the large undertaking that might be required by the court. The Appellate Division denied the petitioners’ application for a TRO and, ultimately, affirmed the lower court deciding that the applicant had proven its case for a use variance.

Leave to appeal was granted by the Court of Appeals. At that time, 12 of the 20 condominium units were fully constructed and the remaining 8 units were under construction. The petitioners’ request to the Court of Appeals for a stay pending appeal was denied, but a calendar preference was granted.

However, the Court of Appeals never reached the merits of the use variance case, because the court declared the case to be moot. The project was substantially completed and could not be readily undone. The court stated that when the issue of mootness is raised, the primary focus of the court is whether the movant sought preliminary injunctive relief to prevent construction and preserve the status quo during the pendency of the litigation. Although it was true that at the Appellate Division, the Petitioners sought injunctive relief, the application was viewed by the Court of Appeals as “half-hearted”.1

Though seen as a harsh outcome by some, the message to the land use bar was clear: at every step of the case, a serious attempt to preserve the status quo must be undertaken or the case might never be heard on the merits.

A decade later, the Court of Appeals gave no showing of relief from the rule in Dreikhausen when it affirmed the Appellate Division, First Department in the hotly contested case of Matter of Weeks Woodlands Association Inc. v. Dormitory Authority of the State of New York, 95 AD3d 747 [First Dept. 2012], aff’d 20 NY3d 919 [2012]. There, the petitioners sought to enjoin construction of a hospital based primarily on the fact that an erroneous interpretation of the law was made and therefore non-compliance with zoning requirements when the permit was issued. An action was commenced to enjoin construction and a stay of construction was requested before the Supreme Court. The stay was denied and the case was dismissed. The petitioner appealed, but did not move for a stay before the Appellate Division.

The Appellate Court determined that the case was moot. The court found that the failure of the petitioner to seek injunctive relief before the Appellate Division was critical and rendered the petitioners “complicit in the project’s having reached its present advanced stage”.2 The court noted that the owner had properly moved forward with construction relying on the building permits that had been issued by the city culminating in the completion of substantial work which could not be readily undone.3 The Court of Appeals affirmed, finding that the project was substantially completed and that the proper course of action was to dismiss the appeal as moot.

In conclusion, a challenger to a land use grant must take a vigorous approach at each step of the litigation to stop construction and to preserve the status quo pending the outcome of the litigation. Failing to pursue this strategy will likely result in the dismissal of the case as moot.

Note: Robert J Flynn, Jr. is a practicing lawyer in Huntington, NY specializing in municipal and real estate law and land use appeals. He is the co-author of the book “Zoning Board of Appeals Practice in New York” published by the New York State Bar Association.


(Continued on page 27)
Benefits of Retaining an Appellate Attorney or ‘Law Person’

By Harris J. Zakarin

Trial attorneys often debate whether they need to retain outside assistance with their appeals or motions. Below are just a few of the reasons why you may consider retaining outside appellate counsel for your next appeal or motion.

Fresh and objective perspective

Trial attorneys tend to focus on details that may have been important during trial and discovery, but which are not a part of the appellate record or may not otherwise be germane to the legal issues that are at the forefront of a particular motion. An outside “law person” or appellate practitioner looks at the case with a fresh set of eyes and with an impartial point of view. Trial attorneys are often mired in details that frequently cloud their judgment and skew their objectivity when it comes to preparing important motion submissions or briefs. Appellate attorneys, on the other hand, are free from emotional attachment and are able to provide an unbiased assessment of the likelihood of success of the appeal or the motion.

Focus on the “Law”

Appellate advocacy is its own expertise. Lawyers often think, “Oh, I’m qualified to write an appellate brief. I’m a litigator. I’ve done this for years.” It’s not so simple. Trial attorneys utilize their own skill sets in thinking, advocating and presenting a case to a jury, which often times requires juggling several different aspects of a case at once leaving little time to sit down and focus on researching and writing a strong brief. Appellate attorneys, too, have their own skill set, requiring that the writing that they present to the court is persuasive, cogent and succinct. It requires attention to detail and the time to focus on germane legal issues that are relevant to the facts, as well as the ability to present arguments in a form that will resonate with the court. Just as presenting a case to a jury involves its own mastery and skills, writing persuasively and effectively is also its own skill.

Credibility in writing

Appellate practitioners and “law” people craft their writing in a certain style that gives their arguments credibility. While the briefs and memoranda must be persuasive, they must also be credible and present the facts in such a way that allow court personnel to fully understand and appreciate both sides of a given matter. Presenting the court with a full picture allows the court to rely on your brief and adds credibility to your position. Practitioners who ignore bad facts or otherwise grossly mischaracterize the facts discredit their overall position. Appellate practitioners and “law” people know how to write persuasively, yet credibly.

Familiarity with the courts, the rules and personnel

Appellate attorneys who regularly appear before appellate courts bring with them the institutional knowledge of those courts, their rules and their personnel. Each department of the Appellate Division has its own set of rules and procedures. Likewise, the New York Court of Appeals and the Second Circuit Court of Appeals each has its own rules. Appellate practitioners are familiar with the rules and customs that govern practice before those courts. In addition, appellate attorneys bring with them credibility with the judges and with court personnel. Just as a medical malpractice attorney who regularly appears before the medical malpractice part has a certain familiarity with the judges and court personnel, appellate practitioners enjoy that same level of familiarity with many of the judges and clerks at the appellate level.

These are just a few of the many reasons that may justify retaining appellate counsel or an outside “law person.” Depending on the particular matter at hand, having the assistance and advice of outside appellate counsel may greatly benefit your client’s cause.

Note: Harris J. Zakarin is a successful litigation attorney with an expertise and concentration in appellate practice. He represents clients in every appellate court in New York, including the New York Court of Appeals, New York’s highest court, and in the United States Court of Appeals for the Second Circuit. He also collaborates and consults with trial counsel to ensure that issues are properly and adequately preserved for appellate review and assists in all phases of litigation strategy, including the handling of motion practice in both trial and appellate courts.

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**Attorney of the Month**

Lew Silverman is pleased to honor Professor Lewis A. Silverman as its Pro Bono Attorney of the Month. Professor Silverman has devoted a substantial amount of his time, effort and expertise to provide free legal assistance to low-income matrimonial clients. He has received this award previously, especially for his leadership through Touro’s Family Law Clinic, but it is his most recent individual contribution to the Project that has earned him this distinction once again.

Lewis Silverman is the Director of the Family Law Clinic and Associate Professor of Clinical Law at Touro College Jacob D. Fuchsberg Law Center. In addition to his many responsibilities at Touro, which include managing the Family Law Clinic, providing technical advice to the Uncontested Divorce Clinic, and teaching Family Law, Civil Procedure, and Rights of Children courses, over the past year and a half Professor Silverman has interviewed and consulted with a substantial portion of the Project’s prospective pro bono divorce clients.

Since taking on this volunteer role in June of 2013, Professor Silverman has interviewed more than 70 prospective clients, vetting each case and preparing a detailed written summary and legal analysis with recommendations in order to facilitate an appropriate pro bono attorney “match.” In addition to gathering the essential information, Silverman also educates the clients about the judicial process, their legal rights, and reasonable expectations for the litigation. This consultation/interview is an important aspect of the intake process in order to avoid common misunderstandings or unreasonable expectations. In addition, Silverman serves as mentor to the Project’s less-experienced attorneys that are representing clients in divorce matters.

Silverman’s expertise and insight on potentially complicated divorce cases has been a great help to the Project. We value his experience in assisting us to sort through these cases and make the best possible pro bono assignments,” said Maria Dosso, Director of Volunteer Services at Nassau Suffolk Law Services. “We are fortunate to have someone with Professor Silverman’s expertise and background donating his time and helping us to meet the heavy demand for legal representation in matrimonial cases. Thanks to his thorough screenings, we are able to make referrals with reasonable assurance that the case is appropriate for pro bono representation.”

Professor Silverman’s legal career began, after receiving his J.D. degree from Boston University School of Law in 1976, at the Suffolk County Attorney’s Office, where he first served as Assistant Suffolk County Attorney and later became Supervising Attorney of the Abuse/Neglect Unit and Deputy Family Court Bureau Chief. In October 1985, he was appointed as a Family Court Hearing Examiner, a position he held for nine years. During most of his tenure he also served as president of the New York Hearing Examiners Association. When the Child Support Standards Act was drafted, Silverman’s comments were solicited by the Legislature and Governor’s office.

In January 1995, Professor Silverman joined Touro Law Center’s faculty as a Law Professor and became Director of Touro’s then newly founded Family Law Clinic, a position he still holds today. The clinic is comprised of, on average, eight law students in their final two semesters of law school, who are given live client experience in Family Court and Supreme Court on primarily child support, custody and visitation matters, and occasionally divorce. With Professor Silverman’s oversight, the students engage in all phases of the matter, from initial client interview through trial. Annually, the clinic conducts approximately 150 client screenings and provides legal assistance ranging from advice and counsel to full representation.

In addition, Silverman serves as the technical advisor to Touro’s First Year Matrimonial Project, a program he helped create in 2013. Students in this program assist pro se clients prepare court filings for uncontested divorces. The Pro Bono Project has worked in tandem with the Pro Se Clinic and referred dozens of divorce plaintiffs to the clinic in order to meet the great demand for services. The clinic has experienced a very high rate of success in getting its pro se clients’ filings submitted and final divorce judgments entered. This is just another example of the cooperative pro bono partnership Law Services enjoys (Continued on page 27)

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**Practical Tips for Appellate Oral Argument**

**By Glenn P. Warmuth**

**Practice**

Find someone who is willing to listen to your argument and who is willing to challenge what you are saying, or how you are saying it. Communication is a two way street and no matter how well you think you are explaining your argument it won’t help you or your client if it isn’t understood. I once explained my argument to my Mother, who is an attorney, the day before oral argument. She didn’t understand my position and we argued about it for hours. She had one particular question and she told me over and over again that she didn’t understand my answer. Finally I was able to explain it clearly. The next morning that was the one and only question that I was asked at oral argument. I gave my well-prepared answer and by the time I finished I knew I had won the appeal.

**Write a one-page outline**

When you stand up to argue your appeal you will not have time to read anything you have brought with you. It is too late for reading. You need to know your arguments by heart. I write a one page double spaced outline with bullet points, which list only the key points of my argument. The one page outline forces me to prioritize and gives me something to quickly look at if I get off track.

**Know who you are**

Oral argument is stressful and it is easy to forget the simplest things. Believe it or not, your name is one of the easiest things to forget to say.

You should start your argument by giving your appearance: “May it please the court, my name is Glenn Warmuth and I represent the plaintiff-appellant, John Smith.” While this may seem simplistic I find it grounds me, allows me to focus and starts me off in the right direction.

**Answer questions directly**

Listen to each question that is asked and then answer that question directly. You may not think the question is important. You may want to talk about something else. You may not know the answer to the question. None of this matters. What matters is that the judge, who is on the panel, which will be deciding your appeal, wants to know the answer to this question. So, you need to listen to the questions and then (Continued on page 29)
Wave of the Future or Outright Theft? Supreme Court Weighs in

By Lauren Kanter-Lawrence

For between eight and twelve dollars a month, a start-up offers subscribers the ability to record shows and watch live and recorded programming from their mobile devices. The service works by distributing broadcast signals through a network of small antennas in a “cloud.” Is this the rabbit ears antenna all grown up, or is this theft masquerading as modern technology?

The United States Supreme Court recently explored this issue in American Broadcasting Companies, Inc. v. Aereo, Inc. fka Bamboom Labs, Inc. (134 S.Ct. 2498, No. 13–1461), a dispute between television broadcasters and Aereo, a New York-based technology start-up. At the heart of the case were “retransmission fees”—money paid to networks and their local stations by cable and satellite subscribers for access to their signals and the right to retransmit their programming. Retransmission fees are an enormous revenue source for broadcasters, who are estimated to collect over $4 billion in retransmission fees from cable and satellite companies in 2014. Unlike cable and satellite services, Aereo did not pay the networks to distribute their broadcast signals. As such, the networks argued that Aereo’s business model was outright theft — the company simply sold subscribers stolen programming.

During the April 2014 argument before the court, the networks argued that Aereo was selling “public performances” of copyrighted work without permission of the respective copyright owners. Aereo countered that their service was the modern-day rabbit ears antenna, allowing subscribers to watch free broadcast television on their own schedules. The Second Circuit had agreed with Aereo’s position a year earlier, finding that “Aereo’s transmissions of unique copies of broadcast television programs created at its users’ requests and transmitted while the programs are still airing on broadcast television are not ‘public performances’ of the [networks’] copyrighted works.” WNET, Thirteen v. Aereo, Inc., 712 F.3d 676, 696 (2d Cir. 2013).

