SCBA Council of Committee Chairs
Includes a Leadership Summit This Year

By Lynn Poster-Zimmerman

As many of our members are aware, there are significant changes being implemented throughout the Suffolk County court system incorporating Alternative Dispute Resolution Plans, in an effort to further the goal of reducing the burden to the system of often lengthy, expensive and acrimonious litigation. This initiative is part of Chief Judge Janet DiFiore’s systemwide initiative to expand the use of ADR.

As with any new initiative and the unknown, there may be a sense of unease as to how this will impact upon our practices and the litigants we represent. However, ADR and mediation is a concept that courts across the country and within New York state are now embracing as a positive change to ease the backlog in the court system and assist all of us to resolve our cases. It is a process we need to be cognizant of and adjust our personal practice towards.

The annual Council of Committee Chairs Meeting was a hit different this year. It included remarks by the Suffolk County Bar Association president and the First Vice President, which is customary, but this year there was also a Leadership Summit. The panelists, who included Hon. C. Randall Hinrichs, Suffolk County District Administrative Judge, Hon. Chris Anne Kelley, Judge of the New York State Court of Claims and Patrick A. McCormick, the immediate Past Academy Dean and current SCBA Secretary, shared some words of wisdom with the crowded room filled with committee chairs and co-chairs.

“Committees are the path to leadership,” said First Vice President Daniel J. Tambascio.

Then the committee chairs and co-chairs introduced themselves to everyone. President Elect Hon. Derrick J. Robin...

(Continued on page 20)
The Hon. Joseph Covello, former appellate division judge and Christopher J. Chimeri are frequently sought by colleagues in the legal community to provide direct appellate representation for clients, as well as consulting services to fellow lawyers.

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Admissible Business Records — Cough ‘Em Up

By Hon. Mark C. Dillon

Practitioners are familiar with the business record exception to the rule against hearsay. It is embodied in CPLR 4518(a), and according to Westlaw, has been cited in 1,552 reported decisions so far. One question addressed earlier this year by the Second Department was whether an affiant in support of a motion, upon laying the business record foundation, may admissibly describe for the court the contents of the record without providing the record itself, or alternatively, whether the record must be attached for the court’s direct review. The answer was provided in a residential mortgage foreclosure action entitled Bank of New York Mellon v Gordon. The answer provided by Gordon applies to all types of civil actions. Before discussing Gordon’s conclusion, it is worth discussing each side of the issue.

On the one hand, a colorable argument could be made that once the affiant has satisfactorily qualified a document as an admissible business record, which the affiant has personally reviewed, the affiant may then describe its contents. New York recognizes a distinction between the admissibility of evidence on the one hand and the weight of evidence on the other. Arguably, a mere description of a qualifying business record is admissible, and the opposing party may then question its weight. On the other side of the coin, one may instead argue that the affidavit establishing admissibility is merely a vehicle for admitting the record as evidence so that the record, once admitted, solely speaks for itself without any filter. Gordon involved, inter alia, the admissibility of an affiant’s description of business records that spoke to a bank’s alleged standing to bring the case. Justice Robert Miller, writing for the court, explained in Gordon that the purpose of the business record exception is to allow the record into evidence; and that a mere description of the record, without proffering the record itself, is of no evidentiary value. “[I]t is the business record itself, not the foundational affidavit, that serves as proof of the matter asserted.”

Gordon’s analysis is correct. New York law has long recognized that while hearsay is not admissible as evidence, there are certain recognized exceptions to the rule where hearsay is nevertheless deemed sufficiently reliable and therefore admissible. The limited examples are excited utterances, dying declarations, pedigree statements, admissions, declarations against interest, and, as relevant here, business records. The well-established theory behind permitting business records into evidence is that they may be presumed reliable if made in the regular course of business, created at or about the time of the events that they memorialize, and maintained thereafter in the regular course of that business by a person that is under an obligation to do so, so that there is no occasion to fabricate the records’ contents for litigation purposes. Since business records typically and definitionally consist of hearsay statements of third person entrants, an affiant’s mere description of the record doubles the hearsay, and it is not certain whether the affiant’s description of it is accurate and complete. Those concerns may only be satisfied if the record is presented directly to the court for the court’s inspection, so that the record does the talking about its salient contents. Permitting the double hearsay would undermine the very reliability by which the information contained in business record becomes admissible. The purpose of the affidavit is to lay the foundation for admissibility, and if needed, decipher for the court any coded or technical entries reflected by the record.

The takeaway of Gordon is that if you are a proponent of a business record, lay the business record foundation and be sure to attach the corresponding documents. If an opponent, and the records are merely described but not provided, object to the admissibility of the affiant’s description and cite Gordon as your support.

Note: Mark C. Dillon is a Justice of the Appellate Division, Second Department, and an Adjunct Professor of New York Practice at Fordham Law School.

1. 171 AD3d 197.
3. Corsi v. Town of Bedford, 58 AD3d 223, 232; CPLR 4518(b).
Our Courts and Our Constitution Will Not Tolerate the Racial Stacking of Juries

By Judge Gail Prudenti

Selecting a jury is both an art and a science, but it should never be a tool for advancing a racist agenda. The U.S. Supreme Court has been reminding us of that since at least 1880 and did so again in June with a ruling I found vitally important and, frankly, comforting.

In a case called Flowers v. Mississippi, the justices made crystal clear that our courts and our constitution will not tolerate the racial stacking of juries. There was some concern that the conservative majority would use the Flowers case to step back from that principle, and I shared that concern while the case was pending. The Supreme Court certainly had the opportunity, but instead confirmed in no uncertain terms that attorneys cannot misuse “peremptory” challenges to exclude potential jurors solely because of their race.

What’s more, the decision was written by President Trump’s most recent appointee to the high court, Justice Brett Kavanaugh. It was to me a great day for the rule of law and fundamental fairness.

To take a step back, attorneys can always ask the judge to excuse a particular juror if that individual expresses open bias, or if there is a good reason to believe the person might not be objective. Perhaps the juror in question is related to the lead detective in the case or maybe the juror is a nurse in the same hospital as the doctor on trial in a malpractice case. Those prospective jurors can be “challenged for cause,” and if the judge agrees, they will be excused.

Additionally, attorneys are afforded a number of “peremptory challenges” so they can, to limited extent, go with their instinct. Perhaps the juror has said nothing that would warrant removing him “for cause,” but there’s just something about his demeanor or the way he’s glaring at the defendant or the fact that he looks bored and surly that makes the attorney uncomfortable. Lawyers can get rid of a few jurors for no better reason than that they just rub them the wrong way. But they can’t use peremptories to stack the deck against, or for, people of a particular race.

Congress made it a crime to “exclude or fail to summon a qualified citizen for...
**NEWS**

**American Bar Association Adopts the ‘ABA Best Practice Guidelines for Online Legal Document Providers’**

By Scott M. Karson

At the August 2019 American Bar Association annual meeting in San Francisco, the Association’s House of Delegates passed a significant resolution (“Resolution 10A”) adopting the “ABA Best Practice Guidelines for Online Legal Document Providers.” Among the sponsors of Resolution 10A were the New York State Bar Association and the New York County Lawyers Association.

The “ABA Best Practice Guidelines” provide as follows:

**“ABA Best Practice Guidelines for Online Legal Document Providers”**

The Utility of Their Online Legal Documents and Forms

1. Online legal document providers (“Providers”) should provide their customers (“Customers”), with clear, plain language instructions as to how to complete their forms, and the appropriate uses for each form.

2. Any notifications to be provided pursuant to these Best Practice Guidelines should be understandable to the average person. Such notifications should be prominent, written in plain language, and delivered by the Provider in ways customers are reasonably likely to see, hear or encounter. The term “notify,” as used in these Best Practice Guidelines, shall refer to notifications that conform to this guideline.

3. The forms that Providers offer to their Customers should be valid in the intended jurisdiction (as represented by the Provider or requested by the Customer).
On the Move...

Christine R. Shiebler and Kimberly Mosscrop have joined the Elder Law and Trusts and Estates firm, Grabic & Grabic, LLP in Smithtown. Ms. Shiebler concentrates her practice in the areas of Elder Law, Estate Planning, Estate Tax Planning, Probate and Estate Administration, Trusts and Trust Administration, Estate Litigation, and Guardianship. Ms. Mosscrop is concentrating her practice in the areas of Trusts, Estates, Elder Law and Medicaid qualification.

SCBA member Jared Artura of West Islip has been hired as associate attorney in the area of practice matrimonial and family law at the law offices of Long Tuminello in Bay Shore.

Announcements, Achievements, & Accolades...

Jessica C. Moller, a member at Bond, Schoeneck & King PLLC, has been named to the Board of Trustees of the Long Island Alzheimer’s Foundation (LIAF).

Congratulations...

To SCBA member Steve Fonduisis who was recognized as the Suffolk County Criminal Bar Association’s Practitioner of the Year Award. At that same event, Matt Martinez was installed as president for the 2019-2020 administration.

To Long Island’s 50 Top Women celebrated by Long Island Business News:

Hall of Fame Patricia Galleri
2018 Honorees
Candance Gomez
Jennifer D. Hower
Lisa Renee Pomerantz
Alissa Van Horn

To the following 2019 Top SCBA Members on Long Island who embody excellence in their special area of legal practice and outstanding community involvement:

Top Boutique Firm - Vishnick, Gover, Milzio LLP
Top Pro Bono Firm - Margolis, Hepburn, Fishman

Condolesences…

We were saddened to learn of the passing of long-time member H. Lee Blumberg. We join in extending to the members of his bereaved family our heartfelt sympathy.

CYBER

Cybersecurity — A Brief Guide

By Victor John Yannacone, Jr.

Verizon claims 61 percent of data breach victims were small businesses. Most law firms and certainly solo practitioners are small businesses. Small businesses have more digital assets to target than an individual consumer has and are generally careless and often negligent about security. Law firms often underestimate their risk level.

Lawyers and law firms are prime targets for cyber attackers because they are easy to attack and rarely invest in cybersecurity. For a variety of reasons known only to their psychiatrists and psychologists, lawyers are more likely to pay a ransom to get their data back than invest capital in protecting it. In many cases lawyers and law firms are hacked to more easily reach their client businesses.

Types of cyberattacks

The goal of most cyberattacks is to steal and exploit sensitive data. The most common types of attacks include but are not limited to:

- APT
  - Advanced persistent threats. Long-term targeted attacks in which hackers break into a network in multiple phases to avoid detection. Once an attacker gains access to the target network, they work to remain undetected while establishing their foothold on the system. If a breach is detected and repaired, the attackers have already secured other routes into the system so they can continue to plunder data.

- DDoS
  - Distributed denial of service where a server is intentionally overloaded with requests until it shuts down the target website or network system.

- Inside attack
  - Someone with administrative privileges, purposely misuses their credentials. The hacker can access and download data, corrupt data, commit fraud, and perform any other malicious acts.

- Malware
  - “Malicious software” — any program introduced into a target computer with the intent to cause damage or gain unauthorized access. Typical malware are viruses, worms, Trojans, ransomware and spyware.

- Password attacks
  - This involves guessing at passwords until the hacker gets in (brute force); using a program to try different combinations of dictionary words (dictionary attack); and keylogging, which tracks a user’s keystrokes, including login IDs and passwords but first requires “penetration” of the target.

- Phishing
  - This involves collecting sensitive information like login credentials and credit card information through a legitimate-looking (but fraudulent) website, or an email sent to unsuspecting individuals on a firm network. Spear phishing, requires in-depth knowledge of specific individuals and then uses social engineering to gain their trust and infiltrate the network.

- Ransomware
  - Typically, ransomware either locks you out of your computer and demands money in exchange for access or it threatens to publish private information if you don’t pay a specific amount. Ransomware is one of the fastest-growing types of security breaches.

- Zero day attacks
  - This exploits unknown flaws in application software and operating systems discovered by attackers before the developers and security staff become aware of them. These exploits can go undiscovered for months, even years, until they’re discovered and repaired.

Security solutions and what to look for

Antivirus software is the most common and will defend against most types of malware. For a side-by-side comparison of the best antivirus software programs for small businesses, visit the Business.com site, https://www.business.com/categories/best-antivirus-and-internet-security/.

Firewalls, which can be implemented with hardware or software, provide an added layer of protection by preventing an unauthorized user from accessing a computer or network.

Three relatively inexpensive immediate security solutions

- Offsite data backup so that any information compromised or lost during a breach can easily be recovered from an alternate location;
- Encryption software to protect sensitive data—yours and your client’s; and
- Two-step authentication or password-security software for your personal and law firm internal programs.

Since there is no one-size-fits-all security solution, consider running a risk assessment, preferably through an outside firm.

Cybersecurity insurance

Your general liability policy will not help you recoup losses or legal fees associated with a data breach. Consider obtaining a separate cyberinsurance policy or endorsement covering these types of damages.

Look for a combination of first- and third-party coverage. First-party liability coverage includes general costs incurred as a result of a breach, such as legal fees, public relations campaigns, client notification and business interruption. Third-party coverage protects you if your company is at the center of a breach that exposed sensitive information. This type of protection covers legal defense costs if the affected parties sue your company.

Make sure your carrier is financially solid and has a good reputation in the industry. Because there are still no standard cybersecurity policy forms yet, you would be wise to use an experienced agent or broker.

Best practices for your business

- Keep your software up to date
- Install the patches and pay for the upgrades.
- Educate your employees
  - Make your employees aware of the ways cybercriminals can infiltrate your system, teach them to recognize signs of a breach, and educate them on how to stay safe while using the firm’s network and particularly accessing client data.
- Implement formal security policies
  - Protecting the network should be on everyone’s mind since everyone who uses it can be a potential endpoint for attackers. Create a culture of caution and preventive practices such as using

(Continued on page 27)
You Can’t “Shoot from the Hip” With Daubert

By Hillary A. Frommer

A recent case from the Southern District of New York shows once again that an expert opinion based on surmise will not be admissiible. In Nemes v. Dick’s Sporting Goods, Inc., the plaintiff brought suit when she partially amputated her finger while shooting a crossbow called the “Lady Raptor FX.” Her complaint alleged that her injury resulted from a design flaw in the crossbow, to wit, the lack of proper finger guards. Both the plaintiff and defendants sought to offer expert testimony supporting their respective positions. Each side moved to preclude the other’s expert from testifying, and the court granted in part and denied in part both motions.

