THE SUFFOLK LAWYER
THE OFFICIAL PUBLICATION OF THE SUFFOLK COUNTY BAR ASSOCIATION
DEDICATED TO LEGAL EXCELLENCE SINCE 1908
website: www.scba.org
Vol. 28 No 3
November 2011

# Social Networks and the Rights of Employees

**By Gary Steffanetta and Nancy Hark**

Being fired for something one posted on the Internet has become a common enough occurrence that a word has been coined for it; one has been "dooced," a reference to a woman who lost her job after criticizing her fellow employees on dooce.com in 2002.[1]

In the private sector, an employer taking disciplinary action against an employee based on the employee's statements on a social networking site can prompt defenses involving workers' federally protected right to form unions under the National Labor Relations Act ("NLRA"). In the public sector, taking disciplinary action based on an employee's statements on a social networking site can prompt defenses involving the Constitutional rights of freedom of association[2] and freedom of speech[3] as well as the right to privacy.[4]

Public employees subject to such discipline can sue under Section 1983 of the U.S. Civil Rights Act, which creates a private cause of action for an individual who is deprived of a constitutional right or freedom by an actor operating under color of state law.[5] In the private sector, the National Labor Relations Board (NLRB) has held that an employee's use of a social networking site to complain about working conditions is protected activity pursuant to the NLRA.[6]


Gary Steffanetta


Nancy Hark

Employers should be aware of the pitfalls that are present when initiating discipline based on an employee's online activities because it may be more challenging than it seems at first glance to determine whether an employee lawfully may be disciplined for that activity.

### Protected vs. Unprotected Speech

Speech can be classified as "protected" or "unprotected." An employee can only be disciplined for speech that is "unprotected" by a law or by a right guaranteed by the U.S. Constitution.

The U.S. Supreme Court has held that the First Amendment does not protect a public employee's speech made pursuant to official duties.[7] In contrast, employees who make public statements outside their official duties "retain some possibility of First Amendment protection because that is the kind of activity engaged in by citizens who do not work for the government."[8] The Supreme Court has also held that an employee may not be disciplined for speaking out on any matter of political, social or other concern to the community.[9]

Therefore, the employer must distinguish between a public statement made in the course of an employee's duties as opposed to a public statement made in the employee's capacity as a private citizen. Additionally, the employer must determine if the "speech" is a matter of public, as opposed to only "private" concern. However, a threshold question is, "what constitutes a public statement?" This is the question that has caused some employees to venture into waters over their head.

The medium of the speech involved in the recent social media discipline cases is the internet, where what one posts can be instantaneously published around the world, even though one may have thought that what was posted – perhaps in jest, or in haste – could only be seen by one's closest friends.

Social networking sites create an illusion of privacy through their "permission systems" which allow the user to set access controls to the contents of their personalized page, including the uploaded photos, comments made to their pages, and the users' affiliations. However, in reality the social networking sites are antithetical to an individual's expectation of privacy: the purpose of social networking is sharing, not shielding, information. All communications through the internet to a "personal page" require disclosure to the network itself as a third-party administrator and these sites often reserve the right to use the information entered by participants. Moreover, users of social networking sites lose direct control of what they post, and cannot ensure that their words will not be copied or distributed in another manner. Participants should have no reasonable expectation of privacy in the information shared with the social networking site.

As a best practice, public employers

*(Continued on page 23)*

## INSIDE...

NOVEMBER 2011



## PRESIDENT'S MESSAGE

# SCBA Assists in Lobbying for "18-B" Funding

**By Matthew E. Pachman**


Matthew Pachman

As readers of *The Suffolk Lawyer* know so well, part of the mission of the Suffolk County Bar Association is to both serve as a voice of our more than 3,600 members to other organizations, governmental entities and the public with regard to the law, the legal profession and the legal system, and to promote access to the justice system. Our commitment to these goals was recently concretely displayed.

In late August, County Attorney Christine Malafi advised the Suffolk County Legislature that the county had exhausted its "18-B" budget for 2011. As a result, there was simply no money to pay those attorneys who have approved vouchers for their representation of clients in criminal and Family Court matters.

To assist in lobbying for a supplemental appropriation to fund the program through the end of the year, the Executive Committee created a task force consisting of Second Vice President Bill Ferris, Lynn Poster Zimmerman, Harry Tillis and Steve Fondulis. On Wednesday October 5, I appeared before the Legislature's Ways and Means Committee, along with Ms. Malafi, 18-B Administrator Dave Besso, and the Task Force members in support of Legislator Ricardo Montano's resolution to amend the County's Operating Budget to transfer $500,000 to the 18-B plan.

I am pleased to report that on October 13 the Legislature approved Legislator Montano's resolution by a vote of 16-1-1. The money will be used to pay for outstanding vouchers which have been approved by the County Attorney for payment as soon as County Executive Levy signs the resolution.

This is just one example of how the SCBA serves and promotes the professional interests of its members. We will continue to support our members by fostering professionalism, advancing personal development and encouraging participation.

On behalf of the SCBA, I would again like to thank County Attorney Malafi and Legislator Montano for all of their efforts with respect to the supplemental appropriations process.


Photo by Arthur Shulman

**The SCBA Committee Chairs attended the Council of Committee Chairs meeting in the Great Hall.**

## BAR EVENTS

**Peter Sweisgood Dinner**
**Thursday, Nov. 17, at 6 p.m.**
Watermill Restaurant, Smithtown

For further information call the Bar.

❑

**SCBA Annual Holiday Party**
**Friday, Dec, 9, 4:00–7:00 p.m.**
SCBA Center

❑

**Annual Judicial Swearing-In & Robing Ceremony,**
**Monday, Jan. 9, at 9 a.m.**
Touro Law Center

District Administrative Judge
C. Randall Hinrichs presiding.
Reception to follow.

❑

# Suffolk County Bar Association

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Phone (631) 234-5511 • Fax # (631) 234-5899
E-MAIL: SCBA@SCBA.ORG

## Board of Directors 2011-2012



## SCBA Calendar

*All meetings are held at the Suffolk County Bar Association Bar Center, unless otherwise specified. Please be aware that dates, times and locations may be changed because of conditions beyond our control. Please check the SCBA website (scba.org) for any changes/additions or deletions which may occur. For any questions call: 631-234-5511.*

OF ASSOCIATION MEETINGS AND EVENTS

**OCTOBER 2011**

**24 Monday** Board of Directors - 5:30 p.m., Board Room.
**25 Tuesday** Solo & Small Firm Practitioners - Board Room.
**26 Wednesday** Professional Ethics & Civility Committee, 5:30 p.m., Board Room.
**27 Thursday** Foreclosure Law for Homeowners in Distress - Great Hall, 1:00 p.m. - A Free informational seminar & clinic open to the public. Taxation Law Committee, 6:00 p.m., Board Room.
**31 Monday** A.D.R. Committee, 6:00 p.m., Board Room.

**NOVEMBER 2011**

**1 Tuesday** Appellate Practice Committee, 5:30 p.m., Board Room.
**2 Wednesday** Animal Law Committee, 6:30 p.m., Board Room.
**3 Thursday** Fee Disputes Committee, 4:30 p.m., Board Room.
**7 Monday** Executive Committee, 5:30 p.m., Board Room.
**9 Wednesday** Labor & Employment Law, 8:00 a.m., Board Room. Education Law Committee, 12:30 p.m., Board Room.
**14 Monday** Elder Law & Estate Planning Committee, 12:15 p.m., Great Hall.
**15 Tuesday** Joint Board of Directors meeting (Nassau/Suffolk) 6:00 p.m., Mineola
**16 Wednesday** Surrogate's Court Committee, 5:30 p.m., Board Room.
**17 Thursday** Annual Peter Sweisgood Dinner, 6:00 p.m., Watermill Restaurant.
**30 Wednesday** Professional Ethics & Civility Committee, 5:30 p.m., Board Room.

**DECEMBER 2011**

**5 Monday** Executive Committee, 5:30 p.m., Board Room.
**6 Tuesday** Joint Surrogate's Court/Appellate Practice Committees, 5:30 p.m., Board Room.
**9 Friday** SCBA's Annual Holiday Party, 4:00 p.m. - 7:00 p.m., Great Hall.
**12 Monday** Board of Directors, 5:30 p.m., Board Room.
**14 Wednesday** Elder Law Committee, 12:15 p.m., Great Hall. Education Law Committee, 12:30 p.m., Board Room.
**15 Thursday** Taxation Law Committee, 6:00 p.m., Board Room.

# *Our Mission*

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

## LETTER FROM YOUR EDITOR


Laura Lane

Hello everyone and happy fall!

I would like to share some excellent news. At a recent SCBA Council of Committee Chairs meeting several committee co-chairs volunteered to serve as special section editors in our upcoming issues. Listed below are the special sections. If you would like to contribute to these special sections please call the bar association and ask for the committee co-chairs contact information.

Thanks to all of the co-chairs who have volunteered their time and talents. I look forward to reading all of your submissions.

Please be advised that *The Suffolk Lawyer* is a publication for all members of the SCBA. Everyone is welcome to submit articles for consideration. Please be advised that if you have any questions or comments you can direct them to me at, scbanews@optonline.net.

- Laura Lane – Editor-in-Chief

**SPECIAL FOCUS EDITIONS**

| | |
|---|---|
| December | - District Court |
| January | - Municipal Law |
| February | - Elder Law & Estate Planning |
| March | - Labor & Employment Law |
| April | - Professional Ethics |
| May | - Federal Court |
| June | - Workers Compensation & Social Security Disability |
| Sept. | - Environmental Law |

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

## THOMAS MORE GROUP TWELVE-STEP MEETING

Every Wednesday at 6 p.m.,
Parish Outreach House, Kings Road - Hauppauge
All who are associated with the legal profession welcome.
**LAWYERS COMMITTEE HELP-LINE: 631-697-2499**

THE SUFFOLK LAWYER

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**Publisher**
Long Islander Newspapers
in conjunction with
The Suffolk County Bar Association



**Send letters and editorial copy to:**
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## The Suffolk Lawyer

**USPS Number: 006-995)** *is published monthly except July and August by Long Islander, LLC, 149 Main Street, Huntington, NY 11743, under the auspices of the Suffolk County Bar Association. Entered as periodical class paid postage at the Post Office at Huntington, NY and additional mailing offices under the Act of Congress. Postmaster send address changes to the Suffolk County Bar Association, 560 Wheeler Road, Hauppauge, NY 11788-4357.*

# Legal Repercussions for Bullies Who are Minors a Slippery Slope

**By Sarah D. Ragusa**

At some point or another in our lives we have all experienced bullying, either as a victim, witness or the actual bully. Considered a "rite of passage," or mere childish pranks, bullying, is not limited to age groups or to settings. People of all ages, from young children to middle-aged adults, in settings ranging from schools, to places of employment, and even to homes, have encountered some form of bullying.

Despite an increasingly diverse and tolerant society, today, more than ever, bullying is widespread and prevalent. Bullying experts attribute this influx to substantial developments in technology over the past several years, enabling cyberbullies to victimize under the guise of anonymity. Whereas in the past individuals could seek refuge from harassment in the comfort and safety of their homes, the deep infiltration of social media into the fabric of society has extended the reach of harassment and curtailed victims' access to safe havens. Periods of solace for victims of bullying are no longer a reality, nor a possibility; cyber space has provided a forum for 'round the clock harassment – social networking sites, instant messaging services, blog sites, and text messaging.