The Supreme Court disagreed. As set forth in the June 25, 2014 decision by Justice Breyer (who was joined by Justices Roberts, Kennedy, Ginsburg, Sotomayor, and Kagan), the court found that Aereo’s resemblance to traditional cable companies was “overwhelming” and that Aereo’s service conflicted with copyright law requiring the copyright owner’s permission.

(Continued on page 27)
The remaining issue before the court was the legal fees of the petitioner’s counsel. Counsel filed an affirmation in support of the requested fees, pursuant to UCR 207.45, and opposition thereto was filed by the objectants. The parties agreed to waive a hearing and have the matter decided based on the papers submitted.

The court noted that petitioner’s counsel had previously been paid $61,253, and was requesting an additional $15,734 for services performed, based on a gross estate of approximately $1.8 million. Pursuant to his retainer agreement with the executor, counsel’s fee was to be 4 percent of the gross estate of the decedent, as shown on the New York State or Federal Estate Tax return, except in the event of litigation, in which event, fees would be charged at the rate of $300 per hour, which the court found commensurate with his experience and professional standing. To this extent, counsel indicated that the hours spent by him could be classified into one of three categories: 1) estate administration work (30 hours of time); 2) legal work in connection with the sale of the decedent’s cooperative apartment (12.75 hours); and 3) litigation in connection with the accounting proceeding (80.75 hours).

In opposition to the requested fee, the objectants claimed that in view of the surcharges against the executor, attorney’s fees should be denied in their entirety. The court rejected this argument, and held that reasonable legal fees for necessary work performed could nevertheless be paid from the estate.

On the other hand, the court held that the legal fees incurred in connection with the sale of the apartment should be charged against the proceeds of its sale, rather than the general estate, finding that the purpose of the sale was not to facilitate the estate administration, but rather to further the interests of only one of the estate’s beneficiaries.

Additionally, the court held that counsel was not entitled to be compensated for services that were executorial in nature, and denied payment of counsel fees for time spent in connection with the litigation that was solely related to the defense of the executor’s personal interests.

Accordingly, the court held that with the exception of the fees disallowed in connection with the sale of the cooperative apartment, the fees paid in excess of those allowed belonged to the residuary beneficiaries, and directed that they be paid to the residuary beneficiaries in proportion to their interests, with interest at the rate of 6% from the date taken.


Summary Judgment

In a contested probate proceeding, the petitioner moved for summary judgment dismissing the objections to probate, and the objectant cross-moved requesting that the propounded instrument be denied probate.

The decedent was survived by a spouse, with whom he was in the midst of a divorce at death, and four children. His will bequeathed his entire estate to his girlfriend, and nominates her the executrix thereunder.

Preservation of Issues for Appellate Review

By Patrick McCormick

I did not begin to truly appreciate the rules regarding preservation of issues for appellate review until after I argued a criminal appeal before the New York Court of Appeals as a young prosecutor with the Bronx District Attorney’s Office. In that case, the defendant had been indicted for First Degree Robbery and related crimes and, at trial, sought to call his mother as a witness. In an offer of proof, defendant’s counsel claimed that the testimony would be used to corroborate defendant’s version of the events that occurred about one half hour before the crime was committed. The trial court precluded the testimony. On appeal, defendant argued that the mother’s testimony would have demonstrated defendant’s state of mind at the time the crime was committed. The legal issues raised on appeal by defendant were complicated and when I was preparing the brief to the Court of Appeals, I thought it was a close case and was not certain about the outcome. I argued in the brief that the court should not consider the issue raised by defendant as to the preclusion of defendant’s mother’s proposed testimony because it was not properly preserved. The issue raised on appeal regarding the significance of the testimony differed from the offer of proof made at trial. However, my argument was made in one short paragraph and a footnote in a 38-page brief (but it was the first issue I raised at oral argument). In a one-paragraph decision, the Court of Appeals affirmed the conviction holding defendant’s “offer of proof was insufficient to alert the trial court to the relevance of the testimony. For that reason, the trial court’s exclusion of the witness would not be reversible error. Defendant’s remaining arguments, to the extent preserved, are without merit.” Thus, what I perceived as a close case on the law turned on the specificity and propriety of an objection and proof made at trial.

Both the Criminal Procedure Law and the Civil Practice Law and Rules contain provisions requiring that issues be preserved for appellate review. The fundamental concept, to which there are limited exceptions, is that an issue cannot be raised for the first time on appeal. Therefore an objection or protest must be made to alert the trial court to the specific nature of the claimed error, at the time of the error or at a subsequent time when the court would have had an opportunity to avoid the error and correct it. If the lower court is not given an opportunity to correct the alleged error, the issue will not be preserved and thus, except in limited circumstances, cannot be raised on appeal. Obviously, potential errors, and thus appealable issues, can arise at any stage of the proceeding or trial. Thus, while in the heat of battle attempting to win your case, counsel simultaneously needs to be diligent in protecting the record for a potential appeal. For example, to preserve a claim regarding the sufficiency of evidence produced at trial, a trial order of dismissal must be made. However, if that motion is made, and denied, and the defendant puts on his own case, the issues of sufficiency will be waived unless the defendant moves again to dismiss at the close of all evidence. The failure to properly and specifically object to testimony at trial will have the same result. Thus, a claim that a 911 tape was inadmissible hearsay will not be preserved absent an objection specifically asserting the hearsay objection at trial. Similarly, the failure to timely object to the court’s jury charge or that the jury verdict was inconsistent will result in a waiver of those claims on appeal. In the case where the claim was that the jury verdict was inconsistent, the court ruled that the objection was required to be made before the jury was discharged.

In short, potential errors, and thus potential appealable issues, can and do occur at every stage during a litigation and trial. Counsel should always focus on the task at hand to win their case. But, the rule in my office is to always “play for the appeal.” By this we mean that we are to always be diligent to properly and timely raise by objection or motion any issue that could possibly be raised on appeal if things do not go our way at trial. You do not want to be in the position of having a potential winning argument that an appellate court will not address because it was not properly preserved for review.

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

2. Id at 948
3. McKinney’s CPL §470.05(2) and McKinney’s CPLR §4017
5. See, People v. Hines, 97 N.Y.2d 56 (2001)
There can be humor in the Appellate Court

By Paula J. Warmuth

While in law school, I worked for Joseph D. Stim, Esq. as a law clerk. I prepared a case in the lower court, which relied solely on a notice to admit because it involved instruments of title. When we lost in the lower court, we appealed and I wrote the appellate brief. It was a complicated fact pattern involving the Recording Act, sheriff’s sale, bona fide purchaser for value, lis pendens, and a deed, which was really a mortgage. On appeal, we got the judgment reversed.

I told my study group at St. John’s about the case because it involved many of the issues we were learning in Property II. They were not interested. As luck would have it, when I looked at my Property II final examination, there was my complicated fact pattern. We were directed to decide the case. It was perfect. I knew all the issues, even the ones the court never reached. I got the highest mark in the class and won the American Jurisprudence Award for Excellent Achievement in Property II.

My study group never forgave themselves.

However, the story does not end there. There was an appeal to the Court of Appeals. The day of the argument was very tense and Mr. Stim decided that humor was the best approach. He explained that this case was on his law clerk’s Property II final exam in law school and that if the court reversed, the exams would have to be rescheduled. At the end of the argument, Judge Sol Wachter asked Mr. Stim to repeat the name of the law school, which the court would have to notify. Fortunately, that was a joke. The Court of Appeals affirmed, “for the reasons stated in the memorandum at the Appellate Division.” My award was safe.

In March 1981, I was admitted to practice law in the Appellate Division of the State of New York, Second Judicial Department by Justice Frank A. Gulotta. Days later, Mr. Stim asked me to argue his appeal in a case where he was a defendant. He was the dummy incorporator of a corporation, which allegedly was used as a vehicle for a fraudulent conveyance. Mr. Stim had moved to dismiss, but the motion had been denied. The Appellate Division was sitting in Mineola for the appeal. Mr. Stim chose to wait outside, while I orally argued the appeal. The courtroom had windows so he could hear some of what was said. I started the appeal as I was trained: “May it please the court, my name is Paula J. Warmuth and I represent the appellant, Joseph D. Stim.” At that point, Justice Gulotta, who had admitted me days before, interrupted. He asked if my point was that Mr. Stim was a dummy. The panel and audience erupted in laughter. Frankly, I do not remember my argument after that. When I left the courtroom, Mr. Stim was furious. He had heard the laughter but not the joke. He told me that an appeal was not the time to be a comedian and tell jokes. I guess he forgot his argument in the Court of Appeals. I am not sure he believed me when I told him it was the panel (Justice Leon D. Lazer, Justice David T. Gibbons, Justice Gulotta and Justice John P. Cohalan) that thought the situation was so funny. A couple of weeks later, a member of my study group from St. John’s was admitted to practice law, again by Justice Gulotta. Justice Gulotta gave a small speech to the newly admitted attorneys. He said that just a few weeks ago, he admitted an attorney, and she had already argued her first appeal, and she had won. That was how I learned I won my first appeal.

Note: Paula J. Warmuth is a partner at Stim & Warmuth, P.C. The firm engages primarily in commercial litigation. She is a graduate of St. John’s University School of Law with a degree of Juris Doctor - cum laude. She is co-chair of the Appellate Practice Committee.

Notices of Entry a Simple Task with Complicated Consequences

By Seth M. Weinberg

Most practitioners know that the service of an order or judgment with written notice of its entry starts the 30-day time limit to file a notice of appeal (CPLR 5513[a]). While serving and being served with notice of entry are ordinarily simple and apparent tasks, there are traps that can ensnare the uninformed practitioner. For example, a notice of entry can come in several unexpected forms, which can cause the time to appeal to expire before an attorney is even aware that it has commenced. Thus, practitioners need to be diligent both in preparing notices of entry and in recognizing when they have in fact received such notice themselves; failure to do so can have significant consequences.

Many practitioners believe that the service of a notice of entry by any party is sufficient to start the clock on filing a notice of appeal as to their client. This is incorrect. It is true that CPLR 5513 states that the time to take an appeal is “thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry...” But at first blush, the statute does not require that every potential respondent serve notice of entry. But the Appellate Division, Second Department interprets the statute differently. In Maddox v. City of New York (104 A.D.2d 430 [2d Dept. 1984]), only one of several potential respondents served the order on appeal with notice of entry. The plaintiff did not serve the order with any notice of appeal to dismiss the City’s appeal, which was taken more than 30 days after the order was served with notice of entry by one of the other defendants. The plaintiff’s motion was denied. The Appellate Division held, despite the seemingly clear language of CPLR 5513, that “…plaintiff’s motion to dismiss the City’s appeal must be denied pursuant to the principle, developed in case law, that a party who is moving to dismiss an adversary’s appeal as untimely must have served upon that appellant a copy of the order or judgment appealed from, together with notice of its entry, in order to start the running of the limitations period in CPLR 5513 (sub[a])” (Maddox, 104 A.D.2d at 431 [emphasis added]). Although not reported, a review of the Second Department’s motion decisions on the website of the New York Law Reporting Bureau shows that the court continues to rely on Maddox as a basis to deny motions to dismiss appeals. Thus, a party moving to dismiss an appeal should attach to its motion papers at the Appellate Division a copy of the order with the notice of entry it served.

Another trap to be aware of is the fact that a notice of entry can take many forms. Most practitioners prepare, and expect to receive, a traditional and obvious notice of entry. They usually bear the caption and index number of the action and will state that the enclosed order or judgment was entered with the clerk on a certain date. While this standard practice is perfectly acceptable it is not the only way a notice of entry can be served and practitioners should be aware of this when determining whether their time to file a notice of appeal has expired.

Regardless of the format of a notice of entry, the Court of Appeals has held that, “the requirements of CPLR 5513(a) must be strictly followed” (Reynolds v. Dustin, 1 N.Y.3d 559, 560 [2003]). “Compliance with CPLR 5513(a) requires a notice of entry that refers to the appealable paper, and the date and place of its entry” (Id). Thus, a notice of entry can come in many forms, but the failure to include the required information in the notice renders it a nullity and the time to file a notice of appeal has not begun. A letter containing the necessary information of CPLR 5513(a) is sufficient to constitute notice of entry (Norstar Bank of Upstate New York v. Office Control Systems, Inc., 78 N.Y.2d 1110 [1991]). Also, an attorney’s affirmation note noting a copy of the order signed by the county clerk indicating the date of entry is annexed to a motion as an exhibit is sufficient to constitute notice of entry. In Mokay v. Mokay (111 A.D.3d 1175 [3rd Dept. 2013]), the Appellate Division searched the record of a prior appeal and observed that the motion papers in the prior case contained a motion where an attorney affirmation noted that the order at issue in the subsequent appeal was entered and annexed a copy of it bearing the clerk’s signature as an exhibit. The Appellate Division proceeded to dismiss the appeal as untimely.