The court first addressed the defense’s motion to disqualify the plaintiff’s expert, Brian O’Donel, and to preclude him from testifying that (i) the crossbow’s design created a substantial likelihood of harm; (ii) it was feasible to design the product safely; and (iii) the defective design was a substantial factor in causing the plaintiff’s injury. In considering the threshold issue of Mr. O’Donel’s qualifi-
cations, the court determined that his education combined with his 30 years of work experience in various fields such as engineering management, project management, and equipment safety improvement, rendered him qualified to testify as an expert concerning equipment safety.

The court then concluded that under Daubert and Rule 702 of the Fed. R. of Civ. P., Mr. O’Donel’s methodologies were sufficiently reliable such that he could testify that the crossbow created a substantial likelihood of harm and that the design defect was a substantial factor in causing the injury. The court rejected the defense’s argument that Mr. O’Donel did not support his opinion with objective and repeatable tests. It agreed with the plaintiff that “the methodology of handling the crossbow, examining others handling the crossbow, and handling and firing other crossbows [was] sufficient under Daubert,” especially considering the extensive sources of data that Mr. O’Donel reviewed and considered in forming his opinion. The court also ruled that Mr. O’Donel could give causation testimony because his physical testing of the crossbow and comparing it to other models as currently designed “are reliable testing methods for proving causation for a relative- ly simple device.”

The court did not however, allow the expert to testify that the crossbow could be feasibly designed in a safe manner because that opinion lacked the foundation of reliability. Mr. O’Donel based his opinion on the following: a particular publication from 2007 stating that certain competitor crossbow manufacturers had changed the design and installed a thumb safety device; the fact that in 2006, there were patents describing features to protect the operator of the crossbow; and photographs of the expert holding both the crossbow and a competitor model with certain “guards.” The court care-
fully considered each piece of “support,” and poignantly noted that Mr. O’Donel did not identify which competitors referenced in the 2007 article had actually installed the purported safety device. Additionally, the simple fact that patents may exist does not prove that those devices were actually manufactured and sold. As for the photographs, the court found that they do not show “how those guards could have been supplanted into the [crossbow] at a low or reasonable cost, and without diminishing its utility.” Altogether, this was fatal to the admission of the expert’s testimony.

The court then considered the plaintiff’s motion to preclude the testimony of the two defense experts, Messrs. Grace and Van Hume who intended to testify solely that the plaintiff was the sole cause of her injuries. The court, as it must, also engaged in the threshold ques-
tion of their qualifications and quickly concluded that, based on their respective experi-
ences, both defense experts were qualified to offer expert testimony. However, the court found that “defendants failed to show” that the testimony of their experts “was based on sufficient facts or data, the product of reliable principles and methods, and that such methods were reliably applied to this case.” The court noted that absent from Mr. Grace’s expert re-
testimony, it agreed, the threshold question of qualification was not met.

The court then considered the plaintiff’s motion to preclude the testimony of McDonnell’s application to cure a U.N. commitment to use Ng’s latest hotel and convention center as a base for proving causation for a relative-
ly simple device.”

The court determined that McDonnell’s application to the U.N. General Assembly travelled to Macau based on insufficient facts or data, the product of reliable principles and methods, and that such methods were reliably applied to this case.” The court noted that absent from Mr. Grace’s expert re-
testimony, it agreed, the threshold question of qualification was not met.

WHO’S YOUR EXPERT

Steady Referrals at Your Fingertips

By Paul Devlin

Attorney Paul Margiotta built his entire practice using the Lawyer Referral and Information Service (LRIS). The practice of law was a second career for him. Prior to obtaining his law license, Paul was presi-
dent of the Nassau County Court Officer’s Benevolent Association, representing all Nassau County Court employees. He wanted to hit the ground running in his new career so he accepted a position with the Town of Babylon Special Prosecutor’s office. One of the perks of the job that he would be permitted to moonlight, i.e., he could work there full time and simultaneous build his solo practice. The big-
gest hurdle he faced in solo prac-
tice was client acquisition. How
could he be at work all day and
epect clients to find him and come to him at night? To solve this problem, he turned
to the LRIS. This decision paid off in spades. The steady stream of clients that came to him through the LRIS were not fickle. They had called the SCBA and were serious about hiring a lawyer. In terms of hard numbers, he received about seven referrals per week and of those referrals, he took on about 2-3 clients per week. The practice areas of the inquiries varied from civil rights to school law, mu-

to the LRIS. This decision paid off in spades. The steady stream of clients that came to him through the LRIS were not fickle. They had called the SCBA and were serious about hiring a lawyer. In terms of hard numbers, he received about seven referrals per week and of those referrals, he took on about 2-3 clients per week. The practice areas of the inquiries varied from civil rights to school law, mu-
nipal law, contracts, litigation, and even personal injury.

After a couple of years of this, he found that he was getting just as much work from prior clients who recommended him as he was getting from the LRIS. Today, he has a thriving practice in Bay Shore, The Mar-
giotta Law Firm. He is also the Executive Director of the Suffolk County Traffic and Parking Violation Agency. He continues to

Second Circuit Declines to Extend the U.S. Supreme Court’s McDonnell ‘Official Act’ Reasoning to the Foreign Corrupt Practices Act

By Jack Harrington

In 2016, in McDonnell v. United States, the U.S. Supreme vacated the former Virgin-
ia governor’s bribery conviction by limiting the definition of what constitutes an “official act.” Critics argue the McDonnell decision legalizes, or at least substantially shields, public corruption and has already served to overturn (at least temporarily, in the case of former New York Assembly Speaker Shel-
don Silver) convictions of other public of-

ficials. However, in a decision likely wel-
ding regarding McDonnell’s application to the Convention to the Foreign Corrupt Practices Act

The U.S. District Court for the Southern District of New York (Brodieck, J.) ordered Ng on June 7, 2018 to serve concurrent 48-month prison terms after a jury convicted him of paying and con-
spring to pay bribies in violation of 18 U.S.C. Sections 371, 666, and the FCPA, 15 U.S.C. Sec-
tions 78dd-2 and 78dd-3. Ng, a billionaire real estate tycoon, paid more than $1 mil-

tion to two United Nations diplomats to se-
cure a U.N. commitment to use Ng’s latest Macau-based hotel and convention center as the site for an annual U.N. conference. The prosecution’s evidence at trial was detailed and overwhelming. For instance, in exchange for monthly payments of $20,000 for alleged services rendered to one of Ng’s media companies, one U.N. diplomat and cooperat-
ing witness testified his “salary” was in fact bribes to secure for Ng not only general U.N. support for the conference center, but also a formal documented com-
mmitment to do so. In another in-

stance, the then-President of the U.N. General Assembly travelled to Macau with U.N. staff to visit the convention site in exchange for a payment of $200,000 to the Office of the President of General Assem-
bly. The diplomats secured official letters and other records of ambassadorial support for Ng’s project and an early committ-
ment to hold the annual conference at Ng’s facility. Diplomatic efforts to finalize the U.N.’s commit-
mment to the convention center were abandoned in September 2015 following Ng’s arrest.

The bulk of Judge Raggi’s opinion ad-
dressed Ng’s argument that his conviction under 18 U.S.C. Section 666, which crim-
inalizes theft or bribery concerning pro-
grants receiving federal funds, cannot stand because the U.N. is not an “organization” within the meaning of the statute. Judge Raggi used precedential, textual, and histor-
ical analysis to hold that public international organizations, such as the U.N., are covered by Section 666 before moving on to Ng’s McDonnell challenge. That the court, how-

ever, may have buried the lead as its hold-
ingen regarding McDonnell’s application to the FCPA is arguably more significant than
When Real Estate Dispute Resolution (ADR) Can Help

By Kenneth J. Landau

In recent years, “Alternative Dispute Resolution,” including both mediation and arbitration, have been used to resolve negligence, contract, business and even matrimonial disputes. Attorneys and their clients have realized the benefits of ADR, in reducing attorney fees and avoiding the delays involved in a traditional lawsuit. In addition, ADR can be held at a mutually convenient time and most disputes can be resolved in a one- or two-hour mediation.

Even more important, your client is likely to feel less stressed and more satisfied with the outcome of the dispute. Of course, it is important that the mediator or arbitrator be experienced in the specific aspects of the real estate dispute. Time may be of the essence in resolving disputes related to real estate matters and the client may be reluctant or unable to pay the mounting legal fees as the dispute progresses.

In the types of real estate disputes outlined below, ADR can be effective and help reduce the possibility of an unsatisfied client filing a grievance and/or malpractice claim against their attorneys for failing to resolve these issues. Fee disputes in a real estate matter between clients and attorneys can also be resolved through arbitration or mediation. Each side can still utilize an attorney to function as their advocate. (Note: The Bar Association may have procedures required by law for the arbitration of certain types of attorney fee disputes). ADR, especially mediation, can be much quicker and inexpensive to resolve real estate related disputes. This can include post-contract issues about the condition of

To File or Not to File? For an HOA Board That May No Longer be the Question

By Melissa B. Schlactus

For homeowners associations on Long Island, the costs associated with filing an amendment to their declaration and by-laws with the county clerk can sometimes be cost prohibitive. Due to these high costs, some homeowner association Boards of Directors recently have sought, where possible, to amend their governing documents without recording the amendments. A recent decision by the Appellate Division, Second Department makes clear that, in some circumstances, recording amendments to a homeowner’s association by-laws is a must.

In Keller v. Kay, The Colony at Holbrook Homeowners Association, Inc. amended its By-Laws in 1997 and 2002. These amendments made procedural changes to the board election process such as eliminating cumulative voting, imposing staggered board elections, utilizing a double envelope system for homeowners voting by proxy and closing nominations at 4 p.m. on the date of the election. The amendments were never recorded with the Suffolk County Clerk’s Office in reliance upon a paragraph in the Association’s by-laws which set forth the procedure for amending the document, but which did not mention anything about a filing requirement.

Following her loss in the 2015 board election, Sheila Keller, a homeowner at The Colony, brought an action against the Association for failing to record the amendments to the by-laws which addressed amendments in order to determine whether the amendments to the by-laws were valid. First, the court examined the sections in the declaration relating to the amendment of the governing documents. Article XII, Section 2, which is entitled “Duration and Amendment” provided that any amendment to the declaration needed to be properly recorded in order to be effective. Section 5 of the same article, entitled “Administrations,” stated that the by-laws of the Association are made a part of the declaration and were annexed to the declaration as Exhibit B. The court then looked to the provision in the by-laws which addressed amendments. In contrast to the declaration, this section did not state that an amendment to the by-laws had to be recorded.

Keller argued that because the by-laws were part of the declaration, and any amendments to the declaration were required to be recorded, any amendments to the by-laws were also required to be recorded in order to be effective. The court agreed with Keller, finding that the language in the Association’s declaration clearly required that amendments to the by-laws be filed.

The Second Department disagreed with the lower court on the issue of whether Keller was entitled to a preliminary injunction. The court found that Keller was not able to establish that she would suffer irreparable harm if an injunction was not granted. The court explained that Keller’s loss in the 2015 election was not sufficient to show irreparable harm since she was unable to prove that she would have won the election if the by-laws amendments had not been in effect. In addition, the court found that a balance of the equities did not weigh in Keller’s favor since the amended by-laws were being followed by the Association since 1997. Keller had voted and twice ran for the board in elections in which the by-laws amendments were operative.

This case makes clear that for homeowner associations whose declaration and by-laws contain language authorizing by-laws as an exhibit to the declaration, recording amendments to the by-laws is imperative. Given the high fees associated with recording amendments with the County Clerk’s office in both Nassau and Suffolk counties, similarly situated homeowners associations will have to think twice before amending their by-laws. In addition to instructing homeowners associations about how to handle by-law amendments in the future, this case also creates implications for associations that have amended their by-laws in the past without recording these amendments with the County Clerk’s office. Pursuant to the Second Department decision in Keller v. Kay, unrecorded by-law amendments, made by homeowners associations where their by-laws are made part of the declaration, may not be considered valid. Homeowners’ association boards of directors will now have to consider whether they are willing to pay the recording costs required by the County Clerk’s office in order to continue enforcing the amendments previously made to their by-laws. Otherwise, these by-law amendments may be deemed invalid, even if they have been followed for years, or decades.

Note: Melissa B. Schlactus is an associate at Taylor, Eldridge & Endres, P.C. where her practice focuses on community association law. Ms. Schlactus currently serves as Vice President of the Board of Directors of the Long Island Chapter of Community Associations Institute (CAI). She can be reached at (631) 265-5550 or at melissa@taylor-eldridge.com.
Avoiding liability when selling a medical practice facility

By Jordan Fensterman

Practice tips for doctors and other medical providers who own their building and are planning on transferring or selling their medical practice, including limiting liability are set forth below:

Review contractual obligations

A must is to compile and comprehensively review all contracts involving the practice and facility. Often these contracts will terminate upon any sale of the business, but certain contractual agreements may remain in place. Agreements with malpractice carriers, insurance, fire, water, electric, gas, lab, toxic waste disposal and other vendors must be analyzed. Some of the agreements may survive the sale.

Often the purchasing physician or group will have their own vendors and relationships that they want to utilize and in that case the selling physician will want to ensure that their contracts are terminable upon a sale. However, on occasion assignable contracts exist which can be of value to the buyer or the buyer. With the ever-increasing frequency of consolidation going on in today’s healthcare environment solo practitioners and small group practices should be especially cognizant when selling their practice to a large conglomerate of protective measures to be taken when one elects to sell and become an employee of their prior practice.

An often-overlooked step that the solo and small group practice doctor can take to add protection to their future under the circumstances where a sale to a mega conglomerate is imminent is to execute a long-term lease for their medical practice with the real estate entity that they own as well in advance of any sale. This affords the solo and small group physician the ability to assign the lease as a required part of any practice sale to have the assurance that 6 months to a year down the road the mega company cannot simply terminate their employment and leave them empty handed.