As is the case in many circumstances, legal protections have developed slowly. However, many have said, we can no longer afford the luxury of 20 year lags; no longer sacrifice each generation while the law catches up with societal changes.

Within just a few short years, cyberbullying has claimed the lives of over a dozen Americans, and has scarred and victimized thousands more. But what can be done? Can cyberbullies ever truly be reprimanded or made to pay for the pain and suffering they have caused to their victims and their victims' families?

Sarah Ragusa

Ginger Lieberman, an award-winning author, Touro College Adjunct Professor, co-founder of Long Island Professional Educators Network, and nationally recognized expert on bullying behavior, suggests yes, there is an answer. For Mrs. Lieberman the answer is raising awareness in schools and the community. Together with her partner Roni Benson, Mrs. Lieberman has developed programs including *Bully Frog and Cyberbullies Beware*. These programs emphasize the importance of teaching children the concept of empathy and tolerance at a young age, and the need to discourage bullying by informing children of the consequences resulting from bullying – depression, self-hurt, suicide, etc.

The idea is that the earlier we learn to empathize, tolerate and accept diversity, the less likely we are to bully – makes sense. While this pro-active approach is certainly necessary to mold a better social landscape for years to come, something legally must be done to address the fast-growing problem now.

On September 26, 2011, nearly 12 years after the nation's first piece of anti-bullying legislation was introduced in Georgia, and just days after the suicide of New Yorker Jamey Rodemeyer, 14, a victim of cyberbullying, Senator Jeffrey Klein (D-Bronx/Westchester) introduced anti-cyberbullying legislation to "modernize New York State's harassment laws and crack down on the emerging cyberbullying epidemic." This proposed legislation seeks to build on the proactive approach promoted by Mrs. Lieberman and other advocates like her, by "reinforc[ing] current anti-bullying education programs and creat[ing] real consequences for those who engage in cyberbullying."

The bill defines cyberbullying as "a course of conduct using electronic communications that is likely to cause a fear of harm, or emotional distress to a person under the age of 21," and bullycide as "when a person engages in cyberbullying and intentionally causes the victim of such offense to commit suicide." The "real consequences" proposed by the bill include expanding the charge of Second-Degree Manslaughter (a Class C Felony punishable by up to 15 years), to include "bullycide," and updating the crime of Third-Degree Stalking, a Class A Misdemeanor punishable by up to a year, to include cyberbullying.

Though the intent and purpose of this bill is admirable and certainly a step in the right direction, many feel there will need to be some "tweaking" of the bill's provisions before it can be considered into law. Cyberbullying experts are particularly concerned with the potential effects of the legislation.

Mrs. Lieberman stressed that, "the question that must be focused upon is, 'did the child realize the ramifications of his/her acts?' If the left frontal lobe in minors has not yet fully developed, then are these children truly guilty of manslaughter, or merely what I call 'cyberstupidity'?"

She is not alone in her concerns. Mary Sue Backus, a cyber-bullying expert and law professor at the University of Oklahoma, who was cited on several occasions in Senator Klein's supporting arguments for his bill, expressed her general opposition to legislation of the type proposed. Ms. Backus' worries, like Mrs. Lieberman's lie in the possibility that the legislation would "fail to act as a deterrent," as it is intended, "and instead have the effect of criminalizing adolescent behavior."

The purpose of this law is to deter bullying behavior amongst youngsters by imposing criminal sentences to those found guilty of cyberbullying and bullycide. Under this proposal, individuals who engage in cyberbullying as minors will be forced to pay for their "cyberstupidity " for the rest of their lives.

This harsh punishment may seem fitting to some who justify their belief by pointing out that victims of bullying will carry the scars of humiliation and depression for their entire lives. But can we truly hold minors, who society has traditionally sought to protect and educate, guilty of such grave charges and in effect deprive them of their youth and a second chance?

*Note: Sarah Ragusa is a fourth year part time evening student at Touro Law Center with a Bachelors Degree in elementary education from St. John's University. Mrs. Ragusa's career interests lie in the fields of education and employment law. She is active in environmental law and is the secretary of Touro's Environmental Law Society.*

# Meet Your SCBA Colleague

*Thomas Maligno,* **a public interest attorney, is the kind of guy who always sees the glass as half full. He's been interested in pro bono work since law school and has dedicated his life to it.**

**By Laura Lane**

**You have been the Executive Director at Touro's Public Advocacy Center since 2007. Before that, beginning in 1999 you were their Director of Career Development and Public Interest. Prior to working at Touro you worked at Nassau/Suffolk Law Services for over 20 years. Why have you followed this career path?** I grew up in the 1960's and 1970's and had an opportunity to observe activism. It seemed to me that being an attorney would be the most concrete way to help people, to make changes in the world. I've seen enough of life that I really understand that money isn't everything. And for me, it is exciting to work with the Touro students who are so enthusiastic. They really believe they can make a difference in the world.

**How did you end up at Nassau/Suffolk Law Services?** I was assigned to them as a Volunteer in Service to America Attorney. I created an outreach program for communities where clients did not have access to law services offices and represented clients in general civil matters. Then I went from staff attorney, to senior staff attorney, to Pro Bono Coordinator. In 1990 I became the Executive Director and working with others I think we made a difference on Long Island.

**Along with many of your other duties you were able to triple the number of funding sources there, right?** Yes. I found out how to do that in my training. The way you get money is to ask, and the way to be a good fund raiser is to believe in your cause.

**Which you were very passionate about - so why leave Nassau/Suffolk Law Services?** I loved my job there but being the executive director required a lot of energy and I was afraid I wouldn't always have that creative energy if I stayed in the same job for over 20 years. I thought it was better to move on to something else. I do believe that people that work in legal aid and legal services are working a noble job and are in a noble profession.

**They asked you to come to Touro and build the pro bono project, right?** Yes. I helped to create the Public Advocacy Center and helped strengthen the public interest program at Touro. There is a partnership at the Center between Touro Law Center and the local not-for-profit agencies. It's a unique institution. We provide the free space for these not-for-profits and they in turn come up with a plan to involve our students in their work. The members of these agencies frequently meet and work with our students. The plan has become so popular we now have a waiting list for groups.

**What do you enjoy about being the Executive Director?** I'd have to say it is bringing all of the different groups together and working together with the students. We can work and think together. I believe by pooling our resources together it makes us all stronger.

And I like working with the students. They are bright and energetic and throw off so many concepts, ideas and initiatives – it's exciting.

**When did you join the SCBA and why?** I joined in 1977 because I felt that this was one of the things that made a good lawyer. I wanted to keep up my CLE's and meet my colleagues.

**What has your experience been as a member?** I've had a chance over the years to see bar associations over the entire country. Truly the Suffolk Bar Association is among the best. They have committed leadership that believe in serving the community. Members are generous with their time, and spirit; I've had many mentors and learned a great deal from my colleagues at the bar association.

**You've been very involved having served on the Board of Directors, as an Academy of Law Officer and chairing committees. What have you enjoyed doing most at the SCBA?** I created the Pro Bono Project in 1981. When I proposed it many people were opposed to it and it took many meetings and a year for it to become a reality. It ended up being very successful. The American Bar Association loved what we did so much they asked me to be a consultant to help set up pro bono projects all over the country. I'm proud that pro bono is now a vital part of the bar association.

Thomas Maligno

**Why would you encourage attorneys to join the SCBA?** For their own self interest. It's the best way to stay educated and stay current. Along the way you will get to rub shoulders with a lot of good people. I always tell friends and neighbors who ask how to find a lawyer that the first rule is to find an attorney active in the bar association. I trust lawyers who are in the bar. In my experience people who care enough to be members of the bar association probably care enough to be a good lawyer.

DMV

# Prepare Your Practice for the Next Storm

By David A. Mansfield

Attorneys should always be cognizant of approaching weather systems because they can disrupt the normal flow of business. It is especially important during a tropical storm or hurricane event, which usually will result in a loss of electrical power for an extended period of time. The recent earthquake could not be predicted. It had the potential to create the same problem. But often tropical storms or earthquakes are predicted with sufficient lead-time for steps to be taken to meet the anticipated challenges to your practice.

What sort of contingency plan could be put in place to meet the challenges by a tropical storm or other natural disaster?

> **"A checklist should be created that lists actions that will be needed in advance, during and after a storm"**

My office tracked the storm. I have to admit to being somewhat of a weather buff. I followed the storm with increasing interest as it was clear that it would make landfall near the New York Metropolitan Area over the weekend of August 27. I carefully monitored my voice mail messages and email over the weekend particularly on the Saturday before the storm. I was able to return phone calls and make arrangements for office appointments the following week. I reviewed all of my work in progress and active files and undertook in advance of the storm to determine those matters. This should be a priority.


David A Mansfield

Motions and other cases with time deadlines such as administrative appeals where practicable, were advanced for completion and service. You may wish to telephone or email clients of their upcoming court cases for the week with an alternate contact number in case you lose the electrical power or telephone service in your office. My office did not experience a power outage, but did lose telephone service for three and a half days. I lost fax and credit card services as well until a temporary fix was made.

Prior to the storm I reviewed my files for the upcoming week and set about to notify each client by email where possible that the office was open during regular business hours. I informed them that I would be in court as scheduled barring any further unforeseen developments. Communication by email proved to be a lifeline to clients who were seeking to contact my office. It was also very useful to inform my clients regarding their upcoming court dates that week. I was able to tell them that my office was open, I would be in court, would be keeping regular business hours and that I could be reached at an emergency number. Individual emails were sent so as not to disclose representation to other clients.

You may not wish to give out your cell phone number, since clients have a habit of using your cell phone number to bypass your office. This can be especially disconcerting because you generally do not know who is calling. Of course you can dial star 67 as a prefix to any client number to block your caller id. But some clients do not accept calls with a blocked caller id.

I have an old fashioned numeric pager, which allows my voice mail to page me. I was able to call the paging company and learned that it also had the capacity to set up a voice mail message for the clients to leave a voice mail message. The pager would notify me. I could retrieve the message and be in a much better position to discuss the matter with my client. I set up a customized greeting to inform my clients, that except for the telephone service outage, I would conduct a normal business week.

The standard numeric message is not helpful since you may not recognize the telephone number and many clients are unfamiliar with how to enter their phone number for a numeric pager. It is part of the digital generation gap.

My home was without power for nearly a week, but my secretary, Susan was able to provide a loaner generator which could run my computer to communicate and monitor email. I also included my numeric pager number as the emergency contact with a request that if they needed to contact me at my emergency contact number that they should leave a message. I would get back to them as soon as possible. I attempted to forward my calls to my emergency pager. Only 90 minutes of precious office time was spent speaking with our former phone company.

While the transfer was successful, a problem arose when all of the circuits were busy so the transfer only took place when the phone service was finally restored.

The call forwarding, in hindsight, could have been achieved online without the expenditure and aggravation of going through the overloaded support contact number. This may require setting up in advance an online account to manage your telephone service.

The Internet and communication by email made the situation easier than Hurricane Gloria in 1987 when cell phones and the Internet were not nearly as prevalent.

There are many valuable lessons to learn from this storm. The next time I will endeavor to update my websites with updated information regarding business hours, court appearances and an emergency telephone contact number.