As can be seen it is imperative for a potential respondent to serve a notice of entry that, regardless of its format, complies with CPLR 5513. Otherwise, your adversary can file a notice of appeal at any time. Conversely, it is (Continued on page 22)
Colleague asks for help combating Autism

“Autism is like this: someone breaks into your house late at night and steals your precious child’s mind and personality and leaves the bewildered body behind.”

By Ed Nitkewicz

My beloved son Edward suffers from Autism. Autism is a severe developmental disorder of neurobiological origin that begins in early childhood and results in seriously impaired social interaction, communication and behavioral functioning. In recent years, there has been an alarming increase in the number of children diagnosed with autism. As a father of a child suffering from autism, I long for the day when my son will be in a position to readily tell me what he feels, what he thinks, what he wants and what he loves.

Bob and Suzanne Wright, grandparent of a child with autism, founded Autism Speaks in February 2005. Since then, Autism Speaks has grown into the nation’s largest autism science and advocacy organization, dedicated to funding research into the causes, prevention, treatments and a cure for autism; increasing awareness of autism spectrum disorders; and advocating for the needs of individuals with autism and their families.

I am proud to announce that I have been named Corporate Fundraising Chairperson for the newly formed Long Island Chapter of Autism Speaks. I continue to serve as a Committee Member of the 2014 Walk Now for Autism Speaks, the annual fund-raising walk dedicated to raising funds crucial to great work of Autism Speaks.

This year, Walk Now for Autism Speaks will be held on Sunday, October 5, at Field 5 of Jones Beach State Park. Last year, many of you joined us as members of “Edward’s Army” which is my family’s Walk Now for Autism Speaks team. Our goal this year is to raise $75,000.00 in support of Autism Speaks and its mission to provide funding for high quality diagnostic and treatment services, educational support for professionals working with our disabled children and research designed to treat and ultimately, cure, autism.

Would you please consider supporting Edward’s Army this year by making a tax deductible donation to Autism Speaks? Donating is as easy as logging online to: http://www.walknowforautismspeaks.org/longisland/edwarsarmy. You can also mail checks payable to “Autism Speaks” to Edward’s Army c/o the Sanders Law Firm, 100 Herricks Road, Mineola, New York 11501.

I thank you and all my dear friends and family who have supported this very personal cause in the past. Your help has been a blessing to families like mine afflicted by this awful disorder.

~LaCova

Original Jurisdiction of the Appellate Division

By Scott M. Karson

As suggested by its name, the Appellate Division’s best known and understood function is review; i.e., it hears and determines appeals from orders and judgments of the Supreme Court, Surrogate’s Court, Family Court, Court of Claims and, where it exists (as it does not in the First and Second Departments), the Appellate Term.

In addition, although administrative determinations by boards and agencies are generally reviewable via proceedings pursuant to CPLR Article 78, which are brought in the Supreme Court (and which are then subject to appellate review by the Appellate Division in due course), there are certain circumstances prescribed by statute where direct application for review of such administrative determinations lies directly to the Appellate Division, including, inter alia, an application to review the determination of a condemnor in an eminent domain proceeding (Eminent Domain Procedure Law 207); proceeding to review determination of wage claims (Labor Law 220); determination of proposed annexation of local government (General Municipal Law 712); appeals from determinations of the Unemployment Insurance Appeal Board (Labor Law 624) and the Workers’ Compensation Board (Workers’ Compensation Law 23); and proceedings to review the suspension or revocation of a professional license pursuant to the Education Law or Public Health Law, Education Law 6510(5); Public Health Law 230-c(5). The reader is cautioned that this list is by no means exhaustive. Furthermore, in many cases, the controlling statute provides that the application for review shall be brought to a particular Appellate Division. For example, the foregoing applications pursuant to CPLR Article 78 are brought to the Appellate Division in the Judicial Department in which the petition is made.

The Appellate Division also exercises original jurisdiction over proceedings pursuant to CPLR Article 78 that are brought against a justice of the Supreme Court, or a judge of the County Court. CPLR 506(b)(1).

Where an Article 78 proceeding brought in the Supreme Court raises a question of whether a determination made as a result of a hearing, at which evidence was taken, is, on the entire record, supported by substantial evidence (CPLR 7803(4)), the Supreme Court shall dispose of all other issues and, if the Supreme Court’s determination does not terminate the proceeding, it shall then make an order transferring the matter to the Appellate Division for determination of the substantial evidence question. CPLR 7804(g). If a triable issue of fact is presented and the proceeding has been transferred to the Appellate Division, the trial shall be conducted by a referee or justice of the Supreme Court, and the verdict, report or decision rendered after trial shall then be returned to the Appellate Division, which shall render an appropriate order. CPLR 7804(h).

Another area in which the Appellate Division exercises original jurisdiction (Continued on page 30)
Got IPS?

An Investment Policy Statement (IPS) is not a boiler plated financial plan, it is so much more. At Klein Wealth Management we offer this sophisticated tool to provide a glide path for your financial future.

The IPS details financial objectives, risk tolerances, tax issues, liquidity needs, and any unique circumstances in your wealth management plan.

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Hightower Advisors, LLC is a SEC registered investment adviser.
Supporting Lawyers in Need

The 14th annual Ira P. Block Memorial Golf Classic, which honored John “Jack” Braslow, and was sponsored by the Lawyer Assistance Foundation, was a great success, thanks to Managing Director David Besso, and our friends and supporters who have contributed so much aid and support to lawyers in need. David gathered his golf enthusiast buddies, all of whom enjoy golfing on a course in the bracing seaside air to attend what was a wonderful day of golf.

The Westhampton Country Club is very special and we have Gair G. Betts to thank. Gair who served as the foundation’s assistant managing director for many years made the arrangements for the foundation to play on this gorgeous venue. Thank you to Manager Michael Thorne and his staff as well, who worked diligently to make a special day for the players and dinner guests. And a special thanks to our sponsors Marvin Salenger, Fred Johns, Long Tuminello, Joe Ryan, Eaton Insurance Agency and so many more who always help support this special cause.

And the winners are:

Women’s Closest to the Pin winner: Debbie Aviles,

women’s longest drive winner: Dorothy Courten. In the men’s category the longest drive winner was Rob Cembrook and the closest to the pin was Mike Capasso (1 ft.8”). Men’s low gross winner was Cameron Alden; first, second and third low net winners were Willie Dowling, Hon Randy Hinrichs and Hon. John Collins.

Special thanks go to the attendees. Judge Andrew G. Tarantino, who graciously donated his winnings back to the Foundation, won the ever-popular 50/50 raffle.

- LaCova

Deadline Extended to Remember Dorothy Ceparano

We are dedicating our November issue to Dorothy Ceparano to honor her impact on the Bar Association, especially in her position as the Executive Director at the Academy of Law. Please send a paragraph of 50 words or less that recounts a memory you cherish of Dorothy, a comment expressing Dorothy’s value to the Association or whatever you’d like to say to honor her to scbanews@optonline.net. The deadline is Saturday, Oct. 25. For additional information, please contact editor Laura Lane at (516) 376-2108.
Big turnout at Law in the Workplace Conference

The SCBA’s Great Hall was packed for the 24th Annual Law in the Workplace Conference presented by the Academy and the Association’s Labor and Employment Law Committee on September 19. Chaired by Sima Ali and Troy Kessler, the conference featured erudite presenters who provided private and public sector updates; dissected New York State administrative procedures; distinguished between independent contractors and employees; and addressed such topics as restrictive covenants, PERB proceedings, and government ethics. Three law firms (Ali Law Group, Littler Mendelson, and Jackson Lewis) and five companies (CMIT Solutions, Compass Workforce Solutions, HR Pro Consulting Services, PBI Payroll, and WestLaw) provided underwriting support. The diverse audience of over 100 comprised lawyers, municipal leaders, labor representatives, and representatives from businesses of all kinds.

– Dorothy Paine Ceparano
Yahoo! Inc., v Microsoft Corp.

By Lisa Renee Pomerantz

In 2009, Yahoo and Microsoft entered into a strategic alliance agreement to merge their search and advertising functions internationally to better compete with Google. The alliance was phased in over time in different geographic markets, with 14 of the 16 markets having been successfully merged, leaving only Hong Kong and Taiwan unmerged.

When Steve Ballmer announced his upcoming departure as Microsoft CEO, Yahoo balked at completing the merger in these two remaining markets. Microsoft initiated an "emergency arbitration" with the American Arbitration Association under the parties' agreement. The emergency arbitrator appointed by the AAA held a hearing and issued an injunction requiring the merger to proceed.

Yahoo brought suit in federal district court to vacate the award, claiming that the arbitrator exceeded his authority by issuing final, rather than interim, relief, and by manifestly disregarding the law. The court rejected Yahoo's motion and granted Microsoft's motion to confirm the award. It ruled that even though the injunctive relief was essentially final, it was authorized by the AAA rules and the parties' agreement regarding emergency measures which authorized "interim injunctive or emergency relief . . . and specific performance;" and provided that emergency relief "will be tailored to preserve, to the greatest extent possible, the scope of Services provided under this Agreement and the parties' intent with respect to such Services." The court also found that the emergency arbitrator had not disregarded the law. Rather, he followed the standards for issuance of injunctive relief by finding the likelihood of irreparable harm to Microsoft, that the balance of hardships faced Microsoft, and that it was likely to succeed on the merits. Of note, it has been common in contracts to provide for arbitration of disputes, but to require or permit applications for preliminary injunctive relief to be filed in court. Such provisions often resulted in a single dispute being decided in multiple forums.

The American Arbitration Association initially addressed this issue by providing for Optional Rules for Emergency Measures of Protection that the parties could choose to incorporate into their agreements. As of Oct. 1, 2013, those optional rules have been incorporated into the AAA Commercial Rules to clarify arbitrators' authority to issue preliminary injunctive relief.

Note: Lisa Renee Pomerantz; graduated from Harvard University and Boston University Law School. Following a stint in private practice, she worked for 15 years as a senior level in-house attorney. Since 2003, Lisa has had her own practice in Suffolk County. She is on the AAA Commercial Panel and represents clients in mediations and arbitrations. She serves on NYSNADR's Board of Directors and is co-Chair of the Commercial Section of the Association for Conflict Resolution. Lisa publishes the monthly e-newsletter, "Making the Connection." Lisa also has chaired the Suffolk County Bar Association's ADR and IP Committees, and has been a Suffolk Academy of Law Officer.

A Review of Part §132

By David A. Mansfield

This shall serve as a follow up to a recent article concerning validly licensed drivers who are notified of a license revocation and their opportunity to request a hearing as a result of said revocation. As a high point driving violation under 15 NYCRR Part §132, the client in this instance is generally unaware that they are subject to being on "double secret probation" with the Department of Motor Vehicles and that a conviction for a high point driving violation could result in a permanent driver's license revocation.

A high point driving violation as defined by Part §132 (b) (2) (c) is that any violation when five or more points are assessed as per Part §131.3. The five or point or point value offenses are defined by Part §131.3(b) (4), cell phone infractions §1225-c and portable electronic device violations §1225-d, reckless driving §1212, §1174 passing a stopped school buses and Part §131.3 (b) (1) (i), (b) (2) (b) (3) (i) §1180, speeding violations of six or more points. Should your client be convicted of one of these violations they will receive a notice of license revocation.

The defense counsel should file for a hearing by certified mail, attaching the Notice of License Revocation to the correspondence. The most common triggers of the Part §132 process are convictions for improper cell phone use, portable electronic device violations and speeding offenses of six or more points. A lifetime review of driving records for repeat alcohol/drug driving offenders, which are defined as dangerous repeat alcohol or drug offenders in Part §132, are performed.

The standard under Part §132.1 is a lifetime look back period for five or more alcohol or drug related driving convictions or incidents not arising out of the same incident, which includes administrative findings of chemical test refusal under §1194. A person is subject to a 25 year look back period for three or four alcohol/drug related incidents not arising out of the same incident in any combination and in addition has one or more serious driving offenses committed during a 25 year look back period.