Proper notification on all registrations, renewals, certifications and certificates

Physicians are required to register to practice in New York and to renew their registration every two years thereafter. Additionally, pursuant to 10 NYCRR 1000.5 physicians are required to report most changes in their employment status and practice to the Department of Health within 365 days of any change. Under Public Health Law §29-D, Title 1, Section 4, certain mandatory practice information is required to be reported to the Department within 30 days of any change. That law also requires that each physician licensed in New York shall create and maintain a Physician Profile and that every physician shall update the profile information within the six months prior to the expiration date of such physician's biannual registration period, as a condition of registration renewal under article 131 of the Education Law.

A Not so Funny Thing Happened on My Way to the Closing

By Irwin S. Izen

For those of us who have been practicing in the area of residential real estate, the old proverb that you never leave a closing table without “closing” rings true for most transactions. But then again, most transactions are “routine,” if not a pleasant experience, as sellers wish their purchasers nothing but health and happiness in their new home. However, even the most seasoned practitioner occasionally runs into the unexpected. How you address these unexpected problems and the impact your actions have on the closing will either make you a “hero” or a “zero” in your client’s eyes.

The unexpected title continuation search

In the world of real estate and title insurance, a continuation is always performed on the day before or even the day of closing. The purpose of the continuation is to disclose objections or other concerns that have surfaced in between the issuance of the preliminary report and the time of the closing. While we can all identify with that “red light” camera judgment that your client swears he/she knew nothing about, or that small claims judgment which now has to be paid, these unanticipated objections should not derail your closing efforts as an escrow can solve the issue and be negotiated along with your attorney’s undertaking, provided the title company is satisfied.

But what happens when your cell phone rings on your way to a closing and it’s the purchaser’s title company advising you that a Notice of Pendency has been filed on your client’s property. Other than trying to avoid driving off the road, you ask the who, what and why of the filing.

A previous purchaser whose contractual changes were not acceptable to your client has filed a Notice of Pendency against the property. The mechanism for filing a Notice of Pendency is contained in CPLR §6501 and provides that a Notice of Pendency may be filed in any action in which the judgment demanded would affect the title to or the possession, use or enjoyment of real property. If the filing party does not assert a claim on title, then filing a Notice of Pendency is improper and under the statute can subject the filing party to pay any costs and expenses occasioned by the filing and cancellation.

Armed with the information of who was the filer, I conveniently stopped in on my way to the closing to discuss the matter and to advise the filer (no surprise he was an arrogant attorney) that he should remove it immediately. The dialogue on his wanting to advise the seller was happy to oblige and a check was cut thus deeming the contract null and void.

Substantially, the contract representations concerning the basement being free of leaks was breached. The measure of damages at this stage was difficult to assess and when the parties failed to come to an agreement on the offer to cancel was accepted and contract deposit was returned from the escrow on the spot. Had this condition not been exposed due to the heavy rain the night before, the usual contractual language stating that no “representations survive closing” would have made for one very unhappy client.

What do you mean the life tenant is still alive?

Clients come to you selling the home their father had lived in it for years. Dad now lives in an adult care facility and his kids are selling the property. Unbeknownst to you, Dad retained a life estate in

The Suffolk Lawyer wishes to thank Real Property Special Section Editor Andrew Lieb for contributing his time, effort and expertise to our October issue.
CIVIL RIGHTS

Hostile Education Environment and Schools That Fail to Address the Warning Signs

By Victor John Yannacoone Jr. and Cory Morris

At around the same time that students went back to school this year, United States District Court Judge Denis R. Hurley wrote a landmark decision about students who are threatened and schools, private or public, that do not act timely and appropriately.

The New York Law Journal, focusing on the characterization by Judge Hurley that this was a “Disturbing Racial Attack,” and “[t]he pictures targeted the student’s race and referenced the KKK, Nazis and suicide, according to copies included with the complaint.”

When white students sent pictures of, among other things, a gun to his head and a lynching noose to an African American/black student, school administrators should have acted but did not. As counsel for the family, we could not wait until our client was murdered.

From emojis to gun gestures, school administrators know that images convey physical threats and this case was no different. In Virginia v. Black, 538 U.S. 343 (2003), an appeal stemming from cross burning by Ku Klux Klan (“Klan”) members, Justice Clarence Thomas dissented in the striking down of the statute banning cross burning, stating that “cross burning subjects its targets . . . to extreme emotional distress, and is virtually never viewed merely as ‘unwanted communication,’ but rather, as a physical threat.” This lone dissent is a reminder of what every African American knows upon seeing images of the Ku Klux Klan, Hitler, and a noose addressed to them — a threat of imminent death if not serious physical harm.

We live in an age where Klan members no longer need wood, matches and gasoline in front of someone’s home to send their message — now all they have to do is click “send!”

As plaintiffs’ counsel in Moore, we argued the position that tolerating and facilitating a racially hostile environment effectively prevents the infant Plaintiffs’ D.W.M. and D.D.M. from obtaining the Roman Catholic elementary school education their parents contracted for from the Defendant St. Mary School and Defendant Diocese of Rockville Centre. The plaintiffs in Moore had no other option but to sue in federal court after exhausting every civil and legal remedy, to obtain relief from these school children.

Unable to obtain an Order of Protection by means of Order to Show Cause, the plaintiff children had to leave St Mary School to remove themselves from the threats.

Of the claims that survived dismissal, the Hostile Educational Environment claim is extremely important in these unfortunate days of violent turmoil and regularly publicized school shootings. “The Second Circuit has indicated that discrimination claims un-

(Carried on page 33)

VETERANS

Have You Served? Aid and Attendance and Housebound Allowance for Veterans and Spouses

By Chad H. Lennon

Suffolk County has the highest percentage of veterans in New York state, thus, you will likely come across a veteran, or spouse of a veteran, in your practice. Veterans and spouses who are eligible for a Department of Veterans Affairs pension and require the aid and attendance of another person, or are housebound, may be eligible for an additional monthly tax-free monetary payment. The allowance is paid in addition to the monthly pension. Since Aid and Attendance and Housebound Allowances increase the pension amount, people who are not eligible for a basic pension due to excessive income, may be eligible for pension. However, a veteran or surviving spouse may not receive Aid and Attendance Allowance and Housebound Allowance at the same time.

It is important to remember that it is common to lump all VA assistance in the term “VA Benefit.” However, not all entitlements are considered a benefit, thus, allowance for Aid & Attendance and Housebound. These are allowances that have medical ratings and additional amounts of money available with all VA disability income benefits to assist individuals receiving these benefits to cope with the added burden of dependency or being housebound. This allowance is utilized to assist veterans and spouses of veterans for long-term care, basically a person is confined to his or her living quarters. The tax-free payments will vary based on single, married, or a spouse that needs assistance.

Eligibility for the allowance is based upon 90 days of active duty service, or 1 day of service during wartime even if it was not in a combat zone. The veteran must not have a dishonorable discharge, be over 65 or permanently disabled, need assistance from another person and there is a net worth limit. Additional requirements include the need for assistance of daily living activities. These activities are bathing, dressing, toiletting, feeding, transferring, personal hygiene, prosthetic adjustments, fall prevention, providing protected environment, and preventing harm to others. In some cases, the VA may require two of these activities requiring assistance.

To qualify for the benefit, the client must have unreimbursed medical expenses, a net worth limit (includes assets, but does not include primary residency and one vehicle) and assets that have not been transferred in the last three years otherwise there may be a penalty of up to five years.

Navigating the allowance can be confusing, so referring to the VA website for special

(Carried on page 32)

COMMERCIAL LITIGATION

An Alternative to Arbitration Via Commercial Division Rule 9

By Leo K. Barnes Jr.

In late 2018, the First Department’s decision in Daesang Corporation v. The NutraSweet Company, 167 A.D.3d 1, 85 N.Y.S.2d 6 (1st Dep’t 2018) refused to vacate a $100 million arbitration award pre-

(Carried on page 34)
The Use of Technology in Mediation Practice

By Courtney Chicvak

Nearly every industry has been impacted by the evolution and implementation of technology with the ultimate goal of further improving customer experience. The field of dispute resolution has also been impacted by this transformation and there are multiple instances where different types of technology have been applied to dispute resolution with positive outcomes. Successful application of technology in an online mediation setting involves a three-part analysis: first, identify the salient factors of the dispute; second, tailor the technology to the dispute; and third, guard against risk.

Identify the salient factors of the dispute

The salient factors may include any of the following: location of the participants, timing of the dispute, number of participants, the subject matter of the dispute, the complexity of the dispute and number of issues to be discussed, the desired credentials and background of the mediator, the budget of the participants, the need for a potential accommodation for the participants, either language or disability related.

Tailor the technology to the dispute

With options ranging from video chat, phone conferencing, shared documents, chat platforms, polls, charts, combinations of each may be used to maximize the experience and increase likelihood of resolution. Some examples include using an asynchronous chat room for long distance participants with time restrictions to have multiple concurrent causes with the mediator or using a synchronous video chat for time efficiency and for working with a particular mediator.

Guard against risk

Potential threats to maintaining a quality and ethical process may include unsecure information or the potential for technical glitches or confusion over the technology. Technology itself is determined to outweigh the potential benefit, the combination of technology envisioned. Overall, the use of technology in mediation is something that is already used regularly. Nearly every settlement agreement is drafted in a Word document or similar program. Because younger generations have become more comfortable with technology and because the technology itself has become more accessible, many of the programs detailed above are available for free and their use in dispute resolution processes is only likely to increase. Through the gradual increase of technology into the process, mediators can deliver a better experience for consumers.

Note: Courtney Chicvak is a member and mediator at Courtney Anne Chicvak Mediation LLC, where she mediates commercial, employment, divorce and elder disputes. In addition to her mediation work, Chicvak is a teaching associate at Columbia University and an online adjunct instructor at Grand Canyon University for Argumentation and Advocacy and Conflict and Negotiation courses. An attorney in New York, she attended the first ever Mediate.com Online Mediator Certification Training Program, with speakers Col-Rule (Tyler Technology), Janet Martinez (Stanford Law School) and Clare Fowler (Mediate.com). The event provided her with the information presented in this article.

FAMILY

The Urn or the Tombstone: What Happens If the Child Dies?

By Vesselin Mitev

Your client, while a defendant in a divorce, comes to you with terrible news: the divorcing couple’s 10-year-old child has tragically died in a car accident. Now, the opposing party, who had temporary (de facto) custody, has noticed they will seek an order from the matrimonial court allowing the child to be cremated.

Your client opposes this vehemently, arguing that the child should be buried instead, on the basis that as the non-custodial parent he had less access to the child; his family and the child’s grandparents had even less access to the child; his family and the child’s surviving parents may so decide.

In relevant part, PHL 4201 provides that “either of the decedent’s surviving parents” may so decide. This doesn’t help the situation, but only complicates it further, since both parents have an equal, prima facie right to direct what happens with the body.

At common law, and continued throughout the case law, the right of the spouse also contemplates damages against any person who unlawfully or improperly impedes that right or mishandles the decedent’s body, (Melfi v. Mount Sinai Hosp., 64 A.D.3d 263, 31, 877 N.Y.S.2d 300).

And, PHL 4200 expressly provides that: “Except in the cases in which a right to direct is expressly conferred by law, every body of a deceased person, within this state, shall be decently buried or incinerated within a reasonable time after death.”

Finally, the Second Circuit prevailing view is that there is no fundamental liberty interest in association with (no right to) a child as the non-custodial parent, Uwadigwe v. County of Suffolk, 639 Fed.Appx. 13 (2d Cir. 2016) sharpening an argument that a noncustodial parent has no true right to the child in life (per 2nd Circuit fiat) would not have any greater right to the child in death.

There have been no reported decisions squarely on point, as to what happens in a custody dispute with the now deceased body; or for that matter, what would happen if the parties were already divorced and delineated as the custodial/noncustodial parent in a final judgment/stipulation of settlement.

One logical view is that the child has now been transmuted into a marital asset (its ashes) or its body and burial plot and is being property subject to equitable distribution. Another, equally cogent point is that depending on the age of the child, there may be a jurisdic- tional impediment to even considering the argument in a matrimonial court since the court would ostensibly lack jurisdiction if the child was over the age of 21 at the time of death.

The argument that only Surrogate’s Court can make the decision is also a facially appealing one; however, both courts have concurrent jurisdiction and the matter at bar involves a quite arguably, the disposition of marital assets.

The crux of the case law surrounding what to do with the body of a person who died without advising how he or she wished to be buried (or cremated) centers on three issues: the person’s religious beliefs, if any; the person’s expressed wishes to others while they were alive as to whether they would like to be buried or cremated, and what to do if their ashes (scattered them into the sea, bury them in the backyard next to the dog, etc.); and the degree, if any, to which a particular disposition would entitle interested persons in carrying out mourning and commemoration of the decedent.

The last factor, I submit, weighs heaviest in favor of a burial, rather than cremation, not to point the post that ashes can be buried in a burial plot as well, with a tombstone erected to commemorate the deceased child’s life, rather than keeping them in an urn up on the fireplace mantle.

In sum, a review of the applicable law and cases reveal that the matter is properly within the court’s jurisdictional penumbra and, absent a written document to the contrary, both the “custodial” and “noncustodial” parent, per statute, have equal rights in determining how to dispose of the body, subject, of course, to the court’s equitable intervention.

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

TECHNOLOGY

An Invitation to Join Our Leadership

By Courtney Chicvak

The Directors of the Suffolk County Bar Association are seeking applications for the Nominating Committee. The Nominating Committee is now seeking applications for the aforementioned positions. If you are interested in becoming a leader and are willing to assume a role in the activities of the SCBA, please send your résumé, either by mail or email to the jane@scba.org.

As officers and directors of the SCBA you manage the affairs of the Association, subject to and in accordance with the Association’s Bylaws and all applicable laws; elevating the standard of integrity, honor and courtesy in the legal profession and cherishing the spirit of goodwill among the members. The membership is deeply appreciative of the energy, dedication and hard work performed by the officers and directors of the Association, especially in these challenging times.

The directors are required to attend all scheduled board meetings of the Association. Eligibility of board members is as follows, as noted in the Association’s Bylaws: “No member shall be eligible for election to the Board of Directors who has not been an Active Member of the Association for at least five years and a member of a committee, task force, recognized foundation of the association, an Officer of the Suffolk Academy of Law, or any combination thereof, for at least four years during such period.”

— LaCova
Grandma’s Co-op, I Own it But I Cannot Live in it! Who Says?