All lawyers should use what they learned during this storm to try to anticipate contingencies to ease the disruption to their practices in future. A checklist should be created that lists actions that will be needed in advance, during and after a storm.

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

## Save the Date

### 2011 DMV Update Seminars

**November 9**,
from 5 to 7:30 p.m.
Four Seasons Caters, 15 Prospect Street, Southampton

**November 16**
at 5:30 p.m. at the SCBA
We will share our experiences with the Ignition Interlock and the death of the "compelling circumstances" exception for misdemeanor and felony drug possession suspensions under §510.



## Not Among Our Law School Goals

**UNMANAGEABLE STRESS CLINICAL DEPRESSION**
**ALCOHOL DEPENDENCY SUBSTANCE ABUSE**
**SLEEPLESS NIGHTS PHYSICAL DYSFUNCTION**

**Sound familiar? You're not alone.**

**Lawyers rank first in incidence rate for clinical depression among 105 professions surveyed. Do you need help or do you just want to talk about it?**

**The Lawyer Assistance Foundation and Lawyers Helping Lawyers Committee of the Suffolk County Bar Association can help. We can provide necessary assistance, whether a sympathetic ear or a referral for professional assistance when necessary.**

**There is no charge. No stigma. Everything will be kept strictly confidential.**

**Interested?**

**Call:** **Rosemarie Bruno (631)979-3480,**
**Arthur Olmstead (631) 754-3200 from the Lawyers Helping Lawyers Committee;**

**Barry L. Warren, Managing Director of The Lawyer Assistance Foundation (631) 265-0010;**

**Jane LaCova, Executive Director, Suffolk County Bar Association – (631) 234-5511, Ext. 231.**

**Let Us Help You.**

## LANDLORD TENANT LAW

# The RPAPL 711(2) Rent Demand

## *Dismissal results from inaccuracy*

**By Patrick McCormick**

It cannot be debated that making or serving a proper rent demand under RPAPL § 711(2) is a necessary precondition to the commencement of a nonpayment proceeding. It is common practice for a landlord to make or serve a rent demand and then commence a nonpayment proceeding seeking to recover not only the rent and additional rent demanded, but also rent that accrued after the demand. An alternative to this common practice is to prepare the petition seeking only the rent and additional rent demanded and to make an application on the return date of the petition to amend the petition to reflect subsequently accruing rent and additional rent. Provided personal jurisdiction has been obtained over the respondent, such amendment seems to be sanctioned by the Appellate Division and relevant provisions of the CPLR.


Patrick McCormick

Nevertheless, Judge Arlene P. Bluth in *RCPI Landmark v. Chasm Lake Management Services, LLC,* found fault with this common practice and dismissed a nonpayment proceeding as fatally defective because the petitioner sought to recover rent that was not previously demanded and held that the nonpayment petition could not be amended before trial to include rent not previously demanded.

The facts in *RCPI* are straightforward. The landlord served a rent demand on January 24, 2011, for rent due through January 2011; tenant failed to pay; landlord commenced a nonpayment proceeding in February 2011, seeking the amount sought in the demand plus February 2011 rent. Respondent moved to dismiss "asserting that the petition is fatally defective because petitioner sued for February rent, which was never demanded."

Despite recognizing that a "motion to amend the pleadings to conform to the proof should certainly be granted at the trial" the court nevertheless found the petition fatally defective because the landlord "unilaterally sued for the February rent that was never demanded." The court continued, "A request to amend a petition to add rents that have accrued after service of the petition must be denied with the ability to renew upon service of the proper papers or at trial." The court concluded that "by unilaterally including the February rent in the petition, petitioner has attempted to circumvent the requirement of first demanding the rent. This shortcut, although common, is improper. Because the petition seeks rent that was never demanded, respondent's motion is granted and the petition is dismissed."

Having recognized that amending the petition is permissible at trial, it seems incongruous to deny amendment where the initial return date of the petition is supposed to be the trial date (see, *RPAPL* § 745), although that rarely occurs in large part due to the overwhelming number of cases handled by the landlord/tenant courts. In addition, the court seems to have overlooked the well settled law that the amount sought in a rent demand need only bear a reasonable relationship to the amount actually due and will be "effective for a reasonable period of time". Nevertheless, it seems to be a waste of resources to dismiss a proceeding where the court would have permitted the petition initially to include February rent if an additional demand was served and would have permitted an amendment to the petition at trial to include February 2011 rent and presumably all other subsequently accruing rent. Despite such, the court determined that including February 2011 rent in the petition without service of an additional demand was fatally defective. The likely result of this decision is addi-

*(Continued on page 16)*

## BENCH BRIEFS

**By Elaine Colavito**

**HONORABLE JOHN J. J. JONES, JR.**

Motion for leave to amend the complaint granted; that violation of a provision may serve as a predicate to an action under General Municipal Law §205-e where the claimed injuries were among those occupational injuries the Labor Law was specifically designed to prevent; inclusion of the newly discovered evidence in the pleadings would not change the basic issues of the case.

In *Daniel Koenig v. Action Target, Inc., and the County of Suffolk,* Index No.: 14104/08, decided on January 25, 2010, the court granted plaintiff's motion for leave to amend his complaint to include a cause of action against the county based upon General Municipal Law §205-e, which created a private right of action for police officers injured in the line of duty to recover from a defendant whose alleged failure to comply with a statute, ordinance or other government regulation directly or indirectly caused injuries.

Plaintiff asserted that the injuries he sustained during a mandatory training drill were directly related to the county's failure to furnish him and other members of the SCPD with a safe work environment in violation of Labor La §27-a. Plaintiff further argued that he should be permitted to supplement his complaint by adding newly discovered evidence of three prior incidents at the subject firing range during which other police officers sustained similar injuries during mandatory training exercises.

The county opposed the motion and cross-moved for summary judgment dismissing the complaint on the grounds that his claims were barred by Workers Compensation Law §11. The county further contended that plaintiff's proposed amendments were devoid of merit and palpably insufficient as a matter of law because an alleged violation of Labor Law §27-a could not serve as a predicate for plaintiff's proposed action under General Municipal Law §205-e since his injuries did not arise from the special risks faced by police officers due to the nature of their work. Defendant Action Target argued that the proposed inclusion of newly discovered evidence regarding three similar incidents at the Suffolk County Police Range would be prejudicial, as it would allow plaintiff to introduce "other acts of negligence through the pleadings."

In granting plaintiff's motion, the court noted that violation of a provision may serve as a predicate to an action under General Municipal Law §205-e where the claimed injuries were among those occupational injuries the Labor Law was specifically designed to prevent. As for Action Target's claim that inclusion of newly discovered evidence of three prior incidents of similar injuries at the county's firing range would be prejudicial, the court found that inclusion of the newly

*(Continued on page 18)*

# You are Invited!

The Society To End Parkinson's Disease (STEP) will be holding its Third Annual Benefit on Saturday, October 29, 2011 from 6 – 10 P.M. at the Crowne Plaza Hotel, 1730 North Ocean Avenue, Holtsville, New York. Join us for a buffet dinner and open wine and beer bar, dancing, and an extraordinary Silent Auction. All proceeds will benefit the Society To End Parkinson's Disease.

Founded in 2007 by families and friends of those affected by Parkinson's Disease, including Zachary Dubey, a member of the Suffolk County Bar Association and of Bracken Margolin Besunder, LLP, STEP is dedicated to improving the lives of those affected by this devastating disease.

Tickets to the event are $55 per person and include dinner, drinks and what promises to be a wonderful evening of fun for a great cause.

To RSVP, please e-mail us at societytoendparkinsonsdisease@yahoo.com, call (516) 658-8983, or speak to Zachary Dubey prior to the event.

STEP is a recognized charitable organization under § 501(c)(3) of the Internal Revenue Code, which means that your donation is tax deductible to the extent permitted by law.

**Thank you for your generous support!**

# COURT NOTES

By Ilene Sherwyn Cooper


Ilene Sherwyn Cooper

**Attorneys Censured**

**Arnold I. Kent:** The Grievance Committee served a petition upon the respondent containing three charges of professional misconduct and the matter was referred to a special referee. After a hearing, the referee sustained all three charges, which alleged, inter alia, that the respondent had pled guilty to operating a motor vehicle while under the influence of alcohol or drugs. The court granted the application by the Grievance Committee to confirm the referee's report. Based upon the record, and the fact that the respondent had successfully participated in alcohol counseling, the court concluded that a public censure was the appropriate discipline to impose.

**Attorneys Suspended:**

**George R. Alderdice:** The Grievance Committee moved to suspend the respondent from the practice of law, and for authorization to institute and prosecute a disciplinary proceeding against him. The court found that the respondent was guilty of professional conduct based upon his failure to cooperate with the Grievance Committee, as well as other evidence of misconduct involving, inter alia, his attorney trust account. The respondent failed to oppose the motion. Accordingly, based upon the uncontroverted record, the respondent was suspended from the practice of law and the Grievance Committee was authorized to institute and prosecute a disciplinary proceeding against him.

**Raymond E. Kerno:** The Grievance Committee moved to suspend the respondent from the practice of law, and for authorization to institute and prosecute a disciplinary proceeding against him. The court found that the respondent was guilty of professional conduct based upon his failure to cooperate with the Grievance Committee, his substantial admissions under oath, and other uncontroverted evidence, involving neglect of client matters. The court rejected the respondent's arguments in mitigation. Accordingly, based upon the record, the respondent was suspended from the practice of law and the Grievance Committee was authorized to institute and prosecute a disciplinary proceeding against him.

**Attorneys Disbarred:**

**Stephen J. Caputo:** On January 4, 2010, the respondent entered a plea of guilty in the United States District Court for the Southern District to one count of conspiracy to commit bank fraud, and five counts of wire fraud. The federal felony of wire fraud has been held essentially similar to the New York felonies of grand larceny in the second degree and scheme to defraud in the first degree. By virtue of his conviction of a felony, the respondent ceased to be an attorney and was automatically disbarred from the practice of law in the State of New York.

**Edmund J. McDowell:** By decision and order of the court, the respondent was suspended from the practice of law, upon a finding that he constituted an immediate threat to the public interest, as a result of his obstruction of the function of the Grievance Committee in its investigation of allegations that he misappropriated funds with which he was entrusted, engaged in a conflict of interest, and failed to timely re-register. In that same order, the Grievance Committee was authorized to institute a disciplinary proceeding against the respondent and the matter was referred to a Special Referee. The respondent failed to submit an answer to the petition, and therefore, the charges against him were deemed admitted. Accordingly,

the charges against the respondent having been established, and the respondent was disbarred from the practice of law in the State of New York.

*Note: Ilene Sherwyn Cooper is a partner with the law firm of Farrell Fritz, P.C. where she concentrates in the field of trusts and estates. In addition, she is a member of the Board of Directors and a past-president of the Suffolk County Bar Association.*

# SCBA Advocates for 18-B Payments

SCBA President Matt Pachman, County Attorney Christine Malafi and 18-B Administrator David Besso, and other members of the bar appeared before the Ways & Means Committee of the Suffolk County Legislature to advocate for the passage of the transfer of $500,000 into the 18-B budget IR1838-2011, which effectuates this, was voted out of committee and will be heard by the full Legislature next week. On behalf of our members, we thank Suffolk County Legislator Rick Montano for his efforts in helping to restore the funds so that 18-B attorneys can be paid for services performed.