A chemical test refusal finding with an acquittal on the underlying criminal charges or a dismissal of the charges in satisfaction of a plea will still count as an alcohol/drug related incident for purposes of Part §132 driving record review and Part §136 for license reapplication. Defense counsel must review the Notice of License Revocation to determine if the chemical test refusal incidents arise out of an underlying criminal conviction for the §1192 infraction, misdemeanor or felony. A merger of the refusal with the conviction could result in a reclassification of your client as not being subject to a lifetime review, but rather a 25-year look back period from the date of commission of the high point driving violation.

In rare instances, an argument can be made that once the incidents are consolidated that this reclassifies your client into the category of a 25 year look back period, which may eliminate from consideration incidents which led to the notice of revocation.

Serious driving offenses are defined under 15 NYCRR Part §132.1(b)(2)(d), as a fatal accident, a driving related penal law conviction or two or more high point driving violations other than the violation which forms a basis of record review and under Part §132.2. That the conviction could result in a reclassification of your client as not being subject to a lifetime review, but rather a 25 year look back period from the date of commission of the high point driving violation.

At the hearing you must present unusual, extenuating, and compelling circumstances, or the administrative law judge will issue an order confirming the revocation proposed by the commissioner. Defense counsel will want to at least raise, some constitutional and other objections to the implementation by regulation as opposed to legislation upon the record without belaboring the matter so as to prejudice the outcome.

The administrative law judge is also entitled to take into account the entire lifetime driving record of your client, who must be prepared to testify and bring in witnesses as to any unusual, extenuating and compelling circumstances.

Should your client be unsuccessful at the hearing, you are entitled to file an administrative appeal pursuant to §261, 60 days from the effective date of the order. The United States postmark governs the question of timeliness. The appeal should be filed by certified mail with return receipt requested for proof that the Department of Motor Vehicles received the appeal. The U.S. postal clerk should postmark the envelope.

A stay of enforcement in most administrative appeals is usually granted, but the Appeals Board retains discretion.

Additional issues to be raised on appeal are whether there are other issues of constitutional attack as to the regulations, in addition to whether or not the administrative law judge erred in not finding unusual, extenuating and compelling circumstances, or the finding that your client was subject to lifetime or 25 year license record review was in error.

Your client will be advised in the Order of Revocation that they can reapply after 30 days. However, this is an illusory remedy because they were previously validly licensed and now are classified on the same footing of special rules for applicants with multiple alcohol or drug related driving violations.
Litigating Child Support in Split and Shared Custody Cases

By John E. Raimondi

The issue of child support in Split and Shared Custody situations is one that is frequently litigated in Family Court and Supreme Court proceedings. As per Family Court Act Section 413 “The parents of a child under the age of twenty-one years are chargeable with the support of such child and, if possessed of sufficient means or able to earn such means, shall be required to pay for child support a fair and reasonable sum as the court may determine.”

In cases involving child support in Split and Shared Custody cases, it is useful to review the cases of Bast v. Rossof, 91 N.Y.2d 723, 697 N.E.2d 1009 (1998) and Baraby v. Baraby, 250 A.D.2d 201, 681 N.Y.S.2d 826 (1998). In Bast, the New York Court of Appeals held that in determining child support in joint custody or shared custody situations, the court must first determine which parent has physical custody of the parties’ children in realizing the maximum benefit of their parents resources and continue as near as possible their pre-separation standard of living in each household.

Another interesting child support decision in the area of Split and Shared Custody matters was the case of M.R. v. A.D., 35 Misc.3d 619, 940 N.Y.S.2d 808 (2012). In M.R., the parties had joint legal custody of the parties’ eight-year-old son. The child resided primarily with the father during the school year and with the mother on weekends and holidays. The mother filed a child support petition seeking child support. The court held that even though the child resided primarily with the father during the school year, it was not clear that the child spent more of his awake time with the father. The New York County Supreme Court granted the mother child support based upon the difference in the parties incomes. The Supreme Court stated “Since J. (the child) will spend very nearly half of his time in his Mother’s care, it seems likely that, in the absence of an award to the Mother of some form of child support, the end result will be the one the Court of Appeals sought to avoid in Bast, and that the Legislature sought to overcome in promulgating the CSSA: J. will be deprived of “needed resources” when he is in his Mother’s care (Bast, supra at 731), and he will bear the economic burden of parental separation by being deprived of the standard of living appropriate to the total income of his parents, thus thwarting the purpose of the CSSA.”

Another recent child support matter involving Shared and Split Custody was the matter of Kelly v. Kelly, 90 A.D.3d 1295, 934 N.Y.S.2d 272 (2011). In Kelly, the parties’ divorce directed shared legal and physical custody of the children with primary physical custody to the mother. The parties 2004 divorce deviated from CSSA as the father waived his equity interest in the marital residence in the amount of $108,500.00 in full satisfaction of his child support obligation. The parties further agreed in their divorce to contribute to the college expenses of the children. In 2009, the parties’ oldest child moved in with the father and the father filed for child support. The Saratoga County Support Magistrate determined that straight application of the Child Support Standards Act would result in an Order of Support of $290.28 per week in child...

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Don’t Overlook State and Local Veterans’ Benefits – Part II

By Ken Rosenblum

New York State and local governments provide generous benefits to veterans and their families, from the familiar (real property tax reductions) to the practical (civil service preferences, tuition grants), to the arcane (discount hunting and fishing licenses, recreational passes, free pet adoption).

Following is the second in a two-part series summarizing New York state and local government veterans’ benefits.

Property taxes

Local and county property tax exemption

Partial exemption from village, town and county real property taxes is based on type of service, with additional benefits based upon degree of service-connected disability. Applications must be filed before Taxable Status Day. Qualifying widow(er)s may file for benefits based on their spouse’s service. Nassau County and at least two Suffolk towns (Smithtown and Huntington) have also adopted an alternative property tax exemption for Gold Star Parents, parents of a child who died in the line of duty while serving in the United States Armed Forces during wartime.

School tax exemption

In December 2013 Governor Cuomo signed legislation that gives local school boards the authority to grant real property tax exemptions to veterans who have served in wartime, similar to the breaks vets already get on their county, town and village property taxes. School boards that opt in can grant exemptions of 15 percent to veterans who served during a war, another 10 percent for those who served in combat zones and additional reductions for service-related disabilities. Parents of veterans who died in combat also qualify. If the local school board approves, vets will be eligible for school tax exemptions on their primary residence (including condos) beginning with the 2015-16 tax year. So far more than half of LI school districts have approved. Check with your local school district or in Nassau with the County Assessor, 240 Old Country Rd., Mineola 516.571.1500, in Suffolk with your Town Assessor.

Employment/civil service

NY State labor department priority job help

Local Veterans’ Employment representatives, specially trained veterans, give priority help to vets with every area of job search, including skills assessment, exploring training options; resume preparation; referrals; calling businesses on vets’ behalf; and referrals for veteran’s support services. http://labor.ny.gov/vets/vetintopage.shtml. NY State Labor Department comprehensive one-stop career centers are located in Nassau (301 W Old Country Road, Hicksville, (516) 934-8532) and Suffolk (725 Veterans Memorial Highway, Hauppauge, (631) 853-6600).

Additional civil service credit for disabled vets

A recent change in the New York State Constitution, effective January 1, 2014, entitles vets who have previously used non-disabled veterans credit for a civil service appointment or promotion and who are subsequently certified by the VA as disabled, to additional credit for a subsequent appointment or promotion. Eligible vets with pending applications need to apply ASAP. http://www.cs.ny.gov/vetcredits/

Vets’ civil service preference

Vets are entitled to extra points on competitive civil service exams: ten points toward original appointment for disabled veterans; five points for wartime service; and a half points for competitive promotional exams. http://www.cs.ny.gov/vetcredits/

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Transfers of the Family Business – Part III

By Lou Vlahos

This is part three of a five part series.

“Blood may be thicker than water,” begins an advertisement in a recent edition of the NY Times Magazine, “but can it hold a business together?” The advertisement continues, “It’s a little known fact that nearly 90% of U.S. businesses are family firms. All over America, people pour their heart and soul into building family companies. Unfortunately, few put that same passion into preparing for the next generation to take over, although most say that’s their wish.” It concludes, “And sadly, due largely to that lack of succession planning, by the third generation a paltry 12% of family businesses remain family controlled.”

In the first blog of this series, we considered some of the issues that a parent faces in determining the disposition of his or her business among family members. In the second post, we assumed that the parent has decided that the business should be kept in the family, and we considered the conceptual groundwork for the parents’ transfer of interests in the family business to his or her children. Now we turn to the various means by which these transfers may be affected.

Transfer vehicles

Assuming that the estate tax benefits of gifting outweigh the economic and income tax benefits of retaining the business interests, the following describes some of the vehicles that may be utilized.

Straight gift

The simplest form of gift is a straight transfer of property that is made without consideration. Such a transfer may be made either outright to a child, or in trust for the benefit of the child (and/or the child’s family). The amount of the gift is the FMV of the business interest (either a voting or nonvoting interest) on the date of the transfer. (Note: an outright transfer of a business interest should be preceded by the parent’s adoption of a shareholder’s or operating agreement, and the admission of the child as an owner should be contingent upon the child’s agreement to be bound by the terms thereof.) If the transfer is made in trust for the benefit of the child and the child’s family (including the grantor’s grandchildren), some of the grantor’s GST exemption amount may be allocated to the trust so as to protect future trust distributions from GST tax.

To start with some gifting basics, a parent can make annual transfers totaling up to $14,000 ($28,000 with the consent of the parent’s spouse) to each of his or her children (or to a trust for the child’s benefit), without such transfers being treated as taxable gifts. In other words, so long as the total value of property transferred (including a business interest) to a child in a single tax year does not exceed $14,000, the parent will not exhaust any of his or her gift tax exclusion amount. This form of gifting remains the simplest way of transferring business interests to a family member free of gift tax.

Instead of making yearly gifts limited to the annual exclusion amount, the parent may decide to make an outright gift of a larger value that represents a greater percentage of the equity in the business. There are any number of reasons why this may be sensible from a tax perspective.

Closely-held entities are difficult to value, and the IRS will often challenge the reported value for such an entity as well as the size of the discount for the transferred interest (even where both are well reasoned and supported by a professional appraisal – which should always be the case), depending upon a number of factors. The result is often a compromise or settlement somewhere between the value reported by the parent-taxpayer and that asserted by the IRS.

With the increased exclusion amount, however, any adjustment by the IRS may be less likely to impact the ability of many taxpayers to make such gifts free of gift tax; this, in turn, should give taxpayers more freedom to make annual gifts, or gifts of greater amounts, with respect to hard-to-value business interests.

Grantor trust

Transfers in trust may also provide an opportunity for leveraging the gift made by the parent-taxpayer and for further reducing the parent’s taxable estate, depending upon the terms of the trust.

A trust is, generally speaking, a taxable entity. In the case of a so-called grantor trust, however, the parent-

(Continued on page 23)
Expanding the Scope of Review in Criminal Cases Before the Court

By Michael J. Miller

Appellate practitioners know that to obtain leave to appeal a criminal case to the Court of Appeals the hurdles of appealability and reviewability must be overcome. A party seeking leave to appeal and the party opposing leave are directed by the court to address in particular whether the issue for which leave is sought has been preserved for review in the trial-level proceeding. Absent preservation, the court should not grant leave to appeal. In 2014, so far, the court has cased two types of preservation, making it at least theoretically easier to obtain review by the Court of Appeals. This article addresses the effect of CPL §470.15 or the scope of appellate review. The second part of this article, to be published next month, discusses preservation of claims for appeal.

The Perverse Effect of CPL §470.15 on the Scope of Appeal

Since at least 1998 and perhaps since 1984, the rule in a criminal case appeal is that the appellate court—either the intermediate appellate court or the Court of Appeals—cannot sustain a lower court’s decision based on a theory or rationale that was either rejected or not ruled upon by the trial level court.1 The Court of Appeals has lamented that this leads to “the fragmented movement up and down for resolution concerning a core issue” of an appeal, but the court felt that it could not remedy the problem because of “unavoidable statutory language” that required a legislative fix.2 Judges Smith and Pigott, however, disagree with the majority of the court and believe that there is no impediment to the Court of Appeals overturning its prior analysis of the statute.3 It is unlikely that the Court of Appeals will retreat from its call for a legislative fix, but the rule’s harsh results have been alleviated by the decision in People v Garrett.4 Analysis begins with Criminal Procedure Law Section 470.15 subdivision (1), which states that “[u]pon an appeal to an intermediate appellate court from a judgment, sentence or order of a criminal court, such intermediate appellate court may consider any question of law or issue of fact involving error or defect in the criminal court proceeding, which may have adversely affected the appellant.”5 In other words, the appellant must have lost on the issue being appealed. The Court of Appeals’ power to review in this instance is no greater than that of the intermediate appellate court if the appeal to the high court is from an order affirming the judgment, sentence, or order of the lower court. And, in the Court of Appeals, this mandate describes the power of the court and is not, therefore, the standard mantra about preservation of an issue for appellate review; thus, the need for a legislative fix.