By Irwin Izen

In this month’s Transactional Law column, I discuss the not too unfamiliar arrangement when ownership rights do not equate to occupancy rights.

The standard of care due to the ward by the guardian ad litem is to act reasonably, as a prudent attorney would, in safeguarding the interests of any client.

The guardian ad litem is responsible for preparing a report to the court as a requirement of the appointment. The nature of the guardian ad litem’s report will vary with the type of proceeding and circumstances presented. While there is no court form or prescribed format, every report must: (a) identify the interest of the ward in the proceeding; (b) indicate that the court has proper jurisdiction over the ward, the parties, and the subject matter of the proceeding; (c) set forth a statement of the actions pursued by the guardian ad litem to verify the court’s jurisdiction, and (d) contain a statement of the activity or investigation conducted by the guardian ad litem which should include a re- citation of evidentiary matters such as statements of witnesses. In addition, the report must include the findings, conclusions, recommendations, and a statement of the objections, if any. The guardian ad litem must make specific recommendations, whether they be favorable or unfavorable to their ward. The primacy of the guardian ad litem’s interest is to be appointed by the court, but also, as an attorney, represents the ward in the same way they would a private client.

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New York State Enacts New Laws Providing Additional Rights to Employees in the Workplace and Disabled Individuals Seeking Access to Public Accommodations

By Mordy Yankovich

The New York State Legislature continues to churn out new laws aimed at providing further protections to employees in the workplace and individuals with disabilities seeking access to public accommodations. As detailed in last month's article, New York state adopted numerous further protections for victims of sexual harassment and discrimination based on any protected class in the workplace. Below is a description of additional recently enacted laws and the impact the laws will likely have on companies in New York state.

Discrimination against Religious Attire and Facial Hair (A4204): Effective Oct. 8, 2019, New York state will prohibit all employers from restricting the “wearing of any attire, clothing, or facial hair in accordance with the requirements of [an employee’s] religion” unless accommodating the employee’s religious beliefs would cause an undue hardship to the employer. (New York City recently passed a similar law focusing on protecting rights of employees to “maintain natural hair or hair styles that are closely associated with their racial, ethnic, or cultural identities”). Absent an undue hardship, employers must, thus, permit an employee to don hair coverings, religious garments, or facial hair in accordance with their religious beliefs. While courts have previously recognized restrictions on head coverings, facial hair, etc. to constitute religious discrimination, it is likely that courts will be more hesitant to permit restrictions unless there is a legitimate safety risk and there is no accommodation (e.g. hairnets) that can mitigate the risk. See Brooks v. City of Utica, 275 F.Supp.3d 370 (N.D.N.Y 2017) (Court held that repeatedly threatening to discipline and ridiculing an employee for failing to cut his hair and ignoring his requests for a reasonable accommodation created a prima facie case of discrimination).

Closed Captioning on Television in Public Accommodations (S1650): Effective Sept. 13, 2019, televisions in an area of public accommodation that have a closed captioning feature must be enabled upon request. Restaurants, amusement parks, etc. that have television screens face potential lawsuits if they do not comply with this new law. However, owners of public accommodations will be more hesitant to permit restrictions on their non-N.Y.-source income if they realize from operating their business in New York state will prohibit all employers from restricting the “wearing of any attire, clothing, or facial hair in accordance with the requirements of [an employee’s] religion” unless accommodating the employee’s religious beliefs would cause an undue hardship to the employer. (New York City recently passed a similar law focusing on protecting rights of employees to “maintain natural hair or hair styles that are closely associated with their racial, ethnic, or cultural identities”). Absent an undue hardship, employers must, thus, permit an employee to don hair coverings, religious garments, or facial hair in accordance with their religious beliefs. While courts have previously recognized restrictions on head coverings, facial hair, etc. to constitute religious discrimination, it is likely that courts will be more hesitant to permit restrictions unless there is a legitimate safety risk and there is no accommodation (e.g. hairnets) that can mitigate the risk. See Brooks v. City of Utica, 275 F.Supp.3d 370 (N.D.N.Y 2017) (Court held that repeatedly threatening to discipline and ridiculing an employee for failing to cut his hair and ignoring his requests for a reasonable accommodation created a prima facie case of discrimination).

Statutory Residence in NY: The ‘Permanent Place of Abode’ Test is in Need of Repair

By Louis Vlahos

This is part one of a four-part series.

A few days ago, one of the daily tax services reported that the billionaire investor and businessman, Carl Icahn, was planning to move his home from New York City to Florida, presumably for tax reasons. What’s more, the article continued, Icahn was planning to move his NYC-based business (including employees) to Florida.

The article noted that, over the years, a number of prominent investors and hedge fund managers have relocated to Florida for tax reasons — it cited David Tepper, Paul Tudor Jones and Eddie Lampert as examples — explaining that Florida has no personal income tax, and a corporate tax rate of 5.5-percent, as compared to N.Y.’s corresponding rates of 8.82-percent and 6.5-percent.

Shortly after reading this article, I came across a recent decision by N.Y.’s Tax Appeals Tribunal regarding the tax status of another hedge fund manager: Nelson Obus (the “Taxpayer”), a co-founder, and the Chief Investment Officer, of NYC-based Wynnefield Capital; specifically, the Tribunal considered whether Taxpayer was a statutory resident of N.Y. during the 2012 and 2013 tax years.

“I Love NY” – unrequited love?

The general fact pattern was not at all unusual and, unfortunately, the outcome was not at all unexpected. Indeed, it was consistent with many other decisions under similar circumstances — which is why it is instructive for individuals who are not domiciled in N.Y., but who own and operate a N.Y.-based business and who are considering the purchase of a “second home” in the state.

It was undisputed that Taxpayer was domiciled in New Jersey during the years at issue. That was his “permanent” home. It was also undisputed that Taxpayer, who worked primarily out of his NYC office, was present in N.Y. for over 183 days each of the years in issue.

Increased Efficiency, Satisfaction and Happiness

By Sheryl L. Randazzo

Think it’s too late to take advantage of opportunities presented through the Academy’s – The Seven Habits of Highly Successful Lawyers: Lead the life of Dream of Personally and Professionally . . . the guided book-discussion series scheduled to take place over the course of the year? Wrong. It’s never too late, you can jump in at any time, and increased efficiency, satisfaction and happiness, too, can be yours.

However, a couple of important things –

1. The next part of the program, which covers Habit 2, is scheduled for either Wednesday, Nov. 6 at 8 a.m. or Thursday, Nov. 7 at 4:30 p.m. (Yes, that’s right! Two chances to make it happen!) Pick your preference and put it on your calendar if you want to attend. While you are at it, add —
   • Tuesday, Dec. 3 at 8:00 a.m. or Wednesday, Dec. 4 at 4:30 p.m. — Habit 3
   • Wednesday, Jan. 8 at 8 a.m. or Monday, Jan. 6 at 4:30 p.m. — Habit 4

2. Consider committing to the series and make a commitment to yourself. Although you are not required to attend the entire series, clearly you are reading this article because you are interested. It’s no surprise that you are interested, because each of us can stand to have more efficiency, satisfaction and, yes, happiness in our lives. So why not provide yourself with the opportunity to take action toward such very worthy goals for yourself. It’s clearly up to you, but aren’t you worth it?

3. Buy the book. Although you do not

(Continued on page 34)
AUGUST PRO BONO HEROES

We thank these generous and committed attorneys who accepted a pro bono case from the Pro Bono Project at Nassau/Suffolk Law Services last month!

Kerrie Stone
Denise Snow
Lewis Silverman
Christine Shiebler

If you would like to join this elite team of volunteers, call us to find out how you can help. Case acceptance is always voluntary. Thanks to the SCBA and Suffolk Academy of Law, you will receive CLE credit and a voucher for a CLE course. Please contact Carolyn McQuade (631) 232-2400 ext. 3325.

PRO BONO

CELEBRATE PRO BONO www.celebrateprobono.org National Pro Bono Celebration October 20-26, 2019

As we celebrate National Pro Bono Week, we honor the generosity of our volunteer attorneys who give back to their community. On October 23, 2019, a Pro Bono luncheon hosted by the Suffolk County Bar Association will acknowledge the attorneys who provided free legal services to the less fortunate members of our community during the past year.

The Suffolk County Pro Bono Project, a collaboration between Nassau Suffolk Law Services, the SCBA, and the Suffolk County Pro Bono Foundation, is privileged to welcome the Honorable Edwina G. Mendelson as the keynote speaker at the luncheon. Judge Mendelson heads the newly expanded Office of Justice Initiatives, which is tasked with ensuring meaningful access to justice for all New Yorkers in civil, criminal and family courts. Hon. C. Randall Hinrichs, who is a steadfast supporter of the Pro Bono Project and its participants, will also congratulate the pro bono attorneys being honored. Professor Lewis A. Silverman will receive a special acknowledgment for having given unstintingly of his time and family law expertise for the last decade. As both a family law clinical professor and a hearing examiner, his insights and skills have been invaluable to the Suffolk County Pro Bono Project. This year, we are also honoring Marta A. Dosso, who is the NSLS Director of Communication and Volunteer Services and will be retiring after 33 years of service.

During Pro Bono Week, the Suffolk County Pro Bono Foundation has generously offered to underwrite the tuition of attorneys who participate in the SCBA’s upcoming Matrimonial Boot Camp CLE and who agree to accept a pro bono divorce case within the next three months. The CLE is being held on Thursday, Oct. 24, with a stellar faculty, and will feature an improved format, being offered in the afternoon and the evening of the same day. The afternoon will be an overview of the divorce process focusing on the preliminary conference, financial issues, discovery and motion practice. The evening session will be an interactive evidence workshop. Topics will include objections, types of evidence and authentication practice. Program details can be found at www.SCBA.org (click on MCLE tab on the left side of the website). Participants will get 3.5 Professional Practice Credits and 0.5 ethics credits for the afternoon session, and the evening session participants will get 2 Professional Practice Credits. It is possible to attend either session or both. Please join us!

Finally, we wish to acknowledge the continuing efforts of our Suffolk pro bono attorneys who are involved in the Community Legal Help Project. As a component of The New York State Permanent Commission on Access to Justice’s Strategic Action Plan for Suffolk, the Community Legal Help Project was born in the summer of 2018. The Project continues to enlist the efforts of local legal service providers and especially, pro bono attorneys. Currently the Suffolk partners include: Nassau Suffolk Law Services, The Victim Information Bureau, The Suffolk County Bar Association, The Long Island Advocacy Center, The Empire Justice Center and Touro Law Center. Pro Bono attorneys play a critical role in providing free consultation and referral services, operating out of Suffolk County’s public libraries to help ensure that residents receive effective assistance in addressing their essential legal needs. Call (631) 822-3272 to volunteer or schedule a consultation.

We are very grateful and proud of the generous pro bono attorneys who are responsible for making these efforts a success. The pro bono spirit is certainly alive and well on Long Island!

IMMIGRATION

Tougher ‘Public Charge’ Rules Create New Hurdle For Immigrants

By Cathy-Lee Ellison

Ever since they started arriving on Ellis Island, immigrants have been required to show that they would not become a “public charge,” by relying on public assistance programs. New guidelines have been issued by the Trump administration with respect to the public charge rules.

The changes in the public charge rule by the U.S. Department of Homeland Security, effective on Oct. 15, 2019, allows a higher level of scrutiny based on an applicant’s use of public assistance programs.

Key changes

The rule expands the programs that the federal government will take into consideration in determining whether an immigrant is likely to become a public charge, and now includes certain health, nutrition, and housing programs. Specifically, the rule adds health care, food stamps, cash assistance and public housing programs to the list of public benefits that could be used against immigrants seeking to be admitted to the United States or adjust status. It also increases an applicant’s income to 250 percent of the federal poverty level. In addition, the rule also redefines public charge and public benefits to include programs that were previously not included in public charge decisions. The rules exclude as a public benefit subsidies for Affordable Care Act Marketplace coverage. Additionally, the rule only allows consideration of benefits used directly by the applicant, and not benefits used by an applicant’s children or other household members. The rule is not retroactive and applies only to certain benefits obtained after Oct. 15, 2019. Any immigrant who has relied on public benefits should consult an experienced immigration attorney.

CONSUMER BANKRUPTCY

Strike One, Strike Two, Strike Three . . . You’re Out!

By Craig D. Robins

In the past six months, Judge Alan S. Trust, sitting in the Central Islip Bankruptcy Court, issued just two written opinions, yet both addressed the mortgagee fi led a motion for relief which the court granted. This time the debtor took the financial management course and she received her discharge in December 2018.

One wonders whether the debtor was irresponsible in failing to take the financial management course during the first filing or brilliantly deceptive since the court closed her case without a discharge, she was able to refile a second Chapter 7 case and essentially get an extra half-year in the house before the next foreclosure sale.

In any event, the mortgagee scheduled its third foreclosure sale for February 2019, and again, on the eve of foreclosure, the debtor filed another bankruptcy case, her third, although this time she fi led under Chapter 13 and this time she represented herself pro se.

The mortgagee quickly fi led another motion for relief from the stay, except this time the mortgagee sought in rem relief. In rem relief is the prospective relief that will apply to others who may file a petition and invoke the automatic stay as to the same property. At the hearing in April 2019, Judge Trust observed that the debtor had not made a single payment since 2012, the original $400,000 mortgage had swelled to over $800,000, and

(Continued on page 35)
Demystifying the Grievance Process

By Mitchell T. Borkowsky

My experience as counsel to the Tenth District Grievance Committee left me with a firm conviction that attorneys, as a rule, are dedicated to representing their clients and upholding the standards of the legal profession with integrity and skill. The Long Island local community, in particular, is comprised of some of the highest caliber individuals, and it has been my honor to get to know many of you, both professionally and personally. It has also been my experience that the grievance process remains a mystery to attorneys and non-attorneys alike. The reactions I receive when discussing my former work at the grievance committee or my current endeavors as disciplinary defense counsel are revealing, if not consistent. Some give blank stares; some express hostility; some walk away, half-joking that they do not want to speak with me; while others take the opportunity to discuss issues, seek guidance, or express regret (or relief) over a former colleague who ran into difficulties and is no longer practicing. Others, particularly non-attorneys, are often intrigued and surprised by the mere existence of an attorney regulatory body and process.