We will continue to work with the Suffolk County Legislature on all matters concerning the administration of justice to the citizens of Suffolk County.

- LaCova

# REAL ESTATE

# Wrongful/Negligent Referral

By Abraham B. Krieger


Abraham B. Krieger

In this age of specialists, many lawyers refer clients and potential clients to other more experienced lawyers. Similarly, professionals in different fields refer to other professionals. This referral process is a productive source of new business. However, under recent case law, referring without exercising due diligence may be actionable.

Recently, New York's Appellate Divisions in the First, Second and Third Department, and a number of other state courts, implicitly recognized negligent recommendation/referral as a potential cause of action. While New York does not yet expressly recognize "negligent referral" or "negligent recommendation" as a cause of action, such a claim may be supported by applying the tort of negligent misrepresentation. A claim for negligent recommendation/referral may also be supported by the scope of duty voluntarily taken as part of a professional's responsibility under the rules governing professional ethics, conduct and responsibility.

Historically, most jurisdictions have only recognized claims for negligent referral in the area of medical malpractice. In New York, "[i]t is generally true that the mere referral of a patient by one physician to another, without more," is insufficient to "render the referring doctor vicariously liable" for the negligent treatment of the patient by the referred doctor. *Datiz v. Shoob,* 71 N.Y.2d 867, 868 (1988). A Pennsylvania federal district court held that "negligent referral to a specialist, i.e. when the referring physician knows or has reason to know the specialist is incompetent, may be a basis for liability under general negligence principles." *Estate of Tranor v. Bloomsburg Hosp.,* 60 F. Supp.2d. 412, 416 (M.D. Pa. 1999). However, the following year, a Pennsylvania state court refused to apply the same standards to the legal profession, ruling that Pennsylvania did not recognize a cause of action for negligent referral. *Bourke v. Kazaras,* 746 A.2d 642 (Pa. Super Ct. 2000). Nevertheless, in the same opinion, the court distinguished *Tranor*, stating that "appellant did not allege in her complaint that Appellees knew [the referred to] Attorney to be incompetent." (*Id.* at 644) The court considered the possibility that where an attorney has actual knowledge of the referred attorney's incompetence, a cause of action for negligent referral may be recognized in Pennsylvania.

In *Tormo v. Yormark,* 398 F. Supp. 1159 (D.N.J. 1975), the U.S. District Court for New Jersey addressed whether a referring attorney was negligent in transferring his client's case to a criminally indicted attorney who subsequently embezzled the client's funds. (*Id.* at 1170) The court recognized a claim for negligent referral involving the lawyers, by denying the attorney-defendant's summary judgment motion. By denying summary judgment, the court implicitly recognized a claim for negligent referral among lawyers. The court went on to state that a jury *could* find that the referring attorney had a responsibility to

*(Continued on page 19)*

# SIDNEY SIBEN'S AMONG US

By Jacqueline Siben

## *On the Move…*

The Elder Law Offices of **Brian Andrew Tully,** PLLC announces that it has now become Tully & Winkelman, P.C. and has relocated to 150 Broadhollow Road, Suite 120 in Melville.

**Lawrence A. Kushnick**, managing partner of Kushnick & Associates, P.C., announced that the firm will be changing its name to Kushnick Pallaci PLLC. The change follows the election of **Vincent T. Pallaci,** who has been with the firm since 2006, as partner.

Farrell Fritz is pleased to announce that **Chris Kent** has joined the firm's land use, municipal and zoning practice group as a partner.

Veteran NYC attorney **Steven A. Ruskin** has joined Meltzer, Lippe, Goldstein & Breitstone, LLP (Meltzer Lippe).

Veteran NYC attorney **Steven A. Ruskin** has joined Meltzer, Lippe, Goldstein & Breitstone, LLP (Meltzer Lippe). Additionally, veteran Surrogate's Court referee and litigator, **Sally M. Donahue,** has joined the firm.

## *Congratulations…*

**Sharon N. Berlin** and **Richard Zuckerman**, of Lamb & Barnosky, LLP, have again been named two of the top 10 Labor and Employment Lawyers by The Ten Leaders Cooperative. They were chosen based on out-of-firm peer referrals, length of practice and focus of practice.

Jacqueline M. Siben

**Scott M. Karson**, was selected for inclusion on the New York Super Lawyers list for 2011 in the appellate law practice area and **Richard K. Zuckerman**, was selected for inclusion on the New York Super Lawyers list for 2011 in the practice area of labor and employment law based on peer nominations, blue ribbon panel review and independent research.

**Lisa Renee Pomerantz** will be awarded with a 2011 Long Island Business News Leadership in Law Award at a gala dinner on November 14 at the Crest Hollow Country Club.

**Leo K. Barnes Jr.** and **Matthew J. Barnes,** founding members of the boutique commercial litigation law firm Barnes & Barnes, P.C. in Melville, New York, have been named to the 2011 Super Lawyers Rising Stars list for the New York metropolitan area.

Congratulations to **Scott and Joleen Karson** on the marriage of their son Jared to Carol.

**Campolo, Middleton & McCormick, LLP**, is a finalist in the prestigious HIALI Business Achievement Awards in the Small Company category.

**Matthew D. Shwom** has been promoted to partner from senior counsel at Lewis Johs Avallonge Aviles in Melville.

Five partners from Ruskin Moscou Faltischek, P.C. have been named to the 2011 Super Lawyers, New York Metro Edition in the following categories: **Harold S. Berzow** (Bankruptcy & Credi-tor/Debtor Rights); **Michael K. Feigenbaum** (Estate Planning & Probate); **Mark S. Mulholland** (Litigation); **Gregory J. Naclerio** (Health/ Criminal Defense); and **Benjamin Weinstock** (Real Estate).

**Certilman Balin Adler & Hyman, LLP** captured the 2011 Long Island Lawyers Softball League Championship for the second year-in-a-row. Certilman Balin had an undefeated season upon entering championship play. They played their championship doubleheader game at Cantiague Park in Hicksville against Jaspan Schlesinger, losing the first game 8-5 and then winning the second, 8-7.

## *Announcements, Achievements, & Accolades…*

**Richard K. Zuckerman**, of Lamb & Barnosky, LLP, is co-editor of the newly published 2011 revision to the New York State Bar Association's Public Sector Labor and Employment Law 3rd Edition treatise.

The law firm of **Futterman & Lanza, LLP** will present a free two-hour seminar which addresses the topics of elder law and estate planning. "Medicaid Planning & Asset Protection" will take place on October 26 at 400 West Main Street, Suite 125 in Babylon. The morning seminar runs from 10 a.m. to 12 p.m., and the evening seminar is from 6 p.m. to 8 p.m.

**Penny Kassel** will present a seminar at Pathways Women's Health, 1350 Northern Boulevard, Manhasset on Thursday, Oct. 27. The topic for the seminar is *How to Protect Your Assets as You Age.* For information call (516) 365-9760. The seminar is free but reservations are requested.

On October 29, 2011, **Sharon N. Berlin**, of Lamb & Barnosky, LLP, will co-present with **Laura Granelli** on the topic, "The ABCs of Public-Nonpublic School Relations" at the 92nd Annual Convention & Trade Show co-sponsored by the NYS School Boards Association and NYS Association of School Attorneys.

SCBA member the **Honorable Stephen L. Ukeiley**, Suffolk County District Court Judge, has authored *The Bench Guide to Landlord & Tenant Disputes in New York©. The Bench Guide* provides practical and current information regarding the highly specialized area of Landlord and Tenant Law within the State of New York. It takes the reader through a Landlord and Tenant summary proceeding from incep-

*(Continued on page 18)*

# Toronto Hosts the 2011 ABA Annual Meeting

**By Scott M. Karson**

As the delegate to the American Bar Association House of Delegates from the Suffolk County Bar Association, I had the privilege of attending the 133rd Annual Meeting of the ABA in the beautiful city of Toronto, Canada. The Annual Meeting ran from August 4-9, 2011 and featured a wide variety of programs and social events sponsored by committees, sections, divisions and affiliated organizations of the Association.

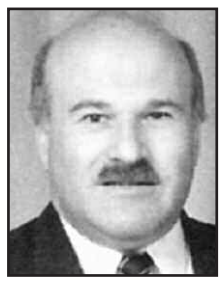
### Civic Education

One of the highlights of the Annual Meeting was a panel discussion concerning the importance of civic education in our nation's schools, featuring retired United States Supreme Court Justice Sandra Day O'Connor and current Associate Justice Stephen G. Breyer. The Justices identified the need to educate adults – as well as children – about our nation's government. They urged all lawyers to get involved, particularly on Law Day, by volunteering to teach or allowing students to accompany them for a day.

### NYSBA Honors Kaye and MacCrate

Another highlight of the Annual Meeting was a reception hosted by the New York State Bar Association honoring two giants of the state's legal community, former NYSBA and ABA President Robert MacRate, senior counsel at Sullivan & Cromwell, LLP, and former Chief Judge Judith S. Kaye, who is now of counsel at Skadden Arps Meagher & Flom. NYSBA President Vincent E. Doyle III presided at the reception.

### The Opening Assembly & President's Reception


Scott M. Karson

The Opening Assembly was held Saturday evening at Toronto's Koerner Hall of the Royal Conservatory of Music. The keynote speaker was Justice Breyer, who called for civility among lawyers. He commented that despite many disagreements among the Justices during his 17 years on the Supreme Court, he "never heard a voice raised in anger." Justice Breyer spoke of the rule of law and the importance of teaching civics to students in the U.S., issues he stresses in his new book, "Making Our Democracy Work."

Also addressing the group at the Opening Assembly was the Right Hon. Beverly McLachlin, Chief Justice of Canada, the first woman in Canada to hold this position.

The Opening Assembly was followed by the President's Reception, which was held at the Royal Ontario Museum.

### The House of Delegates Meeting

The ABA's policy-making body, the 566-member House of Delegates, met on Monday, August 8, and Tuesday, August 9, 2011. Linda A. Klein of Georgia, the Chair of the House, presided.

### Hon. Rosalie Silberman Abella, Supreme Court of Canada

Chair Klein welcomed The Honorable Rosalie Silberman Abella, a Justice of the Supreme Court of Canada. Justice Abella welcomed the delegates to Toronto. She spoke of her pride in being a member of the legal profession, as lawyers represent the best hope for justice, and she lauded the ABA's role as a key player in protecting the institutions of democracy and justice.

### Final Statement by Hon. Bernice B. Donald, Secretary

In her final report to the House, Hon. Bernice B. Donald of Tennessee, Secretary of the Association, noted the names of delegates who had passed away since the last meeting, and they were remembered with a moment of silence. Secretary Donald then thanked members of the House for the opportunity to have served as Secretary of the Association for the past three years. She introduced her successor, The Honorable Cara Lee T. Neville of Minnesota.