The mischief created by the “adversely affected” rule is illustrated in both People v LaFontaine and People v Concepcion. In both cases the People opposed a defense motion to suppress evidence. And in each case the People offered alternate theories—let’s call them A and B—to oppose the motion to suppress. In each case the suppression court accepted, for example, argument A but rejected argument B. But the net result in each case was

Discharging Funds Mistakenly Received and Spent

Recent decision prohibits creditor from pursuing claim

By Craig D. Robins

Consumers sometimes receive money by mistake. It could be an overpayment of public benefits, for example. What happens if a consumer spends that money and later seeks to discharge any potential liability for not returning it? What happens if a consumer spends that money and later seeks to discharge any potential liability for not returning it? Can the consumer discharge this obligation?

A similar scenario with a few unusual twists was just addressed in a decision by Judge Alan S. Trust sitting in the Central Islip Bankruptcy Court, here in the Eastern District of New York. In re Lerner, No. 13-75273-ast, (Bankr E.D.N.Y. August 28, 2014).

In that case, prior to filing a typical Chapter 7 consumer bankruptcy petition, the debtor had suffered from a debilitating illness and hired a well-known Long Island Social Security disability insurance law firm to pursue a claim for Social Security disability benefits. Before the Social Security Administration could determine whether to grant the application, the debtor filed his bankruptcy case, which was in October 2013. By that time, he was unhappy with his SSDI attorneys and scheduled them as an unsecured creditor in the bankruptcy petition and listed their claim as disputed. However, the debtor provided a bad address as the law firm had not used it in 15 years.

By January 2014 the debtor received his discharge and the court routinely closed his case. Three months later, in April 2014, the debtor received a favorable determination from the SSA. In such SSDI cases, the SSA usually pays the applicant’s legal fees and does so by sending the payment directly to the applicant’s SSDI attorney. However, in this case, the SSA inadvertently sent the applicant a large payment, which not only included his benefits, but also included the $6,000 that they should have directly sent to the SSDI attorney.

Judge Trust’s decision was not clear as to exactly when the debtor received the large payment, but in April 2014, the SSA sent the debtor and his SSDI attorney a letter in which it acknowledged that it inadvertently released the $6,000 SSDI legal fee directly to the debtor.

The SSDI firm then immediately sought to collect the fee from the debtor, which is when they found out

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CONSUMER BANKRUPTCY

Discharging Funds Mistakenly Received and Spent

Recent decision prohibits creditor from pursuing claim

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the SCBA. The House consists of 557 members representing state and local bar associations and ABA-affiliated entities. The House met on Monday, August 11, and Tuesday, August 12, with Robert Carlson of Montana presiding as chair. The meeting was Mr. Carlson’s last as chair. Patricia Refo of Arizona succeeded him.

The highlight of the House meeting was the keynote address delivered by United States Chief Justice John G. Roberts, Jr. Chief Justice Roberts focused his remarks on the 800th anniversary of the Magna Carta, which was signed at Runnymede, England on June 15, 1215. He began by telling the story of the married American couple who visited Runnymede as tourists and asked a guide when the Magna Carta was signed. When the guide said, “1215” the husband turned to his wife and said, “I told you we shouldn’t have stopped for lunch. We missed the signing.” When the laughter subsided, the Chief Justice observed, “Do you think it’s easy coming up with a Magna Carta joke?”

The Chief Justice then observed that although the Magna Carta was the product of self-interest of barons and a feudal king, it kindled the fundamental concepts of due process, separation of powers and the rule of law, and was a forerunner for our own Constitution and Bill of Rights. Chief Justice Roberts asserted that the Bill of Rights did not create rights, but preserved rights traceable to the Magna Carta.

Chief Justice Roberts concluded his remarks with the following observation: “We live in an era in which sharp political divides within our political branches have shaken public faith in government across the board. We on the bench can bolster public confidence by exercising independent judgment to reach sound decisions carefully explained to the best of our abilities. We rely on the bar’s skilled professionalism and hard work to help us carry out that function.”

In addition to the remarks of the Chief Justice, the meeting of the House featured the “changing of the gavel” where ABA President Silkenat of New York succeeded Hubbard as President Elect. In 2015, President Elect Brown will become the first African-American woman to serve as President of the ABA. President Elect Brown asked, “Who knew that a girl born in a time of segregation in our country could grow up to be the President Elect of one of the most prestigious professional organizations in the world?”

Former ABA President Robert Gray of Virginia addressed the House on the occasion of the 40th anniversary of the Legal Services Corporation. It was announced that former President Gray has been appointed to the LSC Board of Directors by President Obama. In addition to the foregoing presentations, the House debated and voted on a number of resolutions. Here are brief summaries of some of the more significant actions taken:

For the fourteenth time, the House voted positively to amend a resolution which would have amended the ABA Constitution to include the following purpose of the Association: “to defend the right to life of all innocent human beings, including all those conceived but not yet born.”

The House voted to support prompt ratification by the United States and other nations of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print-Disabled. The ABA is, by federal law, the entity charged with accreditation of law schools. In that capacity, the House passed resolutions concurring in the adoption of certain amendments to the ABA Standards for Approval of Law Schools and the 2013 ABA Rules of Procedure for Approval of Law Schools, by the ABA Council of the Section of Legal Education and Admissions to the Bar. However, following a lively debate, the House rejected an amendment by the council which would have prohibited law students participating in experiential internships for academic credit from receiving financial compensation as well, and remitted that amendment back to the council for further consideration.

The House also passed a resolution encouraging law schools to create veterans’ law clinics.

The House passed a resolution urging appropriate governing bodies to adopt a rule permitting and encouraging in-house counsel already authorized to engage in the practice of law to provide pro bono legal services in that jurisdiction.

The House resolved to oppose the suspension or delay of the fundamental right to a civil jury trial in the face of difficult fiscal circumstances.

The House also passed a resolution proposed by the Tort Trial and Insurance Practice Section, and endorsed by the U.S. Conference of Chief Justices, urging states and territories to adopt clearly articulated, transparent and timely procedures to ensure that judges disqualify or excuse themselves in instances where conflict or bias or other grounds exist to warrant recusal in order to assure fair and impartial judicial proceedings.

The House passed a resolution urging continuing legal education accrediting agencies to approve programs on law practice skills and training, including the use of technology, law practice management and client relations, and to not restrict the maximum number of credit hours that can be earned for such programs.

The House voted to oppose changes in current educational debt loan forgiveness programs for public service lawyers and urged support for continuation of such programs.

The House approved a resolution proposed by the ABA Legal Access Job Corps Task Force urging bar associations and foundations, courts, law schools, legal aid organizations and law firms to create and advance initiatives that marshal the resources of newly-admitted lawyers to meet the unmet legal needs of underserved populations in sustainable ways.

The House urged jurisdictions utilizing court rules to enact laws authorizing successors or appropriate entities to bring and litigate claims on behalf of the executed individual that he/she was in fact innocent of the capital offense.

With regard to domestic and sexual violence, the House passed two important resolutions: first, encouraging employers to enact formal policies on workplace responses to domestic violence, dating violence, sexual violence and/or stalking violence, addressing prevention and remedies, providing assistance to victims and holding accountable employees who perpetrate violence; and second, condemning forced marriage as a fundamental human right violation and form of violence against women, and urging the enactment and enforcement of laws to prevent forced marriage.

The House also passed a resolution recognizing the rights of individuals who are lesbian, gay, bisexual or transgender as basic human rights, and condemning laws and practices that discriminate against them on the basis of their status.

Finally, the House resolved to urge Congress to enact legislation preventing and punishing crimes against humanity, including genocide and war crimes, and urging the U.S. to take an active role in the adoption of a new global convention for the prevention and punishment of such crimes.

The meeting of the House concluded with an invitation by the Texas delegation to the ABA Midyear Meeting to be held in Houston in February 2015. The House thereupon adjourned sine die.

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

**Notices of Entry (Continued from page 13)**

**Important**: Seth M. Weinberg is an associate with Mauro Lilling Naparty LLP, the largest firm in the Northeast dedicated to Appellate Advocacy and Litigation Strategy.
Transfers of the Family Business (Continued from page 18)
grantor who has made a completed gift into the trust continues to be treated as the owner of the trust assets for income tax purposes; thus, the trust’s income and gain are both taxable to the parent notwithstanding the fact that he or she does not have a beneficial interest in the trust. (For a discussion of trusts as shareholders of an S corporation, see our earlier post at ____.)

Consequently, the trust property is allowed to appreciate without being reduced by any income taxes. Moreover, there is an added benefit of the parent-grantor’s estate being further reduced by his or her payment of the income taxes attributable to the trust property. Additionally, this payment of taxes is not treated as a taxable gift by the grantor to the trust.

Of course, there are risks associated with grantor trusts in that the income tax liability generated to the parent-grantor can be relatively substantial, especially with the increased federal rates for ordinary income (39.6%) and capital gains (20%), plus the new surtax (3.8%) on net investment income (NII).

In addition, it is imperative that the parent be careful in structuring the grantor trust so that he or she has not retained any interests, rights or powers with respect to the trust property (the transferred business interest) such that the trust would be included in the parent’s gross estate (for example, a right to income or to control beneficial enjoyment).

GRAT
A parent who wants to receive some revenue stream from the business interest may want to consider a form of transfer which provides some “consideration,” rather than an outright gift.

There is a statutorily-approved means of transferring property to one’s beneficiaries, while retaining an interest in the property, and also reducing the amount of the gift: the GRAT (or grantor retained annuity trust). GRATs allow the transfer of future appreciation in contributed property, generally without any estate or gift tax charged on the growth of that property.

They are irrevocable trusts to which a parent may contribute property (such as a business interest which is expected to appreciate in value), while retaining the right to receive an annuity (a fixed amount, typically based upon a percentage of the FMV of the business interest initially contributed) from the trust for a term of years. At the end of the term, the business interest passes to his or her family, or the trust continues for their benefit (possibly as a grantor trust).

The term of the trust (specifically of the parent’s annuity interest) should be such that the parent will survive the term; if he or she dies during it, the retained annuity interest will cause at least part of the trust to be included in the parent’s gross estate for estate tax purposes.

The annuity is paid out of income, and then corpus, and it may be paid in kind, including from the contributed property. Thus, some portion of the contributed business interest may be returned to the parent; however, if the interest has appreciated during the GRAT term, that appreciation passes to (or for the benefit of) the children.

It should be noted that, in order to make the required payments to the parent-grantor, ideally the GRAT should receive distributions from the business in which it owns an interest. For this reason, S corporation shares or membership interests in LLCs/partnerships are good candidates for GRATs; in general, these entities are not subject to an entity-level income tax, and cash distributions to their owners are generally not taxable. (Absent such distributions, the GRAT will have to make an in-kind transfer to the parent-grantor.)

For transfer tax purposes, the retained annuity interest represents consideration for the contribution into the trust and, so, reduces the amount of the gift. Specifically, the amount of the gift is equal to the FMV of the business interest contributed to the GRAT by the parent over the actuarially-determined present value of the parent’s retained annuity interest.

The receipt of the annuity interest, however, does not cause the transfer of property to the trust to be taxable to the parent, as a sale of the business interest for income tax purposes, because a GRAT is structured as a grantor trust – that is to say, its assets are deemed to be owned by the parent-grantor.

If properly structured, the amount of the gift can be minimal; in other words, the present value of the annuity may be nearly equal to the value of the interest contributed to the trust. This allows the parent’s exclusion amount to remain largely intact and available for other gifting, or to protect transfers at death.

In addition, with a short enough annuity term, the parent-grantor is likely to survive the term of the annuity and, so, the trust property, and the appreciation thereon, are likely to avoid being included in the parent’s estate. At the end of the annuity term, any property remaining in the trust (that has, hopefully, appreciated) passes to the family free of gift tax and estate tax.