One of the most frequent comments I hear from both attorneys and non-attorneys is something along the lines of: “Oh, you mean like when attorneys steal escrow money,” as if escrow defalcations are the only issues giving rise to grievance investigations and prosecutions. Perhaps that is to be expected, as the figurative and real damage resulting from the misappropriation of client funds or other property by an attorney (or any fiduciary for that matter) is so tangible that everyone understands and appreciates the implications. For that reason, the Appellate Divisions historically have viewed cases involving the unauthorized practice of law as the most serious offenses and do not result in formal charges of misconduct or Appellate Division intervention. However, it might surprise you that escrow-related investigations are his own. He may be reached at Mitch@myethicslawyer.com

The last thing to do, however, is to ignore the matter and hope it will resolve itself. The grievance committee and their professional staff are dedicated to doing justice, and all complaints are taken seriously. The overwhelming majority of complaints are privately resolved following investigation and do not result in formal charges of misconduct or Appellate Division intervention. Too frequently, however, the failure to respond adequately, or respond at all, escalates an otherwise benign or limited inquiry into something more serious. If you become the subject of a grievance, do not panic or hide your head in the sand. There is a process, and although it may take some time and effort, your cooperation and candor will go a long way toward, hopefully, a favorable resolution.

Note: Mitchell T. Borkowsky is the former Chief Counsel to the New York State Grievance Committee for the Tenth Judicial District of the Supreme Court, Appellate Division, Second Department. His law firm provides representation to lawyers being investigated or prosecuted by the state grievance committees for alleged ethical or professional misconduct. The firm is also available to represent disbursed or suspended attorneys seeking reinstatement to the bar, as well as to assist law school graduates in the admissions process, particularly where there may be concerns over past conduct. Mr. Borkowsky can be reached at Mitch@myethicslawyer.com

Health (Continued from page 13)

...
The Courts in Suffolk County Mark Sept. 11 Anniversary

By Jane LaCova

Bagpipers began the ceremony that marked the 18th anniversary of the attacks of Sept. 11, 2001. The Honorable C. Randall Hinrichs, District Administrative Judge of Suffolk County Courts, addressed crowds at the Cromarty Court Complex in Riverhead as well as the John P. Cohalan, Jr. Court Complex in Central Islip. He also paid tribute to the heroism displayed by members of the New York State Court family, both during the initial response, as well as the rescue and recovery efforts in the weeks and months that followed. SCBA Treasurer Cornell V. Bouse sang “Living in the Promiseland,” accompanied by Allan Stewart on the keyboard and the Honorable William G. Ford on bass.

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

FREEZE FRAME

It’s official!

Cooper Block, the son of Immediate Past President Justin Block started kindergarten. Courtesy Justin Block
You’ve got to know when to hold em . . . know when to fold them

By Jane LaCova

Casino Night at the Suffolk County Bar Association, hosted by the Suffolk County Bar’s Charity Foundation, was a big success. The Great Hall of our bar association was all decked out as a casino with roulette, blackjack, craps and poker tables in a bar setting supplied by the Joka’s Wild Casino. The food was supplied by Fireside Caterers, the wine by Vindagra USA and the beer by The Brickhouse Brewery (thank you Debra Byrnes). Thank you to the many sponsors, colleagues and friends who attended or contributed raffle baskets to make this fundraiser the smashing success that it was. A shout out to the members of the Charity Foundation, the Counselors Who Care, as they like to call themselves, dressing up as barmaids in a roaring twenties style.

Please make sure you all attend the next fundraiser at the end of this month — their annual Spooktacular Halloween Party — on Friday, Oct. 25, at 6 p.m. where the Bar Center will be transformed into the spookiest Great Hall ever!!

Note: Jane LaCova is the executive director of the Suffolk County Bar Association.
son spoke about the Speakers Bureau that he and Cornell V. Bouse, the Association’s treasurer, chair.

“The Speakers Bureau affords us an opportunity to go out to schools, libraries and organizations to talk on a wide variety of topics,” Judge Robinson said, “from veterans affairs to specialized treatments court. It can give us an opportunity to reach out and have an impact on our community.”

He went on to ask everyone to consider how they can contribute to the bureau and asked that members let him and Mr. Bouse know of areas of interest that they would like the SCBA to share with the community.

“We have a list,” Mr. Bouse added. “Fill in your area of practice and then we will match areas of expertise with the proper vendor. This is to fulfill the community’s thirst for knowledge and put a shine on the SCBA.”

Donna England, a past SCBA president, spoke about the Lawyer Referral Service, referring to it as the biggest benefit of the Association. “By joining you will receive clients,” she said. “Your name will be put on a rotating list and you can pick the areas you want to be considered for.”

The Online Community Lawyer allows for someone to go online and see the profile of three different lawyers, Ms. England continued. Then the Community Lawyer will send an email to the attorney sharing information on who is interested in their services. The attorney will provide a brief consultation for $25. “It is my hope that we will be able to advertise more about Lawyer Referrals in the community,” Ms. England said.

Past President Sheryl Randazzo began the Leadership Summit by defining the word “leadership.” It’s the art of motivating a group of people to act toward a common goal, she said. “We are all in the positions we are in because we have leadership qualities.”

Then the three respected panelists, Suffolk County District Administrative Judge C. Randall Hinrichs, Judge Chris Anne Kelley and Patrick McCormick shared their experiences as leaders.

Ms. Randazzo asked when they first realized they were leaders. Judge Kelley said she didn’t think of herself as a leader. “If I’m passionate about an issue or ideal I will take action around that,” she said.

Ms. Randazzo asked how a leader can make a meeting productive. Mr. McCormick said he hates meetings because most of the time the purpose of having the meeting is not accomplished. “I try to have a specific goal at a meeting and prepare,” he said. “I listen to feedback at the meeting and always leave time to address something that comes up.”

Judge Hinrichs said he makes certain that he is prepared for a meeting and is aware of the issues in advance. “You have to be willing to change your position based on what you hear at the meeting,” he said.

Then Ms. Randazzo asked the panelists to share what they believe are important leadership qualities.

Judge Kelley said one needs to be an effective communicator and learn confidence.

Judge Hinrichs said that motivating people is important. “You have to maintain your personal integrity when you are working with people,” he said. “You can’t ask them to do something you won’t do yourself.”

Mr. McCormick said it’s important to be mindful of who is on the team. “Everyone on it has different skillsets,” he said. “You need to get everyone in the right spot.”

Later the panelists shared who inspired them and their favorite quotes on leadership. By then they had, no doubt, inspired many people at the Association.

Note: Laura Lane is the Editor-in-Chief of The Suffolk Lawyer. She is an award-winning journalist who has written for the New York Law Journal, Newsday, and is currently a senior editor for the Herald Community Newspapers and the editor of the Oyster Bay Guardian, Glen Cove and Sea Cliff/Glen Head Herald Gazettes.
Summer Has Ended, it’s Time to Learn!

By Peter Tamsen

As we all know the Continuing Legal Education season really kicks into high gear with the turn of the calendar page from August to September. The summer season is always a lighter calendar for the Academy.

As dean of the Academy I am responsible for monthly articles for The Suffolk Lawyer. I am learning the print media timetable so that I can try my best to prepare timely articles that might actually make it into the paper.

I have heard from many colleagues seeking to fulfill their CLE requirements. The fall is when they look to get the needed credits.

The Academy has many ways to help all attorneys to stay compliant with the requirements of mandatory continuing education. While the best method to achieve your credits, from my perspective, is attending a live program at the Bar Center or the courthouses, other options are readily available.

In addition to live programs, the Academy offers webcasts of live programs, DVD’s and audio replays of prior programs. The Academy has an online catalog of recent programs from which to choose. The offerings in the catalog include the tough to find ethics and diversity credits which are mandatory. These replays fit the individual’s time schedule and can be watched at any desktop location. If you have viewed the webcast or replayed past programs you might have found them to be deficient because the audio was less than great.

That problem has been resolved! This past summer the Great Hall was outfitted with an entirely new audio system. Long gone are the audio drops that made it hard to hear the panel. Also gone is the need to rise from your seat to pose a question to the panelists at a live program. In the past you had to get up to the microphones in the center aisle. That is no more. The Great Hall has been outfitted with microphones throughout the room that have eliminated that need to use the center aisle microphones. Be careful, almost any comment can be picked up by the new microphones.

Now back to those lectures in the Great Hall. The calendar of CLE programs is readily available on the Suffolk County Bar Association’s website, but for those that don’t care to look at the website here are some upcoming programs that you don’t want to miss.

Starting in October of 2019, the Academy has 14 programs. Some of those that should be noted are the “Back to Basics” programs. These programs are intended to help newly admitted attorneys as well as those seeking to refresh their skills set. Remember you don’t know what you forget until you learn it again.

October is also Domestic Violence Month. As such, the Academy offers many programs that address domestic violence. I make the same statement with respect to the “Domestic Violence” programs as the “Back to Basics” programs.

Everyone should take one of these programs to learn about domestic violence. It is essential to learn how to identify it, address it and assist those that need the help of our profession if they are suffering from some form of domestic violence. Please take one of these domestic violence programs and I am sure the knowledge you gain will prove to be beneficial in your career.

Other October programs that are out of the norm for the Academy is a program on Oct. 28 on the topic of “Asset Protection.” This is a “can’t miss” program for anyone over the age of 50. Take the program and learn how to preserve the fruits of your labors and those of your client in the future.

I urge every member to use the Academy as the go-to source of CLE credits.

Note: Peter D. Tamsen is the Dean of the Suffolk Academy of Law. He is presently engaged in private practice maintaining an office in Bay Shore where he represents parties in residential and commercial transactional real estate matters. He is past chair of the Suffolk County Bar Association Animal Law Committee and is a member of the Bar Association’s Grievance Committee and District Court Committee.
The Academy of Law would like to thank the following sponsors for their generous support.

A THANK YOU!

The staff at the SCBA would like to thank Andrew Lieb, of Lieb at Law, P.C., attorney, entrepreneur, educator, for taking the time out of his busy schedule to give us the required N.Y. State/NYC Sexual Harassment Prevention Training for 2019/2020.

Lieb Complaisance is HR’s one-stop sexual harassment solution in full compliance with NYS Labor Law §201-g and NYC Local Law 96. His firm offers web-based, on-demand, full-video trainings, company branded complaint forms and sexual harassment policies with digital receipts to defend prospective litigation and address Department of Labor audits.

Offering Lawyer’s Professional Liability Insurance

We provide quotes from A rated insurance carriers, to protect your firm with favorable terms and competitive premiums. Please visit insuranceforlawyers.net and complete our application. Or send us a copy of another application recently completed for a different insurance company.

You may scan and email the application to: ken.sciara@outlook.com or mail it to:
The KS Agency, LLC at 396 Pecan St. Lindenhurst, NY 11757
Call Ken at 646-641-6224

Ken Sciara, President of The KS Agency, is an attorney and insurance professional with over 30 years of experience. He is a graduate of New York Law School and a member of the New York Bar. Ken has been serving the risk management and insurance needs of law firms and law schools for over 25 years.
2020 New York State Mock Trial Tournament

The Suffolk County Bar Association wants you...

Are you interested in becoming a volunteer Judge or an Attorney Mentor to Suffolk County High School seniors participating in the annual NYS Mock Trial competition? Approximately twenty-six teams from Suffolk County will participate. This annual competition takes place February - April on Wednesday afternoons at approximately 2:30 p.m. in the following locations:

- Round I – At numerous Suffolk County High Schools
- Round II - District Court, Central Islip
- Semi-Final & Final – March and April locations TBD

Attorneys/Judges may claim CLE credits for participating in this mock trial event.

No experience necessary and it’s a lot of fun!

Please forward to the attorneys in your organization. If you are interested and available please contact Cynthia Doerler at cynthia@scba.org or 631-234-5511 x229 by November 1, 2019 to sign-up.
Legal Research in the 21st Century

Thursday, October 10, 2019
5:45 p.m. – 8:30 p.m.
3 Skills
360 Wheeler Road, Hauppauge

In the 1980’s computer-assisted legal research systems were introduced and began to revolutionize legal research. Over the past few years, the pace of change has increased exponentially. Today, a variety of technology-based tools for legal research and analytics are available for law firms—large, small and solo. This CLE program will introduce you to a variety of new legal research tools to help small and solo practitioners compete with larger firms. See how various tools work in real-time demonstrations.

Faculty:
Camille Broussard, Esq., Associate Dean & Law Library Director, New York Law School
Irene Crisci, Esq., Law Library Director, Touro Law School
Lisa A Spar, Esq., Law Library Interim Director, Hofstra Law School

Program Moderator:
Kenneth Allen Brown, Esq., The Law Firm of Kenneth Allen Brown, PLLC

Sponsored by:
ROSS Intelligence Inc.
www.ROSSintelligence.com

Domestic Violence Awareness Month:
The Suffolk Academy of Law

In partnership with
The Suffolk County Women’s Bar Association
and Judicial Committee on Women in the Courts
Family Offenses vs Criminal Complaint: How to advise your client

Wednesday, October 16, 2019
12:45 p.m.– 2:00 p.m.
Central Islip Courthouse, Central Jury Room

Join us in this extraordinary partnership effort during Domestic Violence Month for a series of CLE programs that focuses on the impact domestic violence has on the lives of survivors and resources available. This lunch and learn program focuses on family offenses vs crimes; what to do if the complaint is civil to provide relief and end the violence, interviewing the victims, drafting the petitions, and use of evidence.

Faculty:
Roseann Orlando, Esq., Court Attorney Referee, Family Court
Kathy Small, Esq., Mazzara and Small, P.C.

Moderators:
Hon. Isabel Buse, (Ret.) Support Magistrate
Shari Lee Sugarman, Esq., President, Suffolk County Women’s Bar Association

Make the point - Win your case!
Communicate with Clarity, Force & Impact
Wednesday, October 16, 2019
4:00 p.m. – 5:30 p.m.
SCBA, Hauppauge

Join veteran Dale Carnegie Trainer, Lou Paolillo, J.D. for practical insights on effective presentation techniques and skills tailored especially for Suffolk County Bar members. This highly informative and interactive 90-minute session will introduce key ideas, strategies, and tactics you can apply to important meetings, the courtroom, and otherwise within your practice to help you persuade a jury, prove your evidence, win the case and make your point!