Secretary Donald delivered a somewhat unique farewell message, calling upon members to plant a garden and create fertile ground for seedlings to grow. She asked the members to plant five rows of peas – the P's of professionalism, principle, purpose, preparation, and politeness. She asked the members to plant three rows of squash, to squash apathy, indifference, and unjust criticism. She then asked the members to include several rows of lettuce – let us treat each other with dignity and respect; let us be unselfish and inclusive; let us promote the goals of the Association and the goals of equal justice of the law; and let us always place principle above power and self-opportunity. She concluded by saying that no garden would be complete without turnips: we need to turn up for meetings; we need to turn up on time, with ideas, a plan, energy to execute the plan, and an unalterable determination to make everything count for something good. She encouraged us to work to make today good and successful and to view tomorrow as a gift by which we receive freshness and innocence.

### Final Statement to the House by ABA President Stephen N. Zack

In his final address to the House as President of the Association, Stephen N. Zack of Florida thanked everyone for the opportunity to have served, and noted that his service would not have been possible without a loving family, a supportive firm, and dedicated staff.

Calling membership the key to all that the ABA does, President Zack reported that we have strengthened our Association in terms of value and visibility. He explained that our key initiatives have been aggressive recruiting, better business operations, and the use of planning and technology to drive membership and revenue growth. Those initiatives have been carried out through a member-

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## TRUSTS AND ESTATES

**By Ilene Sherwyn Cooper**

### Attorney-in-Fact


Ilene Sherwyn Cooper

In a miscellaneous proceeding, the decedent's daughter and one of three beneficiaries of a totten trust account requested an order granting her summary judgment requiring the respondent, the decedent's surviving spouse, to turn over the proceeds of the subject account which had been removed by her prior to the decedent's death.

According to the petition, the respondent removed the funds at issue utilizing a power of attorney that had been executed seven years previously by the decedent. The petitioner further alleged that at the time of the withdrawal, the decedent was dying of metastatic cancer, and was confused, disoriented, and in no condition to make financial decisions. Petitioner's allegations were supported by his medical records, and a letter from his treating physician. Additionally, petitioner submitted proof that the decedent and his spouse had been separated from each other since 1995, and that the decedent was involved in a relationship with another woman at the time of his death.

In opposition to the motion, the respondent alleged, inter alia, that she and the decedent were never separated, had multiple residences, had a relationship built on love, and that although they lived apart from each other, they spoke on the telephone several times a day. The respondent stated that she was aware of the decedent's relationship with another woman, and that the petitioner did not have a close relationship with her father. The respondent admitted withdrawal of the funds with the use of the power of attorney, but maintained that she did so at the decedent's behest, at a time when he was competent.

Relying upon the opinion in Matter of Ferrara (7 NY3d 244), the court opined that the gift-giving authority in a power of attorney is circumscribed by the requirement that the gift be in the best interests of the principal, i.e. designed to fulfill the principal's financial, estate or tax plans. The authority of the attorney-in-fact is further limited by the presumption of impropriety and self-dealing that arises when an attorney-in-fact makes a gift to himself of the principal's monies. Under such circumstances, the presumption can only be overcome with the clearest showing of intent on the part of the principal to make the gift in question.

Based upon the foregoing, the court held that the respondent had failed to demonstrate that the subject withdrawal of funds was in the decedent's best interests, and that he intended her to be the beneficiary of the account in issue. The court found that the respondent's submissions as to the decedent's capacity were self-serving and unsubstantiated, and contrary to the record presented.

Accordingly, upon review of the evidence, coupled with the fact that the power of attorney did not grant the attorney-in-fact the power to conduct banking transactions, summary judgment was granted.

**Matter of the Application of Brock,**

(Continued on page 23)

**LABOR LAW**

# National Labor Relations Act

## *Nonunion employers must post notice of employee rights*

**By Russell G. Tisman**

Russell G. Tisman

Nonunion employers are in for a rude awakening. On August 25, 2011, the National Labor Relations Board "NLRB " – the agency charged with enforcing federal labor laws – issued a Final Rule which requires all employers subject to the board's jurisdiction to post a notice commencing November 14, 2011 that advises employees of their right to organize and engage in concerted activity, under the National Labor Relations Act ("NLRA"). According to the U.S. Department of Labor, "the posting requirement applies to all private-sector employers within the board's jurisdiction." The NLRB has jurisdiction over businesses involved in interstate commerce, a broad concept which includes virtually all private-sector employers, whether or not they are unionized.

> **"Supervisors and managers should be prepared to address questions and employee activity in a manner consistent with the NLRA."**

Employers will be required to post an 11"x17" notice in the form prescribed by the NLRB in the location where other employment notices are posted. Employers who communicate employment policies to their employees over the intranet or Internet also will be required to post the notice electronically. Legal challenges are expected because no statute authorizes the NLRB to direct the general posting of notices.

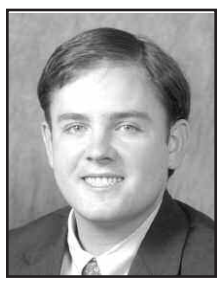
Among other provisions, the poster informs employees that they have a right to: organize a union; form, join or assist a union; select representatives to collectively bargain with their employers over the terms and conditions of their employment, including wages, hours, benefits and other working conditions; and take action with one or more other employees to improve working conditions by complaining to employers or government agencies, seeking help from a union, striking and picketing. The notice also informs employees that they can choose

*(Continued on page 18)*

**TRUSTS AND ESTATES**

# Witnesses to SCPA 2307-A Disclosures

**By Robert M. Harper**



Robert M. Harper

SCPA 2307-a requires that an attorney-draftsperson make certain disclosures to a testator before the testator executes a will nominating the draftsperson, an attorney affiliated with the draftsperson, or an employee of the draftsperson or the affiliated attorney as executor. The failure to comply with SCPA 2307-a, which mandates, inter alia, that the disclosures be acknowledged in writing signed by the testator in the presence of at least one witness other than the nominated fiduciary, generally will result in the reduction of the fiduciary's commissions by one-half. Recently, in *Matter of Beybom,* Suffolk County Surrogate John M. Czygier, Jr. addressed whether "a witness to [an SCPA] 2307-a disclosure form may be affiliated with the nominated attorney/fiduciary" without resulting in a reduction of the executor's commissions. This article discusses the issue in detail.

**SCPA 2307-a**

SCPA 2307-a was enacted to "reduce the potential for overreaching when an attorney drafts a will in which [the draftsperson, an attorney affiliated with the draftsperson, or an employee of the draftsperson or the affiliated attorney] is named as executor." Toward that end, and to ensure that a testator's nomination of a fiduciary is "based upon an informed decision," SCPA 2307-a requires that certain disclosures be made to the testator before the testator executes a will nominating the attorney-draftsperson, an attorney affiliated with the draftsperson, or an employee of either the draftsperson or the affiliated attorney as executor.

In order to comply with SCPA 2307-a, the following disclosures must be made: "subject to limited statutory exceptions, any person, including the testator's spouse, child, friend or associate, or an attorney, is eligible to serve as executor;" "absent an agreement to the contrary, any person, including an attorney, who serves as an executor is entitled to receive an executor's statutory commissions;" "absent execution of a disclosure acknowledgment, the attorney who prepared the will, a then affiliated attorney, or an employee of such attorney or a then affiliated attorney, who serves as an

*(Continued on page 22)*

## PRO BONO

# Pro Bono Attorney of the Month: Thomas Persichilli

By Nancy Zukowski

This month Nassau Suffolk Law Services has the pleasure of honoring Thomas Persichilli, an attorney who has consistently volunteered his time over the long-term to help needy Suffolk County residents. In fact, we have felt compelled to honor Mr. Persichilli twice before, going back to the mid 1990's, due to his outstanding and steadfast commitment to the pro bono mission.

Mr. Persichilli has been a reliable pro bono referral for bankruptcy cases which are screened at Law Services' bimonthly Bankruptcy Clinic. At the clinic, prospective clients who are interested in filing a bankruptcy are interviewed and screened by experienced pro bono bankruptcy attorneys. If the client meets the eligibility guidelines for the service and the matter appears appropriate for a Chapter 7 bankruptcy, the case is referred to a pool of bankruptcy attorneys, like Mr. Persichilli, who have agreed to accept the case on a pro bono basis. The client is usually only responsible to pay for filing fees and mandatory debt counseling fees. With so many people suffering in this economic climate, the clinic is often flooded with applicants for this valuable service who are facing looming debts due to illness, loss of jobs, declining business, and use of credit cards. Mr. Persichilli observes, "With so many people who have lost jobs and are having their homes foreclosed, some cases are being turned away because there are too few volunteer attorneys."

Attorneys like Mr. Persichilli who agree to accept bankruptcy cases on a pro bono basis, give many people an opportunity to reset their priorities and make a fresh start. Describing one of his recent bankruptcy cases which involved a client in the midst of a divorce and recovering from substance abuse, Mr. Persichilli explained, "Obtaining the bankruptcy would be the last hurdle toward getting her life in order. You gain a great deal of satisfaction helping and seeing people turn their lives around after experiencing family or financial trouble. And there is the additional legal experience you gain."

Persichilli has contributed many hours of service over the years. However due to the recession, he has been handling at least one pro bono

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## HEALTH AND HOSPITAL LAW

# Forest Labs Case Illustrates OIG's Broad Powers to Sanction

By William J. McDonald

William J. McDonald

Since they do not normally generate revenue, compliance plans and internal investigations are perhaps two of the least popular items for corporations to spend money on. However, recent events involving Forest Laboratories, Inc. (NYSE: FRX)("Forest Labs"), illustrate how corporations who rely on participating in or selling products to federal health care programs should consider such expenditures worthwhile investments.

Forest Labs recently avoided a devastating sanction from the Health and Human Services Office of the Inspector General ("OIG"). The OIG announced August 5, 2011 that it would not take any action pursuant to its permissive exclusion authority against Howard Solomon, Forest Labs' CEO. If the OIG had imposed the sanction, Mr. Solomon and any company he worked for or owned would have been barred from participating in any federal health care program, including Medicare Part D. Forest Labs is a New York based pharmaceutical company with a $9 billion market capitalization, and Mr. Solomon has been its CEO for the past 30 years. It also has a large presence in Suffolk County . The OIG's announcement provides prescient guidance to help other companies from losing key executives.

The threat to Forest Labs highlights the peril that companies reliant upon participation in federal health care programs face when charged with crimes. Even misdemeanor pleas may result in corporate executives facing OIG's equivalent of the death penalty: exclusion from participation in federal health care programs. If an executive is excluded, a company may no longer employ that individual. This can have devastating consequences. Just consider the equivalent of a pharmaceutical company losing an executive as valuable to it as Steve Jobs has been to Apple.

### The Criminal Case

As detailed in a September 15, 2010 DOJ release , Forest Labs pleaded guilty to one felony obstruction charge and two misdemeanors related to two drugs it illegally marketed. All together, Forest Labs paid $313 million to resolve all criminal and civil liability, including a 2009 False Claims Act case. Mr. Solomon was never charged with any crimes.

### OIG's Exclusion Authority

Under Section 1128(b)(15) of the Social

(Continued on page 22)

## CORPORATE LAW

# When Limited Liability is Not so "Limited"

By Anthony V. Curto and Joseph V. Cuomo

It used to be that corporations and LLCs protected business people from personal liability. Not so fast! Business owners and operators running their enterprises in a corporate or LLC form, as a genera rule, are not personally responsible for the debts and liabilities of their entities. There are, however, certain important exceptions to this general rule. This article provides an overview of these exceptions by describing those situations where a business owner or operator may have personal liability exposure.