All of these benefits are compounded by the fact that the GRAT may be treated as a grantor trust during the term of the parent’s retained annuity interest for purposes of the income tax; thus, its income is taxable to the parent-grantor, allowing the trust to grow further while simultaneously reducing the parent’s estate. The trust can even continue after the annuity term expires, further leveraging the grantor trust status (by causing the parent to continue to be taxed on the trust income), reducing the parent’s estate, and maybe providing other benefits (like asset protection) for the family.

Hedging?
For purposes of the above discussion, we have assumed that the parent’s transfer of an interest in the business made sense from both a tax and a business perspective. Implicit in this assumption is the further assumption that the parent’s successor, from within the family, has been chosen. That may not always be the case. What if two of the children are involved in the business, either one of which may ultimately emerge as the natural successor? Unfortunately, under those circumstances, there may not be an easy solution, and there are many options to be considered (whether in the framework of a trust or of a shareholders agreement). The bottom line: the parent should not shy away from addressing the tough issue – kicking the can down the road should not be an option. It will ultimately benefit the business and the family if the parent discusses the issue with his or her advisors now.

Conclusion
The foregoing reflects some of the gift-related methods by which interests in the family business may be transferred to children. Some are more basic than others, and each may be tailored to address a specific requirement or concern to the parent. The point is that it behooves the parent to discuss the options thoroughly with his or her advisors before directing that a particular gift transfer be made.

Keep an eye out for the next article in this series, where we’ll consider various “non-gift” techniques for transferring interests in the family business.

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

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Whatever your business, Legal Media Publishing can put you in front of a very exclusive readership - members of the legal profession.

CORRECTION
In the September issue of The Suffolk Lawyer on page 11, a column discussing disciplinary actions against attorneys misspelled an attorney’s name. The Suffolk County Bar Association hereby corrects the misspelling of the attorney’s name, which appeared as Richard N. Tannenbaum. The spelling should be corrected to Richard N. Tanenbaum (spelled with one “n”). We apologize for any confusion that may have occurred as a result of this error.
Forty Years After Watergate

By Lawrence Raful

Law school professors who teach legal ethics and professional responsibility love an old Doonesbury cartoon in which a law school student asks her study partner whether the new required ethics course will be “useful?” The other student replies that the ethics course is merely “Watergate fallout . . . trendy lip service.” The student predicts that “six months from now moralizing will be just another defunct fad” and he goes on to equate it to “the streaking craze.” I was reminded of the cartoon, which I think dates to 1975, when I read all the news reports this past August about the 40th anniversary of the resignation of the President and the end to the Watergate affair. But the sad news is that there is more truth to the cartoon than I might have wished. So let me briefly discuss this topic in two ways — first, with regard to the ethics rules and how they have changed over the years, and then about what changes the Watergate affair brought about.

John Dean, the Counsel to the President, was deeply involved in the Watergate cover-up, and in his seven-hour testimony before Congress in June of 1973, revealed that Nixon had prior knowledge of hush-money used to pay off various conspirators. Dean told Congress that he had knowledge of the entire campaign of White House espionage. For me, the story of John Dean is the part of Watergate that I always found fascinating.

The Counsel to the President testified about confidential communications with his client. I am sure you remember his story, that he had a made a list of all the people that he thought had violated the law. He had put an asterisk next to the names of the 10 attorneys on the list. When Senator Talmadge asked him about that, he famously replied, “It was just a reaction to myself, how in God’s name could so many lawyers get involved in something like this?”

So what could or should John Dean have done about the intention of his client to commit a crime? When should a lawyer disclose? It has always been a difficult question, especially if you have “lost your moral compass.” You surely remember that quote from Jeb Stuart Magruder, the man who served in Nixon’s presidential administration. He went to prison for seven months. But why I love the quote is that guess who else said that? “I lost my moral compass and I have done terrible things that I very much regret.” That was Andrew Fastow, chief financial officer of Enron Corporation. I sure wish people would stop losing their moral compasses.

We got in to this mess, I believe, partly because the model code language of 1969 stressed “zealous representation.” Yes, of course, it was zealous representation within the bounds of the law, but lots of lawyers seemed to drop off the last six words of that statement. Law school enrollments soared in the 1970’s, and zealous representation became the mantra. The ABA felt that it needed to update ethical standards, partly in response to Watergate, and they changed the voluntary disclosure rules in 1983 and 2002. Has that stopped unethical behavior by lawyers? Of course not.

So let me turn to the changes in the world of ethics because of and since Watergate. There have been three major changes since Watergate.

First, each law student is required to take a course in ethics. Second, the law school graduate is now required to take an exam about ethics, the Multi State Professional Responsibility Exam. Can you imagine that we actually require a multiple choice test on ethics, as if real life decisions are that clear cut? And third, lawyers in mandatory CLE states are required to take a certain numbers of hours every year or two in legal ethics.

So that’s it — the ethics course, the MPRE, the ethics CLE. That ought to solve all of our problems. I am sure that Nixon, Mitchell, and Dean would have never trampled our Constitution had they only had a really good ethics course in law school. I am sure those Enron lawyers took the ethics course, passed the MPRE exam, and were up to date on their ethics CLE hours.

Well, my friends, I have to admit that it is a joke, and I feel like a fraud. Sure, I teach ethics. But really, is it all that hard to teach a student that if the adver-

Convictions or incidents.

Your client is facing a minimum five-year revocation if they fall into the category of three quarters alcohol or drug related incidents and has no more than one serious driving offense or two or more serious driving offenses within the bounds of the law, but lots of lawyers seemed to drop off the last six words of that statement. Law school enrollments soared in the 1970’s, and zealous representation became the mantra. The ABA felt that it needed to update ethical standards, partly in response to Watergate, and they changed the voluntary disclosure rules in 1983 and 2002. Has that stopped unethical behavior by lawyers? Of course not.

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Client Feedback (Continued from page 18)
indicators of truthfulness.” (Emphasis Supplied). The court refused to narrowly construe the proffered opinion as the government asked it to do in order to deem it inadmissible under Rule 702.

Second, the prosecution argued that the expert’s testimony would not aid the jury because the average juror would know that music lyrics could be fictional. The court disagreed, stating that the expert’s specialized knowledge and scholarship could aid a layperson’s understanding. The court further noted that the fact that the expert’s testimony may not be “surprising” to jurors “does not mean the testimony adds nothing to ordinary experience.” The court further found that the expert’s testimony could “provide context for examining the rap-related video evidence” where “many jurors lack familiarity with gangsta rap.”

Finally, the prosecution argued that the proffered testimony was beyond the proper purview of expert testimony because Dr. Peterson was essentially evaluating witness credibility by telling the jury to disregard the defendant’s statements in the videos. It is well-settled law that the task of assessing witness credibility lies solely with the jury. However, the court prevented a potential invasion of this province of the jury by determining that the expert could testify as to “the history, culture, artistic conventions, and commercial practices of hip-hop or rap music,” but could not opine “on the truth or falsity of the lyrics or representations” in the videos admitted at trial or any of the defendant’s other lyrics. This limitation on the testimony permitted the expert to place the evidence into context, while allowing the jury to be the sole examiner of witness credibility.

While the court referred to its decision as “novel,” it is not the first time that Judge Garaufis has allowed the testimony of an expert in hip-hop culture. During the penalty phase of the prosecution of Ronell Wilson11, the court denied the government’s motion to preclude the testimony of the expert’s witness in hip-hop culture. The expert was expected to testify as to handwritten rap lyrics found in the defendant’s pocket two days after the detectives were murdered, and which were admitted into evidence during the trial phase, that apparently described the murder. The defendant offered the expert as a rebuttal witness in the event the government sought, as it did during the trial phase, to relay on “rap evidence as proof that [the defendant] is a remorseless killer.” In permitting the testimony, the court found the testimony was relevant because remorse was a mitigating factor in sentencing, and because it would likely not mislead or confuse the jury, as it could assess the plausibility of the expert’s theories.

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

3. Id.
5. Id. at *12.
6. Id. Rule 702 provides as follows: “A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert’s scientific, technical or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.”
7. Id.
8. Id.
9. Id.
11. Ronell Wilson was tried and convicted of murdering undercover New York City Police Department Detectives Rodney Andrews and James Nemorin in 2003 (see 483 F Supp2d 491 [EDNY 2007]). During the penalty phase, the government sought the death penalty.
12. Id. at 507.
13. The expert was not permitted to testify during the trial phase because the defendant’s notice thereof was untimely and insufficient (id.).
14. Id.
denying the application, the court pointed out that the defendants did not demonstrate that there had been a willful, contumacious, or bad faith failure to provide the demanded information. The court found plaintiff’s failure to disclose certain medical information, ostensibly because he did not recall the information as a question of credibility and not a matter of sanction.

Motion pursuant to CPLR §3126 to strike the answer of the defendant denied; defendant was directed to continue its search for any former employees and to supply the name and last known address to plaintiff upon receipt.

In Juliania Murphy, as administratrix of John Murphy and Juliania Murphy v. Southampton Care Center, Index No.: 23210/2004, decided on May 5, 2014, the court denied plaintiff’s motion pursuant to CPLR §3126 to strike the answer of the defendant. Defendant was directed to continue its search for any former employees and to supply the name and last known address to plaintiff upon receipt.

In Wendy Yasin v. Saddle Lakes Home Owners Association, Inc. and Board of Managers of the Saddle Lakes Home Owners Association, Index No.: 5860/2013, decided on March 3, 2014, plaintiff’s motion pursuant to CPLR §5251 and Judiciary Law Article 19 punishing the defendants for contempt was granted. In order for plaintiff to prevail, the court noted that she was to demonstrate by clear and convincing evidence a lawful order of the court, clearly expressing an unequivocal mandate was in effect, that the order was disobeyed and that the party disobeying the order had knowledge of its terms and the movant was prejudiced by the conduct.

In Jeffrey King v. Michelin North America, Inc., and Southampton Tire Center, Inc., Index No.: 22604/2013, decided on March 25, 2014, the court granted defendant, Southampton Tire Center, Inc.’s motion pursuant to CPLR §3212 for summary judgment, dismissing the complaint. In rendering its decision, the court noted that on a motion for summary judgment the court is not to determine credibility, but instead, only whether there exists a factual issue. The court must also determine whether the factual issues presented are genuine or unsubstantiated. If the issue claimed to exist is not genuine but is feigned and there is nothing to be tried then summary judgment should be granted. Here, the gravamen of plaintiff’s complaint was based upon allegations that the motor vehicle accident that he was involved in was caused by the de-treading of the front driver side tire, and that the tire was distributed by moving defendant. In support of its application, defendant provided an affidavit noting that they had no record of selling the tires, or installing them and if they had sold the tires, or installed the tires, there would have been a record indicating such sale or installation. In opposition, plaintiff argued that this application was premature, and that the sale of the tires was a disputed issue because plaintiff contended that the moving defendant was involved in the distribution of the tires. Based upon a review of the motion papers, the court concluded that the defendant made a prima facie showing of its entitlement to judgment as a matter of law and plaintiff failed to meet its burden of raising a triable issue of fact. Accordingly, the motion was granted.

Attorneys Disbarred:

Glen D. Hirsch: The respondent was suspended from the practice of law based upon conclusions of law and further investigation. The respondent was convicted of a felony. Therefore, the respondent’s professional conduct was disbarred.

Note: Ilene S. Cooper is a partner with the law firm of Farrell Fritz, P.C., where she concentrates in the field of trusts and estates. In addition, she is past President of the Suffolk County Bar Association and past Chair of the New York State Bar Association Trusts and Estates Law Section.
in the home the day that the will was signed; the decedent’s girlfriend was present for some, but not all of the time, that counsel met with the decedent.

With respect to the issue of due execution, the court opined that when the execution of a will is supervised by an attorney, the proponent is entitled to a presumption of regularity that the instrument was properly executed in all respects. Based on this presumption, together with the testimony of the draftsman and the witnesses, the court concluded that the proponent had fulfilled her burden of proving due execution. Moreover, the court found that the objectant had failed to raise a triable issue of fact with respect to the issue, and accordingly, the objector based on the execution was dismissed.

Additionally, the court held that the objectant had failed to raise a triable issue of fact on the issues of fraud and duress, and therefore, those objections were also dismissed.

On the other hand, the court denied summary judgment on the issues of undue influence and testamentary capacity. Specifically, the court noted affidavits submitted by the objectant from disinterested witnesses, stating that the decedent was agitated about going upstairs to execute his will; that he had expressed unwillingness about executing his will; and appeared frustrated and confused about the urgency to execute a will. Additionally, the court found the allegations in objectant’s pleadings that the decedent was incapacitated at the time he executed his will; appeared to be disoriented, confused, and “not in his normal mental state,” sufficient to raise a triable issue of fact as to the decedent’s testamentary capacity, which would preclude an award of summary judgment on the issue of undue influence.