Who Should Attend?
• Lawyers who want to communicate more effectively with their clients and/or adversaries.
• Trial Lawyers wishing to improve courtroom presentation skills.
• Lawyers who recognize the benefit of improving their communication/presentation skills in any forum.

RSVP required by October 11th
Seating is limited and attendance will be permitted on a first come, first-served basis
Faculty:
Lou Paolillo, J.D., Dale Carnegie Trainer
Moderator:
Patrick McCormick, SCBA Secretary

October/November 2019 CLE Programs

“Back to Basics”

September 2019 – January 2020 ● 6:00 – 7:45 p.m.
SCBA Center, Hauppauge

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<td>November 6, 2019</td>
<td>Criminal Law</td>
<td>Hon. Eric Sachs</td>
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Legal Research in the 21st Century

Thursday, October 10, 2019
5:45 p.m. – 8:30 p.m.
3 Skills
360 Wheeler Road, Hauppauge

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Faculty:
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Program Moderator:
Kenneth Allen Brown, Esq., The Law Firm of Kenneth Allen Brown, PLLC

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(continued on next page)
Domestic Violence Awareness Month: The Suffolk Academy of Law

In partnership with The Suffolk County Women’s Bar Association and Judicial Committee on Women in the Courts
Beyond What You Think is Domestic Violence
Tuesday, October 22, 2019
12:45 p.m. – 2:00 p.m.
Central Islip Courthouse, Central Jury Room

This lunch and learn program focuses on meeting the needs of underserved populations such as the elderly and the LGBTQ+ communities.

Faculty:
- Arlene Markarian, Esq., Unit Chief, Elder Abuse Unit, Nassau County District Attorney’s Office
- Francine H. Moss, Esq., Judd & Moss, P.C.

Moderator:
- Hon. John J. Leo, J.S.C.

Please consider donating an item for The Retreat shelter
(men’s and women’s toiletry items, children’s socks and pjs)

2019 CPLR Update

Tuesday, October 22, 2019
6:00 p.m. – 8:45 p.m.
SCBA, Hauppauge
With Professor Patrick Connors

A comprehensive overview of amendments and updates to the CPLR and decisions affecting civil practice over the past year. Issues that will be covered include:

- Court of Appeals addresses longarm jurisdiction for claim involving negligent sale and distribution of firearms in Ohio
- Court of Appeals addresses application of CPLR 205(a) when first action is dismissed for failure to comply with a procedural condition precedent
- Court of Appeals addresses penalty for attorney’s violation of Judiciary Law section 470
- CPLR 2012’s “Borrowing Statute” takes another trip to the Court of Appeals and the importance it has for transactional lawyers
- Court of Appeals addresses CPLR 203(f)’s relation back doctrine when adding claim in amended pleading

Professor Patrick M. Connors, the Albert and Angela Farone Distinguished Professor of Law in New York Civil Practice at Albany Law School; Author: Siegel & Connors, New York Civil Practice (6th ed. 2018). His publications have been cited in over 200 reported cases.

Save the Date! Judiciary Night

With Honored Guest Hon. Alan D. Scheinkman Presiding Justice, Appellate Division, New York State Supreme Court, Second Judicial Department

The Watermill Caterers, Smithtown
6:00 p.m.
$70 per person

SCBA Pro Bono Project:

Matrimonial Boot Camp
Thursday, October 24, 2019
SCBA, Hauppauge

Part I - 2:00 p.m. – 5:45 p.m.
1:30 p.m. registration

Part II - 5:50 p.m. – 8:00 p.m.
5:30 p.m. registration

Any participant who agrees to accept a pro bono divorce case within three months following the CLE, will have their tuition waived. If a volunteer attorney so desires, we can obtain mentors to assist in the pro bono case. All pro bono cases entitle you to malpractice coverage for the case.

This program is a comprehensive presentation for attorneys, especially those new to matrimonial law. The program will be in two parts: Part I will include an overview of the divorce process in law and practice, financial issues including discovery strategies, imputing income and calculating child support and spousal maintenance, and net worth and preliminary conference/motion practice. There will be a presentation on representing the domestic violence client followed by a presentation on negotiating with the Pro Se litigant and suggestions for drafting the agreement. Part II will feature an interactive evidence workshop, including legal issues and demonstration of procedures to ensure that your best case is presented. Topics will include: hearsay and objections, physical evidence, demonstrative evidence, photographs, self-authenticating documents, etc.

Faculty:

Program Coordinators:
- Lewis A. Silverman, Esq., Louis Sternberg, Esq.

Criminal Law Update

Friday, October 25, 2019
1:00 p.m. – 4:00 p.m.
Nassau County Bar Association, 133 15th Street (15th & West Sts.), Mineola, NY

Presented jointly by the Suffolk Academy of Law and the Nassau County Law Association

A comprehensive review of recent Criminal Law and Procedure, New York and Federal appellate cases and recent legislation. You will hear about:

- New Legislation: The Criminal Justice Reform Legislation, effective January 1, 2020 ( Bail, Discovery, Speedy Trial, and more)
- Mitchell v. Wisconsin (DWE: unconscious driver, implied consent & exigent circumstances)
- Garza v. Idaho (ineffective assistance and appeals waivers)
- People v. Ulett (Brady and surveillance video)
- People v. Hill (DeBour and street encounters)
- People v. Crespo (Pro Se representation)
- People v. Meyers (O’Rama revisited)
- People v. Alvarez (ineffective assistance of appellate counsel)

Faculty:
- Honorable Mark D. Cohen Supervising Judge, Court of Claims Judge, Acting Supreme Court Justice
- Kent V. Moston, Esq., Training Director, Legal Aid Society of Suffolk County

Asset Protection: Using Trusts in New York

Monday, October 28, 2019
5:00 p.m. – 7:45 p.m.
SCBA, Hauppauge

The purpose of this course is to help you implement strategies using New York trusts as a means of protecting assets. Since the federal estate tax exemption has changed the focus of estate planning, new approaches are needed to minimize state estate taxes; minimize current and future income taxes; and protect assets from future and unexpected creditors. Learn how to establish an effective asset protection strategy by re-organizing the ownership of a clients’ assets, through the use of trusts designed to dovetail with the client’s estate plan.

Faculty:
- David DePinto, Esq., DePinto Law, LLP

Private and Agency Adoptions in Family Court

Tuesday, October 29, 2019
6:00 p.m. – 8:45 p.m.
SCBA, Hauppauge

If you are involved in handling private or agency adoptions, this CLE course will provide you with information and insight into adoptions today including addressing cutting edge issues. The program will guide practitioners in navigating this area of law confidently, how to avoid contested adoptions and limiting attorney liability.

Faculty:
- Hon. Caren Loguercio, Suffolk County Family Court Judge
- Laurie B. Goldheim, Esq.
- Carla Lange, LMSW, SDSS Adoption Unit Supervisor, Child Placement Bureau
- Taryn Lukaszewski, Adoption Clerk
- Marguerite Smith, Esq.

Domestic Violence Awareness Month: The Suffolk Academy of Law

In partnership with The Suffolk County Women’s Bar Association and Judicial Committee on Women in the Courts
Assessing and Treating Children Affected by Domestic Violence
Tuesday, October 29, 2019
12:45 p.m. – 2:00 p.m.
Central Islip Courthouse, Central Jury Room

The last in the series, this CLE program focuses on the impact domestic violence has on a child’s exposure to domestic violence.

Faculty:
- Dr. Robert Goldman, JD, Psy.D

Moderator:
- Hon. Isabel Buse, (Ret.) Support Magistrate

Please consider donating an item for The Retreat shelter (men’s & women’s toiletry items, children’s socks and pjs)
Suffolk Academy of Law receives grant from the Townwide Fund of Huntington, Inc.

[Hauppauge, NY] The Townwide Fund of Huntington has awarded the Suffolk Academy of Law $1,000 in support of the Academy’s Restorative Justice – School to Prison Pipeline Symposium at the Annual Harvest Night Wednesday, October 2nd. Suffolk County Bar Association President, Lynn Poster Zimmerman, accepted the award on behalf of the Academy.

The Restorative Justice – School to Prison Pipeline Symposium will address attorneys and school district administration to bring about awareness and help reduce the number of black students, boys and students with disabilities who are disciplined unfairly because of unacknowledged bias. The Symposium will be held on Law Day, May 1, 2020 to create awareness of this troubling trend. The Academy’s purpose is to become a valued resource by developing a “Toolkit” for the legal and educational communities to better serve this population.

The Suffolk Academy of Law is a volunteer led, 501 c3 non-profit organization and has been certified by the New York State Continuing Legal Education Board as an accredited provider of continuing legal education in the State of New York. The Academy has been providing affordable quality legal education to attorneys for over 30 years.

As the educational arm of the Suffolk County Bar Association, the Suffolk Academy of Law seeks to improve the quality of legal services to the public by providing a comprehensive curriculum of continuing legal education that will help practicing attorneys, members of the judiciary, and legal paraprofessionals to strengthen their knowledge and competency.

For further information, contact Cynthia L. Doerler, Academy Executive Director at cynthia@scba.org or on Facebook: https://www.facebook.com/TheSuffolkAcademyofLaw/posts/ and our website http://scba.org.
Meet Your SCBA (Continued from page 5)

the past president of the Smithtown Rotary Club and have been involved in the Smithtown to the Commercial Division, relevant Alumni Association and St. James Chamber of Commerce. I’m a regular golfer, garden and scuba dive. You can’t plan for everything, but I wouldn’t have the freedom that I have now if I was working in the city.

When did you join the SCBA? That would be in 1985 as a young lawyer. One of my bosses, Paul Ades encouraged me to join. He brought me to a meeting.

How did you get involved? It was mostly by doing committee work in the beginning.

Meet Your SCBA (Continued from page 5)

You meet other lawyers in various capacities. When you get to know people they can refer you to people. No one can know everything.

Is SCBA membership particularly helpful for solo practitioners? We have a good bar association. Being on my own without a partner it’s been helpful to be a member. The people in the Association are free about helping each other.

Cybersecurity (Continued from page 7)

strong passwords, identifying and re- porting suspicious emails, and never clicking links or downloading attachments without verification.

Practice your incident response plan

Regularly run drills of your response plan so your staff can detect and contain the breach quickly should an inci- dent occur.

You do have a cybersecurity incident re- sponse plan, don’t you?

Note: Victor John Yamaccone Jr. is an ad- vocate, trial lawyer, and litigator practicing today in the manner of a British barrister by serving of counsel to attorneys and law firms locally and throughout the United States in complex matters. He has been continuous- ly involved in computer science since the days of the first transistors in 1955 and ac- tively involved in design, development, and management of relational databases. He pi- oneered in the development of environmen- tal systems science and was a co-founder of the Environmental Defense Fund. He can be reached at (631) 475-0231, or vyanna- cone@yannalaw.com, and through his web- site https://yannalaw.com.
Avoiding Liability (Continued from page 10)

be given to the patient, the patient should be given an adequate supply of medication for that time period, the patient should be notified that their records will be made available to a subsequent treating provider of their choosing, and the patient should be notified that the physician remains available in case of an emergency circumstance. Notification of all patients by formal letter is highly recommended. Within 15 days of the date of this order, the parties must complete the discovery set forth below. On the date set forth below, which is within 30 days of the date of this order, the parties and their counsel must appear for and participate in an early settlement conference before the court, unless the parties have notified the court, in writing, of their election to proceed with Alternative Dispute Resolution in accordance with Rule 3(a) of the Rules of the Commercial Division of the Supreme Court (22 NYCRR § 202.70) and the Suffolk County Supreme Court Commercial Division Mediation Program.

This order requires the early exchange of targeted, core discovery, and is intended to frame issues for resolution through an early settlement conference. All discovery produced in accordance with this order will be deemed part of discovery under the Civil Practice Law and Rules. The parties’ discovery responses in accordance with this order are subject to the amendment and supplementation requirements of CPLR 3101 (b). Accordingly, it is

ORDERED that within 15 days of the date of this order the parties shall exchange all documents in their possession relevant to the claims or defenses asserted including, but not limited to, contracts, invoices, bills, receipts or other proof of payment, estimates, change orders, statements, emails, photographs and videos, and proof of damages; and it is further

ORDERED that within 15 days of the date of this order the parties shall exchange the names and contact information of all witnesses; and it is further

ORDERED that within 15 days of the date of this order the parties shall exchange the following, if applicable:

1. Accident reports (including police reports) regarding the underlying accident;
2. The coverage limits of any applicable insurance agreement(s);
3. All photographs and videos depicting the accident, damage to the vehicles involved, injuries sustained by the plaintiff(s), or the accident scene;
4. The names and contact information of all witnesses;
5. Statements of adverse parties;
6. Invoices, bills, or repair estimates for all vehicles involved in the accident, and it is further

ORDERED that within 20 days of the date of this order the parties shall exchange the following, if applicable:

1. Duly executed authorizations permitting defendant(s) to obtain copies of all medical records relating to the injuries sustained by the plaintiff(s) as a result of the underlying accident;
2. All medical reports in the plaintiff(s) possession relating to the injuries sustained by the plaintiff(s) as a result of the underlying accident;
3. Documents supporting any claim for loss income, and it is further

ORDERED that on or before the plaintiff(s) shall be produced for depositions(s), and it is further

ORDERED that the parties and their counsel shall appear before this court’s designated representative for a settlement conference on

Dated:

Hon. Paul J. Baisley, Jr., J.S.C.
**ABLA Best Practices (Continued from page 6)**

by the Customer). If not, Providers should inform their customers, in plain language, that the form is not substantially valid, or of any possible limitations on enforceability, in the intended jurisdiction and what steps can be taken to make it valid, including if necessary the reten-
tion of a lawyer. Providers may limit their warranties to “as is” warn-
ties, using notifications consistent with Best Practices Guideline 2.

4. Providers should keep their forms up-to-date and promptly account for material changes in the law. Providers should notify Customers or poten-
tial Customers as to when their forms were last updated.

5. If a Provider selects the service agent for a form, the Provider should not disclaim legal responsibility for the proper recording or filing of the document, and should disclose the fees charged by or for the use of such service agent.