The concept of "limited liability," whereby a business owner or operator's personal liability is limited to the value of his equity investment in his company, is a hallmark of corporate law. Both statutory and case law, and the courts, recognize that this well-established principle serves an important public policy by encouraging business development, which in turn creates jobs and fosters economic growth. If the entity is sued, the liability exposure is typically limited to the entity itself and does not extend to its owners or operators. Such limited liability protection therefore encourages individual business owners and operators to pursue new ventures in corporate or LLC form, without having to worry that their personal assets will be at risk.

### Personal guaranty

If a business owner or operator personally guarantees his company's debts or obligations, he is then personally liable for their non-payment. This occurs most commonly at the entity's start-up phase, as lenders, landlords and vendors will often require a personal guaranty before dealing with a newly formed company. An owner or operator may be willing to sign a personal guaranty to make some third party dealing with his company feel more secure in doing so. This is arguably the most straightforward scenario in which a business owner or operator might bear personal responsibility for his company's debts and obligations.

Anthony V. Curto

Joseph V. Cuomo

### "Piercing the corporate veil"

Although doing business as a corporation or LLC typically protects individual owners from personal liability, in rare cases, courts will allow a litigant to "pierce the corporate veil" and will hold the owners personally responsible for the company's actions. A court may grant this extreme remedy in situations where a business owner misuses or abuses the corporate or LLC form, or attempts to use it as a shield to protect his own culpable conduct. Piercing usually occurs only in the closely held company context. The test for piercing has been stated in many ways, but the general concept is that the litigant wishing to pierce must show: first, that the defendant owner dominated and controlled the entity, so that the entity had no will of its own; second, that the owner used this control to commit fraud or some other wrongdoing; and third, that these wrongful actions were the cause of the litigant's loss or injury. The owner must have participated in the actual wrongdoing in order to be personally liable—a court can "pierce," therefore, for one owner, without piercing for all of them.

Beyond the three-step inquiry stated above, courts will consider other factors. One is whether or not the company has observed corporate formalities, such as holding meetings, having shareholder or member votes, and keeping a minute book. If the company does not do these things, a court may be more apt to believe that the entity is simply a front for the business owner's individual actions. A court will also look to see whether there has been a commingling of individual and company funds and assets, another indicator that the owner is using his corporation or LLC for his own personal purposes. Finally, if a company uses deceptive business practices to give the appearance of stability and solvency, thereby luring potential investors and creditors to part with their money under false pretenses, a court is more likely to pierce the corporate veil and hold the culpable individual owner responsible.

### Payment of sales tax

New York Tax Law § 1133 imposes personal liability for unpaid sales and use taxes upon "persons required to collect tax." With respect to companies, this can include shareholders, members, directors, managers, officers and employees who are under a duty to act for the entity and collect taxes. The inquiry is whether the business owner or operator is a 'responsible person' who had adequate control and authority over the entity's tax collection function—an owner or operator is not automatically liable simply by virtue of being an owner or operator. If such individual does not exercise sufficient control over the collection of taxes, he is not a responsible person for purposes of the law. The Tax Commission considers various factors when making its determination, including the individual's status as an owner and the percentage of equity owned. Possible evidence that an owner or operator is a "responsible person" may be found if he is also the chief financial officer or treasurer, if he signs corporate tax returns, or if he has full access to the entity's books and accounts. The "responsible person" determination is made on a case-by-case basis.

### Wages

New York's Business Corporation Law ("BCL") § 630 addresses the potential personal liability of corporate shareholders for wages owed to corporate employees. The aim of this statute

(Continued on page 21)

## CONSUMER BANKRUPTCY

# Life Estates and Remainder Interests Are Exempt

*U.S.D.C. in first impression case permits homestead exemption*

**By Craig D. Robins**

Many senior citizens, as part of an elder-law planning strategy, transfer title of their homes to their children while retaining a life estate. Doing so, and waiting a requisite period of time, enables the seniors to qualify for certain Medicaid benefits, and further permits the house to pass without probate.

However, up until recently, there was a degree of uncertainty by some bankruptcy trustees as to whether the remainder interests were protected in bankruptcy.

In 2009, I was retained by the Rasmussens – a husband and wife – to represent them in what appeared to be a typical Chapter 7 filing involving typical consumer debt.

The only fact that was out of the ordinary was that they lived with the husband's mother, a widow, who had previously deeded a life estate in her house to herself, while granting the remainder interest to her son and daughter-in-law.

I assumed that the debtors would be able to protect their remainder interest by asserting the homestead exemption which permits debtors who own their homes and reside in them to protect a certain amount of equity. After all, the debtors owned the remainder interest, which is an interest in real estate, and they resided in the house. They also contributed to the household expenses by paying rent to the husband's mother pursuant to an oral lease.

I filed the Chapter 7 bankruptcy petition in March 2009 and Kenneth Silverman was appointed trustee. The trustee disagreed with our contention that the remainder interest was exempt as a homestead. The trustee then brought a proceeding challenging the debtors' claimed exemption, arguing that since the debtors did not have a present right to possession, they did not sufficiently "own" the property as required by the homestead statute.

Craig D. Robins

Judge Alan S. Trust, in a decision in July 2010, ruled in favor of the debtors stating that they could exempt their remainder interest as a homestead. In re *Rasmussen,* No 09-72069-ast, (Bankr. E.D.N.Y., Jul. 20, 2010).

The judge commented that this was a case of first impression in the Second Circuit, and that there was no federal or New York case law in this jurisdiction addressing whether holders of either a life estate or a remainder interest can claim a homestead exemption under the New York homestead exemption statute, C.P.L.R. § 5206.

The court determined that the debtors' remainder interest qualified for the exemption because New York's homestead exemption statute does not specify which types of ownership interests are exemptible, and hence does not preclude it.

The court further concluded that since a future interest in real property is descendible, devisable, and alienable to the same degree as estates in possession, the debtors' interest is therefore an ownership interest and thus exemptible.

Judge Trust further found this outcome was particularly apt in light of the Bankruptcy Court's duty to construe the homestead exemption in the debtors' favor to effectuate its purpose of protecting homeowners from seizure of their homes and to protect a debtor's home in the event of bankruptcy.

Although the debtors and I were elated by this decision, within days the trustee appealed to the United States District Court for the Eastern District of New York.

In September 2011, Judge Joanna Seybert affirmed the Bankruptcy Court's decision, commenting that Judge Trust's decision was thoughtful and well-reasoned. In re Rasmussen, No. 10-CV-4173-js (E.D.N.Y., Sept. 14, 2011).

Judge Seybert focused on the wording of the homestead statute which permits homeowners to exempt their home when it is "owned and occupied as a principal residence." There was no dispute that the debtors occupied the premises as principal residence. The only issue was therefore whether the debtors "own" the premises within the meaning of the homestead statute.

The District Court held, as did the court below, that a future interest is an ownership interest.

The trustee had claimed that the Bankruptcy Court was incorrect in concluding that "neither exclusive possession nor exclusive ownership are, on the face of CPLR § 5206(a), required to establish an exemptible interest." To that, the District Court stated, "The trustee is plainly wrong. Section 5206(a), by its terms, does not specify the circumstances of ownership or occupation required to claim a homestead exemption."

Although Judge Seybert applied her reasoning to the actual set of facts, which included the fact that the debtors paid rent to the husband's mother pursuant to an oral lease, the decision is pretty clear that the debtors would have received the same result, even if they did not pay rent. The judge did not address this distinction at all.

Thus, there should be no doubt in this jurisdiction, absent a higher appellate court case down the road, that future interests and remainder interests are exempt as homesteads in bankruptcy proceedings, as long as the debtor resides in the premises.

*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 20 years. He has offices in Coram, Mastic, West Babylon, Patchogue, Commack, Woodbury and Valley Stream. (516) 496-0800. He can be reached at CraigR@CraigRobinsLaw.com. Visit his Bankruptcy Website: www.BankruptcyCanHelp.com and his Bankruptcy Blog: www.LongIslandBankruptcyBlog.com.*

## RESTAURANT REVIEW

# Gotta' Go to Moe's!

*Come for the pancakes, stay for the baked oatmeal!*

**By Dennis R. Chase**

Dennis R. Chase

This Smithtown landmark has the sheer, unmitigated audacity to close at 3 p.m. during the busy week and at 1:45 p.m. on the even busier weekend! How can a restaurant survive by closing in the middle of the afternoon? The answer is quite simple; the food at Maureen's is not only the best brunch on Long Island, but one of the best bangs for the buck in New York.

Several years ago, Maureen's went from being a local greasy spoon serving homespun breakfast at a roadside stand located further south from their current location, and across the street, to their current digs, an upscale temple to the goddess Bovine. Look for the cow sculpture out front, look at the glass encased classic motor cycle in a piebald motif in the waiting area, or the thousand of other cow related tchotchkes strewn about the place.

There are three down sides to the place, however.

First, is considering just what to order ... breakfast or lunch? For years, Maureen's patrons haven't even given any consideration to flipping over their menus to peruse the lunch selections. Breakfast, at Moe's, is giving consideration to all of the ultimate comfort foods. Someone at your table must (or should, at the very least, be strongly encouraged to) order the best pancakes in the world, even if just the short stack. Chase those pancakes with the crispy home fries or the tasty corned beef hash. Once you have Moe's pancakes, IHOP becomes a four letter word. But, it's all great! Innovative omelets cram the center of the menu... and deeply into my heart. Local faves include the Artichoke, Roasted Pepper & Mozzarella omelet or the Pastrami, Fresh Scallion & Swiss omelet... but don't forget the baked oatmeal. Oatmeal... really? Who in their right mind goes out for breakfast and orders the oatmeal? Picture a steaming, fresh, and incredibly moist oatmeal cookie served in a bowl with raisins, dates, and slivered almonds, oh my!

Keep a keen eye on the specials board as there are always new and interesting omelets to try (and all omelets are served with home fries and toast). Also, another breakfast fave is The Original Croissant French Toast, stuffed with cream cheese and delightful raspberry preserves, as well as all the specialty pancakes of the day. If you are lucky enough to see the cheese blintzes served with fresh fruit on the specials board, make sure this is served on the side. Now you understand why few feel the need to consult the lunch menu.

The lunch menu can be broken down in to three categories... burgers, platters, and sandwiches. The burgers are thick, juicy, and carefully cooked to order. Try one with your choice of five cheeses, mushrooms, onions, bacon, ham, or a slew of other fresh toppings. These burgers MUST be served with some of Moe's mouthwatering and crispy fries or the extremely fresh cole slaw. The platters include everything from your basic tossed salad to a Chef's Salad Platter that truly is a meal in itself. There is the choice of 15 different sandwiches, not including the specialty sandwiches of the day. Experiment with the Cranberry Chicken Salad with White Cheddar and Sliced Apples served on Grilled Wheat or be pleasantly surprised by the Sliced Everroast Chicken with Eggplant, Asparagus, Roasted Peppers, Mozzarella & Pesto on Grilled Rye. The standards, however, chicken salad, tuna salad, or even the classic BLT are all terrific with some of the chunky potato salad on the side. If you plan a trip to the gym on the way home, order a milkshake, because you need the extra calories only these milkshakes can provide . . . move over Ensure.