Reformation

Before the court in In re Isasi-Diaz, was a request for reformation of the sole dispositive provision of the decedent’s will. The decedent, testate, died survived by one distribute, her mother, with an estate of approximately $1.2 million. Article Second of her will, which was admitted to probate, provided, inter alia, for the disposition of 2/3 of her residuary estate to and among her siblings, nieces, and nephews, but failed to dispose of the remaining 1/3 thereof. Absent a reformation, such portion of the estate would pass by intestacy.

According to an affidavit of the attorney-draftsman, the decedent provided him with instructions for the disposition of the last 1/3 of her estate, but due to an error on his part, that dispositional provision was omitted. The threshold issue was whether this extrinsic evidence could be considered. Referring to the Court of Appeals opinions in Matter of Corder, 58 NY2d 539, 544 (1983) and Matter of Piel, 10 NY3d 163, 164 (2008), the court held that extrinsic evidence would not be admissible to vary or contradict the unambiguous expressions of the decedent. With this in mind, the court turned to the language of the decedent’s will and found that the instrument was unambiguous in disposing only of a portion of her estate. The court therefore concluded that the affidavit of the attorney-draftsman contradicted, rather than clarified the express terms of the will. Noting that the existence of a testamentary instrument gives rise to a presumption against intestacy, the court nevertheless concluded that it could not rewrite a will or supply an omission not reasonably implied from the language. Accordingly, the petition for reformation was denied.

In re Isasi-Diaz, NYLJ, Mar. 28, 2014, at p.35 (Sur. Ct. New York County)

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

The Dreikhausen Effect

Inc. v. Dormitory Authority of the City of New York, 195 AD2d 747 at 749. 3. It is interesting to note here that the Appellate Division majority stated that had it not determined the case to be moot, that it would have reached the conclusion set forth in the dissenting opinion that in fact an erroneous interpretation of the law had been made when the permits were issued.


Wave of the Future?

Prior to starting his own practice, Harris was a partner in a national law firm where he co-chaired the firm’s appellate practice group. In that regard, he represented individuals, closely held businesses and major insurance companies in all aspects of commercial and civil litigation, with an emphasis in appellate litigation. A former law clerk in the Appellate Division, his name appears on countless appellate decisions that he has briefed and argued in nearly every area of civil law.

Pro Bono

with Touro Law Center.

Silverman is not the first in his family to provide voluntary legal assistance to clients of Nassau Suffolk Law Services. His father, Julian Silverman, a long time caseworker with Suffolk County Adult Protective Services, served as a volunteer paralegal in the Mental Health Law Project Unit for many years after retiring from APS and was Law Services’ first non-lawyer recipient of a Pro Bono Recognition Award.

Professor Silverman has been a member of the Suffolk County Bar Association since 1977. He served as an officer of the Suffolk Academy of Law from 1987 to 1991 and was the first chair of the Family Court Committee. He also served as chair of the New York State Bar Association’s Committee on Social Services and Law Guardian Task Force. Silverman’s other professional memberships include the American Bar Association and the International Society of Family Law. He is a frequent lecturer for both the Suffolk County Bar Association and the New York State Bar Association on various family law and sexual orientation related topics, contributes articles on topics of interest to the New York Law Journal and The Suffolk Lawyer, and serves as a media advisor on occasion.

The Pro Bono Project is indebted to Professor Silverman for his decades-long dedication to providing pro bono legal assistance to the less fortunate on Long Island. It is with great pleasure that we honor him once again as Pro Bono Attorney of the Month.

The Suffolk Pro Bono Project is a joint effort of Nassau Suffolk Law Services, the Suffolk County Bar Association and the Suffolk County Pro Bono Foundation, who, for many years, have joined resources toward the goal of providing free legal assistance to Suffolk County residents who are dealing with economic hardship. Nassau Suffolk Law Services is a non profit civil legal services agency providing free legal assistance to Long Islanders, primarily in the areas of benefits advocacy, homelessness prevention (foreclosure and eviction defense), access to health care, and services to special populations such as domestic violence victims, disabled, and adult home residents. The provision of free services is prioritized based on financial need and funding is often inadequate in these areas. Furthermore, there is no funding for the general provision of matrimonial or bankruptcy representation, therefore the demand for pro bono assistance is the greatest in these areas. If you would like to volunteer, please contact Ellen Krakow, Esq. 631 232-2400 x 3323.
Don’t Overlook State and Local Veterans’ Benefits
(Continued from page 18)

Discharging Funds Mistakenly Received and Spent
(Continued from page 21)

for the first time that their client had previously filed for bankruptcy relief. They sent the debtor a demand letter in which they stated that the SSA had released the legal fee to him in error, indicated that these errors occasionally happen, and requested a turnover of the $6,000 fee.

When the debtor refused, and instead told them about the bankruptcy case, arguing that they had never received notice of the bankruptcy filing, and that they wanted to bring an adversary proceeding against the debtor, seeking a determination that the $6,000 legal fee is a non-dischargeable debt under Bankruptcy Code section 523(a)(4), as the debtor had embezzled it.

Judge Trust then held a hearing and issued his written decision several weeks later. He refused to permit the SSDI attorneys to re-open the case, going so far as to label their proposed non-dischargeability proceeding as frivolous, further stating that their embezzlement theory lacked a good faith basis. I must admit that I was surprised by this result until I understood the judge’s reasoning behind it. First he determined that the SSDI firm did, indeed, lack notice or actual knowledge of the debtor’s bankruptcy case, as the debtor had used an incorrect address. However, Judge Trust held that the SSDI firm, in order to re-open the case, must also prove that it holds a non-dischargeable debt under Bankruptcy Code section 523(a).

The judge opined that the proposed adversary proceeding would be frivolous because the SSDI firm openly acknowledged that the SSA’s payment to the debtor was inadvertent. He pointed out that the firm even wrote a letter to the debtor calling the payment an “error” made by the SSA. In addition, the SSA considered the payment erroneous. “There is simply no good faith basis upon which [the SSDI firm] can argue that the Debtor embezzled money that both the SSA and [the SSDI firm] acknowledged was sent to the Debtor in error.”

Judge Trust also found that there was no entreatment; there was no evidence to suggest that the SSA requested the debtor to turn over the money to the SSDI firm, and there was no evidence that the debtor knew he received the legal fee.

“The SSA made an error; pure and simple. Debtor, an honest but unfortunate debtor, filed for bankruptcy protection, and has earned and received his discharge... [The SSDI firm] had a debt, and it has been discharged. [They] have no basis to seek a determination of nondischargeability. As such, it also may not seek to collect this debt from Debtor directly or indirectly, through recoupment or otherwise.”

The SSDI firm also advised the court that it had brought a separate federal action against the SSA and cited Second Circuit case law indicating that it should be successful in recouping the legal fee directly from the SSA. Judge Trust, noting the questionable basis for the SSDI firm’s embezzlement claim, combined with the firm’s ability to proceed directly against the SSA, commented that the motion to re-open appeared to serve no legitimate purpose or have a proper basis.

Judge Trust found that the SSDI firm’s conduct in bringing its motion may have violated Bankruptcy Rule 9011 and may be sanctionable, but decided that the debtor would be better served by keeping the case closed, rather than re-opening it for the consideration of sanctions. The judge did permit the SSDI firm to proceed against the SSA.

Huntington: Office of Veterans Affairs, Town Hall, Room 301, 100 Main Street, Huntington, (631) 351-3012. Information, referrals, liaison with the Town Veterans Advisory Board, comprised of representatives of vets organizations in the town. http://www.huntingtonny.gov/content/13749/13861/16626/16638/

Islip: Hotline for vets: (631) 224-VETS. “Hometown Hero” Welcome Program at LI MacArthur Airport, Ronkonkoma, welcome home with a town official for serviceperson ending deployment or returning wounded serviceperson. Webpage with job listings for vets http://www.townofislip-ny.gov/component/content/article/1-content/1661-veterans-quarterdeck.


Note: Ken Rosenblum is the Associate Dean for Administration and Director of the Veterans’ & Servicemembers’ Rights Clinic at Touro Law Center in Central Islip, NY. He is a former active duty US Army JAG officer who served a tour in Vietnam. The Veterans’ & Servicemembers’ Rights Clinic represents veterans, servicemembers and their families in civil, criminal and administrative matters with a priority to preventing or ameliorating veteran homelessness. (631) 761-7001, vetsclinic@tourolaw.edu.
support. The Support Magistrate deviated to $80.00 per week child support as the Support Magistrate considered that the child’s mother paid towards the car insurance of the child, the college expenses of the child, the child worked part time and the mother had the parties other two children in the home for whom she was not receiving child support from the father. The father appealed and the Appellate Division Third Department denied his appeal. The Appellate Division held that the Support Magistrate properly set forth reasons for deviating from CSSA as the Support Magistrate considered the resources of the parties respective households as well as the needs of the parties two children remaining with the mother.

Another interesting child support case was the Mower v. Shapiro, 30 A.D.3d 1054, 815 N.Y.S.2d 855 (2006). In Mower, the parties’ custodial arrangement split the child’s physical custody so that neither parent could be said to have physical custody of the child. The Monroe County Support Magistrate directed the Respondent to pay $75.00 biweekly in child support based upon the fact that his income was higher. The Respondent Appealed and the Respondent’s appeal was denied. The Appellate Division Fourth Department held that the parent having the greater pro rata share of the child support obligation should be identified as the noncustodial parent for the purpose of support regardless of the labels employed by the parties (See Baraby v. Baraby, 250 A.D.2d 201, 681 N.Y.S.2d 826 (1998). The Appellate Division stated “the Respondent had the greater pro rata share of the child support obligation (See Domestic Relations Law Section 240 [1-b]; Bast v. Rossoff, 91 N.Y.2d 723, 697 N.E.2d 1009, 675 N.Y.S.2d 19 [1998], and there is no basis on the record before us to disturb that determination.”

The matter of Ryan v. Ryan, 84 A.D.3d 1515, 923 N.Y.S.2d 754 (2011) was another recent case regarding Split and Shared Custody. In Ryan, the parties agreed in their divorce to equally share legal and physical custody of the parties two children. The parties’ agreement also directed the father to pay a reduced amount from CSSA of child support to his former wife. Subsequently, the father was granted sole legal custody of the parties’ son and the father filed to modify the parties’ divorce, which directed him to pay $935.00 per month in child support. After trial, the Broome County Support Magistrate reduced the father’s child support obligation to $109.00 per month. Both parties filed objections to the Support Magistrates’ decision, which were denied by the Broome County Family Court Judge. The mother appealed. The Appellate Division Third Department held that the change in custody of one of the parties’ children constituted a sufficient change in circumstances warranting modification of the father’s support obligation. The Appellate Division further held that the Support Magistrate erroneously calculated child support in that the Support Magistrate multiplied the parties combined income by 25 percent. The Appellate Division stated, “Instead, the Support Magistrate should have calculated 17% of the combined parental income up to the statutory cap and then determined the father’s proportionate share for Richard, the child of whom the parties share custody. The same base amount should have been multiplied by 17% to then determine the mother’s proportionate share of the basic child support obligation for Francis, of who the mother is not non-custodial parent (See McMillen v. Miller, 15 A.D.3d at 816-817). The net support obligation owed by the father should then be calculated (See Riseley v. Riseley, 208 A.D.2d 132, 622 N.Y.S.2d 387 (1995)).” The Appellate Division further stated, “that because the father’s income is higher than the wife’s income, he is the non-custodial parent of the child that the parties equally share physical custody.” The matter was further remitted back to the Support Magistrate for articulation as to consideration of the parties’ income over the statutory cap.