**Protection of their Customers**

6. Providers should notify Customers of the 31 terms and conditions of their relationship to the Provid-
er, and Customers should have the opportunity to actively manifest their assent (such as clicking on an “accept” button) to those terms and conditions.

7. Providers should notify Customers of all of the ways (if any) they intend to use and share Customers’ information with third parties.

8. Providers should notify Customers that the information Customers provide is not covered by the attorney-client privilege or work product protection.

9. Providers should make reasonable efforts to prevent the inadvertent or unauthorized disclosure of or unau-
thorized access to Customer information. In the event of a significant data incident or breach the Provider should use reasonable remedial and notification efforts and otherwise comply with applicable data security statutes or other data security protections in a Customer’s jurisdiction.

10. Providers should notify Customers: (a) how long they intend to keep and maintain Customer information pro-
vided to them; (b) how long the Provider will keep and maintain a com-
pleted form; and (c) how long the Provider will allow Customers access to their completed form with-
out imposing a new or additional charge.

11. Providers should not charge Customers an excessive fee for their services.

**Recommendation of Attorneys to Assist**

12. Providers should notify their Customers that their forms are not a substitute for the services of a law-
er, and that Customers may benefit from the services of a lawyer in any legal transaction.

13. Providers should not advertise or describe their services in a manner that suggests their forms are a sub-
stitute for the advice of a lawyer.

**Dispute Resolution**

14. Providers should notify their Customers of their legal name, address and email address to which Customers can direct any complaints or con-
tacts about the Provider’s services.

15. Providers should provide a forum convenient to the Customer for reso-
lation of any dispute. Providers should offer inexpensive, efficient and effective dispute resolution, ei-
ther in court, arbitration, or mediation, andinality, including, without limitation, local ADR or court proceedings, online dispute resolution or similar means. Providers should not impose lawyer fee or cost shifting to the Customer in any such proceeding. Providers should not unreasonably delay the resolution of disputes with Customers.

In addition to Resolution 10A, the House of Delegates approved a number of other important resolutions, including the fol-
lowing: calling for appropriate legislation and funding to ensure equal access to jus-
tice for Americans living in rural commu-

nities by ensuring proper broadband ac-
cess; calling for appropriate legislation and regulation limiting the possession of fire-
arms in courthouses to only those persons necessary to assure security; urging legal employers to implement and maintain poli-
cies to close the compensation gap be-
tween similarly situated male and females; urging courts and bar associ-
atations to carefully review policies on use and admittance of cellphones in courthous-
es, to ensure meaningful access to our ju-
dicial system, and balancing the security risks posed by cellphone use and the needs of litigants.

During the House of Delegates meeting, outgoing ABA President Robert Carlson, of Montana, passed the presidential gavel to incoming President Judy Perry Marti-
nez, of Louisiana.

The next meeting of the ABA House of Delegates will take place in February 2020 in Austin, Texas.

On a personal note, the San Francisco meeting was my last as the Suffolk Coun-
ety Association’s delegate to the ABA House of Delegates. I have had the privi-
lege of serving in that capacity since 2006, and I am thankful to the SCBA for having afforded me the opportunity to do so. How-
ever, having assumed the office of Presi-
dent Elect of the New York State Bar Asso-
ciation on June 1, 2019, and in preparation for my term as President of NYSBA begin-
ning on June 1, 2020, I have stepped down as SCBA delegate and become a NYSBA delegate to the ABA, effective at the con-
clusion of the 2019 San Francisco annual meeting.

**Note:** Scott M. Karson is the former dele-
gate from the Suffolk County Bar Asso-
ciation to the American Bar Association. Mr. Karson is a for-
mer president of the SCBA and currently serves as President Elect of the New York State Bar Association. He will become President of NYSBA on June 1, 2020. He is a partner at Lamb & Barnsley, LLP in Melville, where he concentrates in appel-
late litigation.

The term “online legal documents and forms” or “forms,” refers to documents and forms made available on the internet, ei-
ther for sale or free-of-charge from for-profit or not-for-profit enterprises, including lawyers or law firms (through ancillary businesses or oth-
wise), to members of the public who wish to engage in legal transactions (including, without limitation, real estate sales, purchase-and-sale transactions, corporate or partnership forma-
tion or structuring, wills, trusts, deeds, patent and trademark filings and the like) and/or to use or file in litigation (including, without limi-
tation, form pleadings, releases, discovery re-
quests, jury trial demands, and the like without engaging a lawyer. This includes both static forms and forms created using an online docu-
ment assembly process. This does not include: (a) forms prepared by lawyers, law firms, or le-
gal services organizations for those with whom they have bona-fide client-lawyer relationships; (b) forms primarily prepared for or market-
ed to lawyers, either as part of legal treaties or otherwise; or (c) forms prepared by courts, court systems, court-related self-help centers, or government agencies. These Guidelines are not intended to address other online document marketplaces primarily addressed by other pro-
essionals, including without limitation tax fil-
ings and title searches.

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**International (Continued from page 8)**

its holding regarding the U.N. failing within Section 666’s definition of an organization.

Ng argued the FCPA requires proof of an official act satisfying the McDonnell stan-
dard and the district court’s jury instruction failed to satisfy that standard. At issue in McDonnell was whether “arranging a meet-
ing, contacting another public official, or hosting an event — without more — con-
cerning any subject, including a broad pol-
ICY issue such as Virginia economic develop-
ment,” qualified as an “official act” as defined by 18 U.S.C. Section 201(a)(3). In hold-
ning these actions did not qualify, the Supreme Court reversed McDonnell’s convic-
tion and identified two requirements in the statutory text to prove an official act un-
der Section 201: first, the government must identify a “pending” question, matter, pro-
cceeding, or controversy that involves the “formal exercise of governmental power.” Second, the government must prove the

<table>
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<th><strong>Annual Meeting</strong></th>
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<td><strong>Note:</strong> The ABA Annual Meeting is held annually and is a significant event for the legal profession. It provides opportunities for networking, education, and the latest developments in the legal field.</td>
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Bench Briefs (Continued from page 6)

compel the defendant to appear for a deposition.

In rendering its decision, the court noted that in opposite to plaintiff's application, defendant contended that the relief sought was improper due to the mental incapacity of the defendant. The defendant provided a note from the defendant's doctor, indicating that the defendant suffered from Aphasia and dementia and is unable to create coherent thoughts and her cognitive impairment rendered her unable to answer or respond to questions. The court further stated that the defendant shall be precluded from testifying at trial of the matter if she failed to testify at a deposition within 45 days of the subject trial.

Honorable Martha L. Luft

Motion to renew denied; claimed new law was in effect for two weeks at the time of the decision.

Who's Your Expert (Continued from page 8)

both defense experts were qualified to offer expert testimony. However, the court found that “defendants failed to show” that the testimony of their experts “was based on sufficient facts or data, the product of reliable principles and methods, and that such methods were reliably applied to this case.” The court noted that absent from Mr. Grace’s expert report was any mention that he actually examined, measured or evaluated the plaintiff’s actual crossbow or that another crossbow of that same model. Also missing was any mention that Mr. Grace had attempted to reconstruct the incident or test this theory, or that he even watched a video of the plaintiff using the crossbow before opining that she did so incorrectly. As for external sources of data relied on, Mr. Grace conceded that he relied solely on the plaintiff’s deposition testimony. With the lack of information, the court concluded that “the foundation” of Mr. Grace’s causation opinion “too unstable ground to pass muster under Daubert.”

As for Mr. Van Hume, the court concluded that his methodology of simply reviewing the plaintiff’s complaint and deposition testimony, the crossbow owner’s manual and caution sticker, photographs of the plaintiff, and the plaintiff’s expert disclosures was “not a reliable method for [the expert] to opine on what he believes occurred on the day of the incident and caused [the plaintiff’s] injury.” Indeed, the court determined that the expert’s opinion as to what he believed caused the plaintiff’s injury was nothing more than his “interpretation of [the plaintiff’s] deposition transcript.” Allowing such testimony could usurp the role of the jury. The court also found that Mr. Van Hume’s failure to inspect or test the actual crossbow or any crossbow in connection with the matter was fatal, because without any such testing, the court “simply cannot allow [the expert] to testify about the cause of this specific incident.” That being said, the court did not deliver a complete blow to the defense. It noted that Mr. Van Hume’s experience rendered him qualified to testify generally about causation. He could not offer any causation opinion about the plaintiff’s injury. It seems to me that the lesson learned here is that you can’t take a “shot in the dark” or “shoot from the hip” when it comes to presenting expert testimony.

Shoot From the Hip (Continued from page 8)

As for Mr. Van Hume, the court concluded that his methodology of simply reviewing the plaintiff’s complaint and deposition testimony, the crossbow owner’s manual and caution sticker, photographs of the plaintiff, and the plaintiff’s expert disclosures was “not a reliable method for [the expert] to opine on what he believes occurred on the day of the incident and caused [the plaintiff’s] injury.” Indeed, the court determined that the expert’s opinion as to what he believed caused the plaintiff’s injury was nothing more than his “interpretation of [the plaintiff’s] deposition transcript.” Allowing such testimony could usurp the role of the jury. The court also found that Mr. Van Hume’s failure to inspect or test the actual crossbow or any crossbow in connection with the matter was fatal, because without any such testing, the court “simply cannot allow [the expert] to testify about the cause of this specific incident.” That being said, the court did not deliver a complete blow to the defense. It noted that Mr. Van Hume’s experience rendered him qualified to testify generally about causation. He could not offer any causation opinion about the plaintiff’s injury. It seems to me that the lesson learned here is that you can’t take a “shot in the dark” or “shoot from the hip” when it comes to presenting expert testimony.

Employment (Continued from page 14)

not be penalized if television screens in the facility do not have closed captioning capabilities. This is poised to be the next wave of lawsuits against public accommodations which have been battered by lawsuits for failure to make their premises and their websites accessible to individuals with disabilities in violation of the American with Disabilities Act and NYCHRA.

It is, thus, imperative to immediately inform clients operating a public accommodation of the requirements of this new law.

New York State Adds Status as a Victim of Domestic Violence as a Protected Class (S1040): Effective Sept. 8, 2019, New York state extended protections against discrimination in the workplace to victims of domestic violence. The law prohibits an employer from firing or hiring an employee or otherwise discriminating against an employee in compensation, terms, conditions or privileges of employment because of such employee’s status as a victim of domestic violence. The law also requires employers to provide specified reasonable accommodations (seeking medical attention; obtaining services from a domestic violence shelter, programs, or rape crisis center; obtaining psychological, counseling or legal services; and, taking safety measures to increase protections against future incidents of domestic violence.) Time off as a result of such accommodation may be charged against the employee’s paid-time-off (per law and/or employer’s policy). If paid time off is unavailable, an employer may treat such absence as leave without pay.

It is imperative to advise clients of these new laws so policies can be updated and employees can be trained to minimize potential exposure.

Note: Mordy Yankovich is a senior associate at Lieb at Law, P.C. practicing in the areas of Employment, Real Estate and Corporate Law. He can be reached at Mordy@liebatlaw.com.
Changes in N.Y. Rental Law (Continued from page 9)

written receipt if rent is paid in cash.[ii] Under New Subdivision (c) and (d) there is no language limiting this rule to only residential. Therefore, the new sub-division is interpreted by practitioners to apply to both residential and commercial properties. Subdivision (c) provides that receipt must be provided within specified time frames based on the tender of pay-ment. Under (d) if the landlord of prop-erty does not receive rent from the tenant within 5 days of the due date in the lease, then the landlord must first send a written notice to the tenant by certified mail and a 14-day demand notice using a process server. Failure to do so provides an affir-mative defense for the tenant. [iii]

Use and occupancy during non-pay-ment proceedings

The changes to RPAPL §745 and §749 are the most problematic to both com-mercial and residential landlords. Changes to RPAPL §745 require landlords seeking use and occupancy during a summary pro-ceeding to make a motion, which is per-mitted only after the tenant has had two adjournments and this does not include an adjournment to obtain counsel. The move can take several months to be decided leaving the landlord without a remedy and without payment. As a result, the tenant is in control of when the landlord’s right to request use and occupancy begins. [iv]

Warrant execution

Changes to RPAPL §749 (a)(2) require that a marshall give a tenant 14-day notice of execution rather than 72 hours. In ad-dition, the court may vacate a warrant at any time if the tenant cures the non-pay-ment prior to the eviction. The court even has the power to prevent the landlord from re-letting the space and or may restore a tenant after the execution of the warrant. [v]

Major changes that affect only residen-tial landlords

Extended holdover and restore

Under RPAPL §753, the court has broadened discretion to allow tenants and occupants to continue possession for a period of up to a year, increased from 6 months if they pay use and occupancy. If the proceeding is based on breach of the lease, the tenant must be given a 30-day opportunity to cure the breach after trial.

Duty to mitigate

Landlords now have a duty to mitigate damages in good faith. Seek to re-rent the apartment regardless of any lease provi-sion to avoid a loss of rent for the remain-der of the lease term. The landlord now has the burden of proof.[vi]

Coops and condos

Landlords seeking to change from rent-als to cooperative or condominiums no longer have the option of an eviction plan and are now required to obtain, under General Business Law §352-ee, “51% purchase agreements from bona fide ten-ants under a non-eviction plan,”[vii] up from the formerly required 15%, for a conversion plan to be declared effective. Tenants must be given the exclusive right to purchase with an additional six months right of refusal in the future where spon-sor intends to sell an occupied unit.

Major changes to government housing

In addition to these changes, there are significant changes to government hous-ing regulations which are significantly im-pacting the ability of owners to profit from their investments but have afforded greater protections to tenants facing mass evic-tions over the past few years. Landlords of regulated buildings have higher hurdles to deregulate, convert, and increase rent. It will be interesting to see how the im-plementation of these laws will play out in the courts. There will no doubt be push back. Either it will be broadened by case law or simply dialed back over time.

Note: Sabine K. Franco, Esq. is the principal attorney at Franco Law Firm, P.C., located in Garden City New York. Ms. Franco focuses her practice on real estate and business transactions.


[ii] See Id.


[iv] See Id.


Have You Served? (Continued from page 11)

Surrogate (Continued from page 13)

Closing (Continued from page 10)

the property and when you casually look over the title and see this objection, you start to profusely sweat as you realize Dad is needed at the closing as well as the current fee owner.