**Maureen & Daughters' Kitchen**
108 Terry Road, Smithtown, New York
(631) 360-9227

Now the downsides . . . cash only, no credit cards, period. Finally, if you plan to visit Moe's on the weekend (and there are no reservations, ever), be prepared to wait and come with the understanding that the restaurant's host rules with an iron fist. He will not seat your party until all of the members of your party are present. When the door closes, it locks, and if you're convincing enough to connive a waiting patron to let you in after closing time, the host will not add your name to his list of those waiting for a table. We've been shut out of brunch by arriving at 1:46 p.m. on a Sunday morning.

*Note: Dennis R. Chase is the current First Vice President of the Suffolk County Bar Association and the managing partner of The Chase Sensale Law Group, L.L.P. The firm, with offices conveniently located throughout the greater metropolitan area and Long Island, concentrates their practice in Workers Compensation, Social Security Disability, Short/Long Term Disability, Disability Pension Claims, Accidental Death and Dismemberment, Unemployment Insurance Benefits, Em-ployer Services, and Retirement Disability Pensions.*

**PRACTICE MANAGEMENT**

# 5 Ways to Motivate Employees and Associates

**By Allison C. Shields**

One of the biggest issues my law firm clients face is motivating employees and associates, particularly in a difficult economy such as this one, which has forced law firms to cut back on benefits and reduce salaries. But research shows that trying to motivate employees simply with financial incentives may be a poor long-term strategy anyway.

So how can you get your employees and associates to look more at the 'bigger picture,' produce a consistent, quality work product, think and work independently, show some initiative and provide excellent client service?

Studies have shown that there are four factors involved in keeping good employees or associates:

- Intrinsic rewards
- Opportunity to grow
- Recognition of accomplishments
- Economic rewards

This article will focus on the first three factors by discussing five ways to increase loyalty by changing your perspective; instead of thinking about what that employee is giving to the firm, think about what the firm can do for the employee. Why should this individual want to continue working for your firm? What does the firm provide that they won't be able to get elsewhere?

When you think about your employees in this light, considering how you can help them and how you can ensure loyalty and boost retention, their cooperation, commitment and motivation to your and to your firm will naturally increase.

Invest in your employees in ways that have nothing to do with salary

Once you have laid out your expectations, it's your job to do what you can to make sure your associates and staff have the tools they need to perform their jobs effectively. Have you provided the tools, training and equipment necessary to help your employees succeed?

Perhaps the biggest step you can take is to be interested in your employees as people and as professionals. How can you provide challenging work and opportunities to grow? In what ways can you help them advance their careers? Are there particular interests they would like to pursue? How can you align their goals with the firm's goals?

### Set expectations up front

When I am working with law firms, the first thing I ask law firm managers when they complain that their associates or staff are not performing well, are not 'properly motivated' or not invested in the work that they are doing is whether firm managers or supervisors have specifically discussed individual expectations with the employee.

While many managers think that their employees 'should' know what is expected or what benchmarks (whether formal or informal) the firm is using to measure their progress or contribution to the firm, when we've actually done the work and asked employees and firm managers to list these expectations, they frequently do not match up.

As longtime lawyers or law firm managers, many of my clients tend to forget how much they have learned over the years and how much they did not know as new associates – or even as experienced attorneys moving to a new firm with a different culture and different expectations. Too often, firms discuss expectations in terms of billable hours and caseloads and offer associates a financial incentive for generating business, but never specifically discuss what they expect associates to do or to produce in terms of client service, professional growth and development, business generation, commitment to the firm, work product and non-billable items.

Allison C. Shields

Many law firm associates are frustrated because they have no idea what the criteria and/or opportunities for advancement are within the firm. They don't know what the firm considers valuable, how to get promoted, or what the opportunities for advancement are. Giving associates a glimpse of the future can be a very valuable tool for motivating performance and ensuring retention.

### Provide immediate, personalized feedback

Are you waiting until your associate or employee's 'annual review' to discuss their job performance? If so, it is no wonder that your employees are not performing well or are not motivated to go the extra mile for your firm. Reviewing an individual employee's strengths, weaknesses goals and expectations on an annual or semi-annual basis is a good idea (even though most firms who say that they conduct annual reviews rarely do so, and if they do, give them short shrift), but it isn't enough.

In the same way that you give a child feedback right away when they do something wrong or when you want to encourage positive behavior, you need to provide ongoing, timely feedback to your employees. Getting angry that the work is 'never done right' or re-doing tasks performed poorly without taking the time to show the employee where they went wrong and where they can improve fosters resentment on your part and laziness or apathy on the part of the employee. You simply cannot expect an employee to change or improve their behavior or work product if you wait until their annual review or if you only tell them as a group in a firm-wide meeting that there is a problem.

Telling employees as a group that work is not being performed properly rarely leads to change or improvement without additional personalized meetings, because it is too easy for every employee to think that you are talking to someone else. After all if their work was a problem, someone would have pointed it out to them by now, wouldn't they?

### Praise a job well done

Believe it or not, most employees want to do a good job. They want to be well treated and respected, regardless of the compensation they receive. These are the "intrinsic rewards" mentioned above.

When I ask lawyers what they like best about the work that they do for clients, more often than not, the first response I receive is 'When a client says thank you,' or 'When I feel that I have helped someone reach their goal or get out of a difficult situation.' The satisfaction of helping others is a big part of why many lawyers enter the practice, but it isn't limited to lawyers – non-lawyer employees like to know that they helped someone, too.

Many associates and staff do not deal directly with clients or do not get the benefit of hearing praise from clients. Indeed, for associates and staff, you, the law firm partner or their supervisor are their 'client.' Associates and employees enjoy receiving praise and knowing that their work made a positive difference to the firm or its clients.

Share the praise with your employees when a client expresses gratitude for a job well done. Make sure that everyone in the firm knows their part in the success of the firm and in individual matters.

Praise the work that the clients never see – the employee who is always on time, who goes the extra mile, whose work is insightful or high quality. Those employees make a significant contribution to the firm, but are sometimes overlooked.

Unfortunately, as a manager, your time can be too easily consumed by the 'problem' employees who are not doing what they should be doing, or who are providing low quality work, and the employees who are performing well are ignored simply because they are not a problem. Reverse that trend, and show your employees and associates that you appreciate them and that their good work is worth just as much of your attention as the work of those who are not producing.

That's the kind of attitude that fosters even more good work. After all, don't you feel energized and ready to tackle another problem with more energy and enthusiasm after a client compliments you? Contrast that with how you feel when clients seem ungrateful or don't realize the work that goes into the service you provide for them.

### Seek input

If you want your employees and associates to develop an "ownership mentality" rather than an "employee mentality," you need to give them some ownership of what happens in your firm. Ask for their insights and suggestions about improving the firm, whether that are in the form of improved procedures internally, new ways to communicate with clients, or new technologies that might aid your day to day operations.

The more your employees are involved in helping to make decisions and build your firm, the more likely they are to want to protect and grow the firm. Haven't you had that experience? When you have a hand in creating something, you're proud. If you feel that something belongs to you, you take much better care of it.

Allow associates to have input about how to grow the firm. Have them attend and participate in business development activities or new client meetings. Let associates come up with creative or innovative ideas for business development that showcase her strengths.

These five steps may take some additional time or require a new way of thinking, but they won't require digging into the firm's pocketbook, and they may very well reap more rewards than monetary bonuses would.

*Note: Allison C. Shields is the Founder of Legal Ease Consulting, Inc., which offers management, productivity, business development and marketing consulting services to law firms. Get more management and marketing tips at www.LawyerMeltdown.com or www.LegalEaseConsulting.com.*

**SCBA PHOTO ALBUM**

# Council of Committee Chairs Meeting

Photos by Laura Lane

# Celebrating National Hispanic Heritage Month

Photos by Court photographer Danielle Dreves

See story on Page 23

**PERSONAL INJURY**

# Adding Insult to Injury

## *Product that allegedly injured plaintiff destroyed before trial*

**By Madeline Klotz**

The best evidence in a products liability case is almost always the product itself. The plaintiff uses it to prove that the defective product caused plaintiff's injuries, and that it was manufactured by the defendant. The defendant uses the actual product to prove that it had not manufactured the product, or that the product was not defective. But what happens when the product has been destroyed before trial? Can the case proceed to trial without the most critical piece of evidence?

As discussed below, court opinions vary widely based upon a variety of factors. This article will discuss cases involving a party's intentional or negligent destruction of evidence, known as spoliation, as well as cases in which evidence was innocently destroyed, and suggest public policy reasons for allowing a case to proceed to trial despite the innocent destruction of the product in question.

### The status of the Law of Spoliation

When evidence is destroyed, it is usually destroyed by a party to the case. When this happens, the party who has not destroyed the evidence may seek sanctions against the destroyer. Sanctions for the destruction of evidence are provided under Section 3126 of the CPLR. They are also available under the common law doctrine of spoliation.

**The CPLR:** When a party has destroyed the product, it is unable to disclose the product as evidence. Section 3126 provides three possible remedies for the failure of a party to disclose evidence: first, that the issues will be resolved in favor of the party moving for sanctions; second, an order preventing the destroying party from supporting or defending claims or defenses, and from producing evidence; or, third, an order striking the pleadings, dismissing the action, or rendering a default judgment against the disobedient party. But, for a court to strike a party's pleading pursuant to the statute, the failure to produce the evidence must be "willful, contumacious or in bad faith." Foncette v. LA Express, 295 A.D.2d 471, 472 (2d Dep't 2002).

**Common Law:** Common law sanctions for spoliation of evidence allow striking the destroying party's pleading when the destroyed evidence is essential to the case and the non-destroying party is unable to defend itself with "incisive evidence." However, if the destroyed evidence is not essential or its destruction does not prejudice the other party, a lesser sanction of preclusion from proving the evidence's condition may be imposed. See *Mylonas v. Town of Brookhaven,* 305 A.D.2d 561, 562-63 (2d Dep't 2003); Foncette, 295 A.D.2d at 472; Marro v. St. Vincent's Hosp., 294 A.D.2d 341, 341 (2d Dep't 2002).

While both the statute and common law allow the striking of a pleading, they have very different standards for imposing this drastic sanction. The distinctions are due to the different focuses of the two standards. The common law focuses its basis for sanctions on the prejudice to the party seeking sanctions, while the statute focuses on the intent or conduct of the party who caused the loss of evidence. See *Favish v. Tepler,* 294 A.D.2d 396 (2d Dep't 2002). Regrettably, many court decisions do not differentiate between them resulting in conflicting opinions and confusing law.

For example, in *Kirschen v. Marino,* when considering whether to impose sanctions for spoliation, the court stated that

> [a] party seeking a sanction pursuant to CPLR 3126 such as preclusion or dismissal is required to demonstrate that 'a litigant, intentionally or negligently, dispose[d] of crucial items of evidence . . . before the adversary ha[d] an opportunity to inspect them', thus depriving the party seeking a sanction of the means of proving his claim or defense. The gravamen of this burden is a showing of prejudice.

16 A.D.3d 555, 555 (2005). While the court in Kirschen referred to the statute, its analysis was based on the common law standard of prejudice, rather than the statutory requirement of willful, contumacious or bad faith conduct. Because courts sometimes confuse these standards, a practitioner should clearly state the sanctions sought and the proper standard required for the imposition of sanctions.