Another interesting shared and split custody matter was the case of McMillen v. Miller, 15 A.D.3d 814, 790 N.Y.S.2d 556 (2005). In McMillen, the parties executed a stipulation agreement, which was incorporated but not merged in their divorce and agreed to joint legal custody with physical custody of the parties’ three children to the mother. The parties also agreed to apply CSSA to the parties’ total combined income above the $80,000.00 cap and the father, a pediatrician, agreed to pay $2,400.00 per month in child support to the mother. In January 2003 the parties’ two younger children moved in with the father and the parties oldest child remained with the mother when she was home from college. In September 2009 the Albany County Supreme Court terminated the father’s child support obligation for the two children that were living with the father and recalculated the child support obligation. The mother appealed. Upon appeal, the Appellate Division Third Department held that the Albany County Supreme Court erred in multiplying the parties combined parental income by 29 percent and directing the mother to pay a two-thirds share of said amount and the father a one-third share of said amount. The Appellate Division stated, “At the very least, the Supreme Court should have calculated 17% of the first $80,000.00 of the combined parental income for the one child residing plaintiff (mother) and then determined defendant’s (father’s) proportionate share. The same base amount should have been multiplied by 25% to determine plaintiff’s (Mother’s) proportionate share for the two remaining children residing with defendant (Father’s).” (See Domestic Relations Law Section 240 [1-b][i][ii]; see Matter of Cassano v. Cassano, 85 N.Y.2d 649, 628 N.Y.S.2d 10 [1995]; Riseley v. Riseley, 208 A.D.2d 132, 622 N.Y.S.2d 387 (1995).”

Note: John E. Raimondi has been employed as a Family Court Magistrate since 1999. He was previously employed with the Suffolk County Legal Aid Society and was also a partner in Raimondi & Raimondi, P.C. He received his Bachelors Degree from John Carroll University, Juris Doctor from Creighton University School of Law and an LLM, Summa Cum Laude from Touro Law School. He is a former Officer of the Suffolk Academy of Law, a frequent lecturer at the Suffolk County Bar Association, an Advisory Committee Member of the Suffolk Academy of Law, a Program Coordinator with the Suffolk Academy of Law and an Adjunct Professor at Briarcliffe College.

Tips for Appellate Oral Argument

Give direct answers. If you don’t know the answer, say you don’t know. If you think the answer will be harmful to your case answer anyway. You are not going to help anything by running from problems. Give a direct and accurate answer to the question and then take some time to explain why your client should prevail anyway. If you answer questions directly you will have more time to make your arguments.

Treat every question as an opportunity

My Appellate Advocacy professor, IsraeI Rubin of the First Department, told me that he often asked questions even when he knew the answers. He did this in an effort to help the attorney sway another judge on the panel who was not in agreement. You will never know why you are being asked a particular question. Don’t waste your time feeling attacked. Being defensive will not help your argument. Use each question to your advantage.

Know when to stop arguing

You should have a plan for your argument. If you have completed your plan you should conclude. Too often attorneys continue to argue after their point has been made and in doing so they manage to raise an issue that sinks their appeal, snatch defeat from the jaws of victory. I once had an oral argument in which I said three words. I was the respondent. The panel had peppered my adversary for 15 minutes, asking questions on every issue and showing a clear understanding of my arguments. When my adversary concluded the presiding justice turned to me and said: “Is there anything you need us to know which was not raised in your brief?” I responded: “No, your honor” and said nothing further. My client won the appeal.

Never submit

You have the option to not orally argue your appeal. This is called submitting. You should always argue your appeal even if your adversary does not show up. You may think the appeal is simple. You may think there is no way your client can lose. You may think the panel has no questions. You may be wrong. At a minimum stand up, give your appearance; ask if the panel has any questions. If there are no questions you can respectfully conclude.

Have a conclusion

Try to conclude your argument formally by respectfully asking for whatever it is you want. This formal conclusion is not only stylistic. When you know what you are trying to get, it helps you focus on what you are trying to achieve.

Note: Glenn P. Warmuth is a partner at Stim & Warmuth, P.C. where he has worked for over 25 years. He is a director of the Suffolk County Bar Association and an officer of the Suffolk Academy of Law. He teaches a number of courses at Dowling College including Entertainment & Media Law. He can be contacted at gwp@stim-warmuth.com.
Expanding the Scope of Review in Criminal Cases (Continued from page 21)

that the suppression motion was denied.¹ In each case the defendant was adversely affected by the rule denying the suppression motion.

The defendants in both LaFontaine and Concepcion appealed to the intermediate appellate court and argued that the suppression motion was wrongly decided. In each case the Appellate Division affirmed the lower court but decided the issue on ground B, which had been rejected by the trial court. The Court of Appeals reversed in each case because neither the Appellate Division nor the Court of Appeals could rule against a defendant based on a theory or rationale that was not decided adversely to them in the lower court; in both cases the reasoned used by the intermediate appellate court – argument B – was decided in the appellant’s favor in the lower court. The only remedy available to the Court of Appeals was to reverse the Appellate Division and to remit the case to the suppression court for further proceedings.²

The suppression court could, on remand, change the result and suppress the evidence. In this case the People could then appeal from suppression of the evidence. Alternately, the suppression court could change its opinion and adopt the appellate court’s analysis and deny suppression based on ground B, which the suppression court had originally rejected. In this case the defendant could once again appeal from the denial of suppression even though he or she should have an inking of how the appellate court may rule on the issue. In either case the result is the unwanted “fragmented movement” up and down the appellate ladder.

Judges Smith and Pigott of the Court of Appeals find this fragmented method of appellate advocacy particularly offensive to the efficient administration of justice. Neither thinks that this result is statutorily mandated, and each would reverse the holdings of LaFontaine and Concepcion.³ And Judge Smith wrote a concurring opinion in People v Garrett – that Judge Pigott joined – in which he opined that the majority opinion in Garrett effectively overruled LaFontaine and Concepcion.⁴ Garrett, however, did not overrule either LaFontaine or Concepcion; rather, it loosened the restrictive effect of those cases.

The majority opinion in Garrett, authored by Judge Abdus-Salaam, addressed the LaFontaine issue. The court agreed that LaFontaine and its progeny precluded review of a theory or rationale for affirmance that was not decided against the appellant at the trial level, but also noted that this rule did not prohibit review of a multi-pronged legal standard where nisi-prius addressed only part of the legal standard. In those instances where the issue raised in nisi-prius requires multiple step analysis, reference to one step of the analysis by nisi-prius permits appellate review of all parts of the multi-step analysis. Legal doctrines such as Brady, Molineux, and DeBour, for example, would permit appellate review of each part of the analysis even if nisi-prius addressed only one part of the required analysis.⁵

The Court of Appeals in Garrett modified the adverse-ruling rule by softening the parameters of the rule. Appellate courts can now address all parts of a multi-pronged legal analysis even if the lower court has neglected to undertake a complete review of the issue. It is, however, unlikely that the rule has been or will be overruled despite Judge Smith’s hope.

Note: Michael J. Miller graduated from Vanderbilt University School of Law in 1981. He is currently the Chief of the Appeals Bureau of the Suffolk County District Attorney’s Office. The views expressed are those of the author and they do not represent the views or policy of the District Attorney’s Office.

1. People v Romero, 91 NY2d 750, 753-54 (1998); People v Goodfriend, 64 NY2d 695, 698 (1984).
5. People v LaFontaine, 92 NY2d at 473-74 (“this limitation is not a standard preservation prerequisite.”)
6. LaFontaine, supra n.2; Concepcion, supra n.3.
7. Id.
10. People v Garrett, ___NY3d at ___, 2014 WL 2921398 (three-step analysis for Brady rules); People v Lay, 21 NY3d 958, 960-61 (2013); People v Ingram, 18 NY3d at 950 (dissent) (DeBour multi-level analysis of permissible scope of police stop should be available for review once DeBour issue raised); People v DeBour, 40 NY2d 210 (1976).

Forty Years After Watergate (Continued from page 24)

sary has a lawyer, you cannot talk to the adversary. You must only talk to that person’s lawyer? And if a lawyer once represented someone, they cannot represent someone else later against that person. But he refuses to let his attorney say that in court, and goes to the gallows to defend her honor.

I hope I can give a more upbeat and hopeful report in 2024.

Note: Lawrence Rafal is a professor of Law at Touro Law School. He has taught legal ethics classes in law school and ethics CLE programs for almost 35 years.

Original Jurisdiction of Appellate Division (Continued from page 14)

involves review of ex parte orders pursuant to CPLR 5704. Because they are ex parte, such orders are not appealable as a matter of right. CPLR 5701(a)(2). A party aggrieved by such an ex parte order may move on notice to vacate it, in which case the order granting or denying vacatur will be appealable. Or, the aggrieved party may make an ex parte application to the judge or justice who granted the original ex parte order pursuant to CPLR 2221(a)(2), but if that application is denied, the resulting order will not be appealable. CPLR 5704 provides another alternative; i.e., it authorizes the Appellate Division or a justice thereof to vacate or modify an order granted without notice to an adverse party by a court from which an appeal would lie to that Appellate Division; and it further authorizes the Appellate Division (but not a justice thereof) to grant an order or provisional remedy applied for without notice by the adverse party and refused by a court from which an appeal would lie to that Appellate Division.

To be sure, the procedures prescribed by CPLR 5704 and 7804 should be more aptly described as falling within the “quasi-original jurisdiction” of the Appellate Division as, in both instances, the action or proceeding was commenced in the trial court but found its way to the Appellate Division in a manner not involving traditional appellate review.

Note: Scott M. Karson is the Vice President of the NYSBA for the Tenth Judicial District and serves on the NYSBA Executive Committee and in the NYSBA House of Delegates. He is a sustaining member and former President of the SCBA, member and former chair of the SCBA Appellate Practice Committee, member and former chair of the NYSBA Committee on Courts of Appellate Jurisdiction, member of the ABA House of Delegates, member of the NYSBA Original Jurisdiction Division Council of Appellate Lawyers, Life Fellow of the New York Bar Foundation, Fellow of the American Bar Foundation and Vice-Chair of the Board of Directors of Nassau Suffolk Law Services Committee. He is a partner at Lamb & Barnosky, LLP in Melville.
express our opposition to Chief Judge Jonathan Lippman to require attorneys to report pro bono services on the registration statement. The Board also voted to reach out to the New York State Bar Association and other bar associations throughout New York State. Early in the fall of 2013, then President Chase and I met with Judge Prudenti, who had been negotiating with the State Bar and they had recently reached a general accord. He explained that Judge Lippman wants information about attorneys performing pro bono services. However, the collection of that information and the definition of that information will be changed as follows:

- Information of pro bono services by attorneys and their contribution to organizations providing pro bono services will be collected anonymously, separate from the registration statement.

Public disclosure of attorney pro bono services will be disclosed in an aggregate, rather than an individual basis.

President Lau-Kee advised me that during his discussions, he remembered my suggestion to him that the public should be aware of the services attorneys provide to our citizens and not only to underserved persons. Accordingly, the definition or classification of pro bono services will be expanded to include hours devoted to helping persons in the courts, participating in extra legal functions such as serving on community boards, and non-payment of fees.

Attorneys will have to certify on the registration statement that they have complied with providing the information separately.

The details of the agreement need to be worked out, but the proposed changes accomplish two goals: remove the requirement of reporting pro bono services on the registration statement, while publicly acknowledging the services that attorneys provide to their clients and the public.

I am grateful this Bar Association has assumed an important role in bringing about this change. I will report back to you after the November 1, 2014 meeting of the House of Delegates.
Academy’s Opening Fall Program Was Fun and Informative

“This was one of the best CLE’s I have ever attended.” ... “Excellent opportunity to meet and get familiar with Suffolk County Police Department.” ... “Creative and informative format...very well done.” ... These were just a few of the positive comments registrants wrote on their evaluation forms following the Academy’s opening fall program, “Social Hosting and Dram Shop Laws,” held September 12 at the SCBA Center.

The successful event, chaired by Academy Advisor Cheryl Mintz, featured both an information-packed, four-credit CLE and a fun and festive ambience, complete with complimentary “happy hour” refreshments. The knowledgeable panel – SCBA President William Ferris, Michael Glass, Daniel Tambasco, Leonard Badia, Jennifer Mendelsohn, and Hon. Caren Loguercio – provided insights into relevant criminal and civil liability issues. And representatives of the Suffolk County Police Department – Officers Susan Laveglia, Carl Ruff, James Spadaro, and Dave Weinerman – performed field sobriety demonstrations and provided eye-opening commentary on a variety of practical matters.

Rendering the evening both fun and enlightening were the sobriety tests performed on “volunteer drinkers” (all of whom brought along designated drivers). The volunteers underwent Breathalyzer tests three times during the evening, and the differences from one individual to the next – even when alcohol consumption was similar – were striking.

– Dorothy Paine Ceparano

Photos by Arthur Shulman

Hon. John Leo, an Academy Officer, helps police officer demonstrate the “eye test.”

Attorney Tracey Epstein works with police officer to demonstrate a field sobriety test.

Attorney Cory Morris, chair of the SCBA Young Lawyers Committee, helps to demonstrate a Breathalyzer test.

SCBA President William Ferris lectures on criminal issues arising in social hosting situations.

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