Substantively, Dad maintains a life estate, present interest in the property with the kids maintaining a remainder interest. If Dad were deceased, then a death certificate would be necessary and the kids could convey as the remaindermen. With Dad still alive, he would have to join in the sale of the property as his life estate is superior to the remainder interest held by the kids. Lucky for the attorney, Dad was available to attend the closing to join in the conveyance, as the life tenant. This is more problematic when you have the property held pursuant to a Medicaid Trust whereby the life tenant needs to join in the conveyance but without disqualifying the life tenant from benefits.

What beach rights?

Clients had owned water view property in which their adult son granted an easement to the private beach maintained by the local residents. When certain improvements were made to the beach, those who were entitled to use the beach were assessed the costs of the improvements. Neither the private beach was owned by any association nor were there any further restrictions contained in the covenants and restrictions mandating membership in any type of “beach association.” Without any restrictions appearing “of record,” the sellers had no obligation to contribute to any beach improvements.

There were no beach club dues or other mandatory assessments and any membership in or monetary contributions made on behalf of this private beach was strictly voluntary. Despite the existence of beach rights, there was no mention in the title at closing there was no need to receive any clearance on potential beach association objections and the closing went smooth as silk.

Note: Irwin S. Izen, is a solo practitioner concentrating in real estate, transactional and business law. He has served as the co-chairman of the Suffolk County Real Property Committee twice, from 2001-03 and 2009-11 and maintains his office at 357 Veterans Memorial Highway, Commack, NY and can be reached at (631) 543-3167 or at izenlaw@aol.com.

Grandma (Continued from page 13)

via the death of the borrower), but inquiring to the board should be made as soon as possible.

Whether the Co-op has a restriction on a natural person owning the shares is the first inquiry. Counsel will likely have to forward a copy of the trust (incuring a co-op attorney review fee) along with a UCC lien search (additional fee) to the management company. In addition to these fees, most management companies will treat the transfer as a normal transaction thus generating a management transfer agent fee along with the payment of any required capital contributions and outstanding maintenance charges. Lastly, the co-op may require an affidavit of occupancy from the trust as to who will be residing in the co-op.

What appeared to be a very generous and thoughtful act by your client’s grandmother has further defined your action in the transaction.

Note: Irwin S. Izen, is a solo practitioner concentrating in real estate, business and transactional law. He is currently the co-chair of the Transactional Law Committee and is the past co-chairman of the Real Property Committee. He represents both individuals and small companies in business transactions and maintains his office at 357 Veterans Memorrial Highway, Commack, New York, 11725 and can reached via email at izenlaw@aol.com.
The question of Taxpayer’s statutory residence, therefore, turned on whether he maintained a permanent place of abode in N.Y.

In fact, just prior to the years at issue, Taxpayer had purchased a house in Northville, New York, which is more than 200 miles from N.Y.C., on a northern extension of Great Sacandaga Lake in the Adirondack Park. The house had five bedrooms and three bathrooms, with year-round climate control.

It was undisputed that Taxpayer and his family used this house for vacation purposes; only Taxpayer enjoyed an occasional temporary place of abode there. Taxpayer did not maintain a permanent place of abode in Northville, because

(i) he did not reside in the house for more than 183 days during any of the years at issue; and
(ii) he did not obtain housing services required by State Law or by State Law regulation.

The issue is joined

Taxpayer filed New York State Nonresident Income Tax returns, on Form IT-203, for each of the years at issue. In response to a question on Form IT-203, Taxpayer responded that he did not maintain any living quarters within N.Y. state for either 2012 or 2013. After an audit conducted by the Department of Taxation, a notice of deficiency was issued to Taxpayer in 2016. The notice asserted additional N.Y. State Income Tax due in excess of $525,000 (plus interest and penalty) for the years at issue.

The additional liability was based upon the department’s finding that, because Taxpayer enjoyed a temporary place of abode in the N.Y. and was present within the state in excess of 183 days, he was liable as a statutory resident for income tax purposes for the years 2012 and 2013. Taxpayer protested the notice by filing a timely petition with the Division of Tax Appeals.

Unfortunately, Taxpayer didn’t stand a chance of succeeding under the current state of the law relating to N.Y. statutory residence.

Statutory residence

The NY Tax Law sets forth the definition of a N.Y. state resident individual for income tax purposes. A resident individually means an individual: (A) who is domiciled in this state, or (B) who is not domiciled in this state but maintains a permanent place of abode in N.Y. during the years at issue.

To determine whether Taxpayer was liable for N.Y. personal income tax on the basis of statutory residence. As there was no dispute that Taxpayer was physically present within N.Y. for more than 183 days — after all, he resided there on a year-round basis — the sole issue in the case involved whether Taxpayer maintained a permanent place of abode in N.Y. during the years at issue.

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

[i] Carl Icahn Is Said to be Heading to Florida for Lower Tax Rates, Bloomberg’s Daily Tax Report, Dec. 12, 2019. Another article indicated that his employees were being offered a moving allowance to back their bags and head south with him. Clearly, he has been advised that it will not suffice for him to move from NY while leaving his business behind – the business must come along too if he is to successfully demonstrate that he has abandoned his N.Y. domicile and has established Florida as his new home. https://www.taxlawforchb.com/2019/07/escape-from-new-york-it-will-cost-you/

[ii] The article could have added that New York City imposes a personal income tax on its residents at a rate of 3.876%, it also imposes a corporate tax rate of 8.95%, and a tax on nonresident businesses of 4%. https://www.taxlawforchb.com/2017/07/an-overview-of-the-nyc-business-tax-environment/

[iii] This translates, roughly, into additional taxable income of approximately $8 million, or about the same amount as all of the other years at issue. This income would, for example, represent wages earned outside of N.Y., rental income sourced outside of N.Y., and investment income.
award, while NutraSweet cross moved to vacate the same, arguing that the arbitration award constituted a manifest disregard of the law sufficient to vacate.

The First Department’s refusal to vacate the Arbitration Award

Prior to undertaking its analysis as to why the NutraSweet arguments in favor of vacat- ing the arbitration award did not constitute a manifest disregard of the law, the First De- partment confirmed that public policy con- siderations weighed in favor of deference to arbitration and likewise highlighted Court of Appeals precedent which guided the analy- sis:

The Court of Appeals has offered the fol- lowing guidance concerning the enforcement of arbitration awards under the FAA:

"It is well settled that judicial review of arbitration awards is extremely limited. An arbitration award must be upheld when the arbitrator offers even a barely colorable justi- fication for the outcome reached. Indeed, we have stated time and again that an arbitrator’s award should not be vacated for errors of law and fact committed by the arbitrator and the courts should not assume the role of over- seers to mold the award to conform to their sense of justice" (Wien & Malkin, 6 N.Y.3d at 479-480, 813 N.Y.S.2d 691, 846 N.E.2d 1201 [citations, brackets and internal quotation marks omitted][emphasis added]).

The First Department ultimately reversed the trial court decision to vacate in part and remand to the ICC panel, and granted the pe- tition seeking to confirm the award in favor of Daesung, observing:

The order vacating the award in part can- not be justified under the “emphatic federal policy in favor of arbitral dispute resolution” embodied in the FAA, a policy that “applies with special force in the field of international commercial enterprise” (Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 631, 105 S.Ct. 3346, 87 L.Ed.2d 444 [1985]). Under the FAA, even if the arbitral tribunal’s legal and procedural rulings might rea- sonably be criticized on the merits, an award is not subject to vacatur for ordinary errors of the kind the court identified in this case, as opposed to manifest disregard of the law, a concept that, as more fully discussed below, means “more than a simple error in law” [in- ternal omissions]).

After analyzing NutraSweet’s arguments, the First Department concluded that the same did not constitute a manifest disregard of the law:

The foregoing suffices to show that the resolution in the partial award of the issue of the viability of NutraSweet’s fraud counter- claim: — whether or not that resolution was correct (a question on which we express no opinion) — does not meet the high standard required to establish manifest disregard of the law, namely, a showing that “the arbitrator[s] knew of the relevant principle, appreciated that principle controlled the outcome of the disputed issue, and nonetheless willfully flouted the governing law by refusing to ap- ply it” (Westerbeke Corp. v. Dainatus Motor Co., 304 F.3d 206, 217 [2d Cir. 2002]) [bold added].

In the light of foregoing daunting thresh- old, sufficient to trigger appellate review pursuant to a manifest disregard of the law standard, transactional counsel may consid- er alternatives to mandatory arbitration due to the fact that arbitration is unlikely to af- ford a party with substantive review of an arbitration finding of fact, conclusion of law or the ultimate award, despite inherent errors contained within the same. In this regard, the Commercial Division’s Rule 9 Accelerated Adjudication Procedure may provide a party with truncated discovery and expedited judi- cial relief while preserving appellate review of the merits of the court’s determination. Those in favor of arbitration will tout its inherent confidentiality, as compared to pub- licly-available documents that are available in Commercial Division practice via the ECF system. But truth be told, very few disputes require absolute confidentiality, and there is risk nonetheless of public disclosure when the inevitable motion to confirm or vacate surfaces after the arbitration decision. Ac- cordingly, transactional counsel drafting dispute resolution provisions must evaluate the pros and cons incident to an arbitration clause (including its ancillary limited appel- late review) with the miscellaneous waivers which Rule 9(c) incorporates.

Note: Leo K. Barnes Jr. is a partner at Barnes Catterson LoFrumento Barnes LLP. He practices commercial litigation and can be reached at LKB@BCBLawGroup.com

Real Estate Dispute (Continued from page 9)

of the money held in escrow.

When property changes hands, or over- time, other disputes may arise concern- ing fences, pools, boundaries, sidewalks, trees, shrubs or driveway disputes. Al- though litigation may be possible, espe- cially where there is no liability or title insurance coverage available, mediation may be a better way to resolve these very personal disputes and keep both the legal bills and tensions from escalating. At times, these disputes may involve access or other easements and they too can be resolved in this manner. It is not uncommon for tensions to es- calate between neighbors concerning noise or other nuisances. The police may be reluctant to intervene, or angry neigh- bors may file lawsuits or counterclaims, pursue police intervention or otherwise increase tensions. Once again, communi- ty mediation or formal mediation may be helpful in helping the parties to reach an agreement and agree on conditions they can abide by and maintain harmony in the neighborhood.
Immigration (Continued from page 15)

the house was only worth $400,000. The debtor announced that she wanted to retain counsel. Judge Trust found cause to lift the stay but directed the bank to settle the order on 14 days notice, giving the debtor two weeks to find counsel and object to the proposed order. Not surprisingly, a few days later the trustee brought a motion to dismiss. Thirteen days after the proposed order was settled, the debtor retained counsel who filed a letter in opposition to the notice of settlement. Debtor’s counsel did not challenge the factual allegations concerning her defaults, the loan balance, the property value, or the scheduled foreclosure sale, nor did she claim that the mortgagee lacked standing to seek stay relief. The debtor also did not address how she could adequately protect the mortgagee’s interest in the property or why her proposed Chapter 13 plan was viable. The debtor’s sole objection was that the court should not grant in rem relief. In other words, the debtor’s attorney, without explicitly saying it, likely wanted the ability to file a petition for the debtor’s husband down the road and utilize the automatic stay with that filing.

Judge Trust dismissed the case at the hearing but reserved decision on the issue of in rem relief. In his decision, the judge noted that Congress added Section 362(d)(4) to the Bankruptcy Code in 2005, to address perceived abuses in the bankruptcy process by repeat filers. This section provides that the court can order that any and all future filings by any person or entity with an interest in the subject property will not operate as an automatic stay against the creditor for a period of two years after the date of the entry of such an order; if the court finds that the filing of the bankruptcy filing was part of a scheme to delay, hinder and defraud creditors that involved, among other things, multiple bankruptcy filings affecting the property.

In his decision, Judge Trust Court stated that the mortgagee successfully met the burden of demonstrating a scheme to hinder, delay and defraud. Judge Trust cited his ten-year-old Montalvo decision in which he joined other courts which held that the mere timing and filing of several bankruptcy cases is an adequate basis from which the court can draw a permissible inference that the filing of a subsequent case was part of a scheme to hinder, delay and defraud. In re Montalvo, 416 B.R. 386, 2009 WL 5203738 (2019).

Judge Trust granted the mortgagee in rem relief for two years although he did indicate in his motion that a debtor in a subsequent case may move or relief from the order based upon changed circumstances or good cause. The judge noted that while the debtor did earn her Chapter 7 discharge in her second case, was more than the court was willing to permit, and the court put its foot down, recognizing that creditors have important rights also. So, with the “third strike,” Judge Trust called this debtor out.

Practical Tip: If the debtor in a similar case can demonstrate some aspect of good faith, such as making mortgage payments during or after prior bankruptcy filings, or having a viable Chapter 13 plan, then the debtor may prevail. However, if you are considering defending a client with a rotten track record, don’t expect the court to be sympathetic.

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

What amount of public assistance matters? The final rule considers an immigrant a “public charge if he/she receives public benefits for more than 12 months in the aggregate, in any 36-month period, such that the receipt of two benefits in one month counts as two months.” However, any duration or amount of public benefits an applicant received, could be taken into consideration “in the totality of the circumstances.”

The totality of the circumstances test

Under the new rule, determining whether or not an applicant is inadmissible on public charge ground requires an analysis of the aforementioned factors and “making a determination of the applicant’s likelihood of becoming a public charge at any time in the future based on the totality of the circumstances.”

Section 212 (a) (4) of the act requires that other factors, such as age, health and financial status are also considered.

There are some factors that will weigh heavily in favor of a determination that a person is likely to become a public charge. These factors are: (1) the immigrant is not a full time student, authorized to work and has been unemployed or cannot show “reasonable prospect of future employment” (2) the immigrant has received or is certified to receive “one or more public benefits for more than 12 months in the aggregate within any 36 months period;” (3) the immigrant has been diagnosed with a chronic medical condition; and (4) the immigrant has previously been found inadmissible on public charge ground by an immigration judge.

Note: Cathy-lee Ellison is an immigration attorney at the Law Offices of David M. Sperling. She previously served as a Law Clerk at the New Jersey Office of the Attorney General.
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