### The rarer case when Spoliation is not involved

Most case law involves situations where one of the parties, usually the plaintiff, has either intentionally or inadvertently destroyed evidence. Under these circumstances, the court may apply either a common law spoliation analysis determining the prejudice to the party seeking sanctions or a statutory analysis determining whether a party willfully destroyed the evidence. However, there is a rare occasion when neither party is at fault for the destruction of evidence. Here, the court considers whether a plaintiff can prove its case without the crucial evidence.

In strict products liability cases, courts have recognized that a plaintiff need not prove a specific defect, but may prove the necessary facts with circumstantial evidence. See *Coley v. Michelin Tire Corp.,* 99 A.D.2d 795, 795 (2nd Dep't 1984); *Otis v. Bausch & Lomb Inc.,* 143 A.D.2d 649, 650 (2d Dep't 1988); *Yager v. Arlen Realty & Dev. Corp.,* 95 A.D.2d 853, 853 (2d Dep't 1983). "[A] product defect may [also] be inferred from proof that the product did not perform as intended by the manufacturer." *Coley,* 99 A.D.2d at 795.

For example, in *Otis v. Bausch & Lomb Inc.,* a plaintiff claimed she suffered eye injuries from contact lenses. 143 A.D.2d at 649. Although the plaintiff disposed of the lenses because they had dried out, the court permitted the case to go to trial without the lenses because the plaintiff had presented sufficient circumstantial evidence to raise a triable issue. Id. at 650. The court acknowledged that both the identity of a manufacturer and the existence of a product's defect can be proven with circumstantial evidence. Id.

Thus, courts will allow a plaintiff's case to proceed without essential evidence.

### Public policy reasons for allowing cases involving destroyed evidence to proceed to trial

Unless the plaintiff has intentionally or negligently destroyed the product, it seems fundamentally unfair for the injured plaintiff to suffer a second injury -- the loss of compensation for his injuries -- because the product has been destroyed. Must the plaintiff bear this additional loss?

Madeline Klotz

Although the answer is not clear, it appears that courts are expanding the rights of plaintiffs in missing product cases. For example, in 1973, the Court of Appeals expanded manufacturers' liability holding that manufacturers may be liable not only to users of a defective product, but also to injured innocent bystanders. *Codling v. Paglia,* 32 N.Y.2d 330, 335 (1973). In *Codling,* the court found that a manufacturer of an automobile containing a defective steering mechanism was liable to bystanders who were injured when the defective automobile lost control and collided with the bystanders' vehicle. Id. The court discussed important public policy reasons to support imposing liability.

First, the court recognized that the ultimate rationale for expanding warranty protection is to cast the burden on the manufacturer which sold the product on the market. Second, the court noted that

> [t]oday as never before the product in the hands of the consumer is often a most sophisticated and even mysterious article. . . Advances in the technologies of material, of processes, of operational means have put it almost entirely out of the reach of the consumer to comprehend why or how the article operates, and thus even farther out of his reach to detect when there may be a defect or a danger present in its design or manufacture. In today's world, it is often only the manufacturer who can fairly be said to know and to understand when an article is suitably designed and safely made for its intended purpose. Once floated on the market, many articles in a very real practical sense defy detection or defect, except possibly in the hands of an expert after laborious and perhaps even destructive disassembly. Id. at 340.

Finally, the court recognized that holding manufacturers liable to nonusers will pressure manufacturers to create safer products, especially since the manufacturer "alone has the practical opportunity, as well as a considerable incentive, to turn out useful, attractive, but safe products." The court also noted that the increased price as a result of this burden on the manufacturer is acceptable because users will have the added assurance of safety. *Codling,* 32 N.Y.2d at 341.

The court's rationale in *Codling* for expanding manufacturers' liability can be applied to the context where a product causing injury to a person is later innocently destroyed. When a product has been destroyed before trial through no fault of the plaintiff, the injured plaintiff should nevertheless be given an opportunity to seek compensation for its injuries. Since the manufacturer sold the defective product on the market, the defect was likely undetectable, and only the manufacturer was in the position to produce a safe product, the manufacturer should be held liable when its defective product causes injuries to others. The manufacturer will still have its day in court, but at least the injured plaintiff will, too.

*Note: Madeline Klotz is as an associate in Meyer, Suozzi, English & Klein's Personal Injury Department.*

# *Rent Demand* *(Continued from page 5)*

tional motion practice rendering nonpayment proceedings anything but "summary" and increased costs to the tenant if the lease requires the tenant to pay costs and fees associated with prosecuting the summary proceeding.

Another recent proceeding in which a court dismissed the petition based on a "defective" rent demand is *JLNT Realty LLC v. McKenzie,* 56518/2011, NYLJ 1202508287984, at *1 (Civ., KI, Decided, July 19, 2011). In JLNT, the court dismissed the nonpayment petition where the amount sought in the rent demand was almost double the amount alleged due and sought in the petition.

In *JLNT Realty,* the landlord's rent demand sought two month's rent that had been previously paid by the tenant upon resolution of a previous non-payment proceeding. The stipulation of discontinuance of the previous proceeding specifically recited that the tenant had paid rent through September 2010, but the landlord, in a new rent demand, sought rent for August 2010, and September 2010. The petitioner "corrected this error in the subsequent petition" but the court nevertheless dismissed the petition because the rent sought in the rent demand was "not reasonably related to the actual amount owed and therefore the demand is defective." The court further found the rent demand was "not made in good faith and is defective as a matter of law. The importance to the tenant of receiving an accurate demand of rent due is of paramount importance especially in view of the consequences of non-payment."

It is interesting to note that the court in *RCPI* did not discuss the requirement that a rent demand must seek an amount reasonably related to the actual amount owed. If the demand does not need to recite the exact amount owed, why is a petition defective if it seeks some rent not demanded? I suppose the court in *RCPI* would say "because the statute requires it." This seems contrary to the CPLR provisions permitting amendment and puts landlords on a slippery slope requiring exact precision and agreement between the amount recited in a rent demand and a subsequent petition.

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

## AMERICAN PERSPECTIVES

# Guitar Wars

## *US Justice Department versus Gibson Guitar*

**By Justin Giordano**

On August 24, 2011 in the early morning hours, 8:45 AM CDT to be precise, fully armed federal government agents entered Gibson Guitar's facilities in Nashville and Memphis, Tennessee, to execute four search warrants. Upon entering they seized pallets of wood as well as a number of electronic files and guitars. Manufacturing operations were forced to cease for the day while Gibson's employees were sent home. Gibson Guitar fully cooperated with the agents as they executed the warrants. The materials and equipment seized amounted to approximately one million dollars.

This incident is in fact a repeat performance as agents armed with automatic weapons previously raided the Gibson Guitar's manufacturing plant in Nashville in late 2009. At that time federal agents confiscated a substantial amount of ebony fingerboard blanks that emanated from the country of Madagascar as well as guitars.

The question is what is Gibson Guitar being charged with? This is a perfectly legitimate inquiry and in the vast majority of cases where such public and forceful execution of warrants is exercised the answer(s) would be readily and widely available. However, oddly enough in the case at hand, no criminal charges were filed and furthermore the U.S. Government is still holding onto Gibson Guitar's property.

The 2009 presumed charge was that Gibson Guitar obtained, by whichever means, illegally harvested hardwoods from Madagascar's protected forests that were used in the production of guitar fingerboards. Were this charge to be proven true this would indeed constitute a serious offense if done intentionally. There has been however no evidence presented to this date that Gibson knowingly purchased or acquired the aforementioned illegally harvested hardwoods. If the Justice Department has such evidence they have not made it public as of this date. With regard to the most recent raid, the issue is even more clouded.

"Everything is sealed. They won't tell us anything," Gibson Guitar CEO Henry Juszkiewicz said, maintaining a calm and even demeanor in the aftermath of the federal government's execution of the warrants. He further added that "(The government) has suggested that the use of wood from India that is not finished by Indian workers is illegal, not because of US law, but because it is the Justice Department's interpretation of a law in India."

The foundational justification from this presumed charge derives from the Lacey Act of 1900. In terms of context and background, the commonly known Lacey Act (16 U.S.C. ss3371-3378) was introduced in 1900 by then Iowa Congressman John P. Lacey, who's law is named after, and signed into law on May 25, 1900 by President William McKinley. In its essence, the act is a conservation law, and the first law aimed at protecting plants and wildlife through the creation of criminal and civil penalties for broad spectrum of violations.

Most notably the Lacey Act makes it illegal to trade in fish, plants and wildlife that have been unlawfully acquired, sold or transported. The law came about to curb illegal commercial hunting that at the time threatened many game species across the United States. The intent of the original act was thus to prohibit poaching game in one state and selling it in another. Such activity was made a federal crime. In its present day incarnation the act makes illegal the importation, transportation, exportation, sale, acquisition, and purchasing via interstate and/or foreign commerce any plant that is deemed illegal by the laws of the United States, any given state law, or any foreign law that protects said protected plants.

Justin Giordano

More recently, on May 22, 2008, the Food, Conservation, and Energy Act of 2008 expanded the Lacey Act's reach by incorporating under its protective umbrella an even broader range of plants and plant products.

In the August 24, 2011 raid the federal government appears to be raising the issue of whether some of the wood Gibson Guitar brought in from India avoids every possible prohibition that the Lacey Act may incorporate within its purview, even such prohibition is far from evident. If that is the case the question that follows is which one of these inferred prohibitions was violated? There is no evidence that has been put forth at this point, by the government or any other source, which would indicate that this wood was taken from the equivalent of a rain forest or otherwise endangered the environment in any way. Nevertheless the suggestion from the Department of Justice is that the utilizing wood from India that is not finished in India by Indian workers is prohibited by law. This is not because U.S. law was violated but rather Indian law was, at least according to the Justice Department's interpretation of Indian law. It is important to underscore however that the government of India did not seek, support or consent to these actions taken by the American Justice Department.

Nevertheless, the suggestion from the Department of Justice is that utilizing wood from India that is not finished in India by Indian workers is prohibited by law. This is not because U.S. law was violated but rather Indian law was, at least according to the Justice Department's interpretation of Indian law. It is important to underscore however that the government of India did not seek, support or consent to these actions taken by the American Justice Department.

In response to this insinuation Gibson has stated that the wood confiscated during the August 24, 2011 raid was obtained from a supplier that is certified by the Forest Stewardship Council. Consequently, the direct implication is that the wood at issue complies with its standards. The Forest Stewardship Council is recognized as a reputable, independent not-for-profit organization that was established with a stated mission of responsible management of forests all across the planet. Its Controlled Wood standards mandate that the wood cannot be illegally harvested including in violation of traditional and civil rights. In addition, Gibson Guitar as a corporate entity reminds its critics that it has long been a supporter of sustainable wood sources. This has been demonstrated by its work with prominent organizations such as Greenpeace and the Rainforest Alliance and by acquiring its wood from suppliers certified by the aforementioned Forest Stewardship Council.

In terms of apparent inconsistencies vis-à-vis protection of resources, as was mentioned previously, if this same wood had been finished in India by Indian workers then, according to the Justice Department, there would have been no violation whatsoever be it by Gibson or anyone else. Consequently, it is amply clear that this is not an issue of conservation and thus a case might be made that it falls outside the purview or at least the original thrust of the Lacey Act of 1900. That aside, it was also noted that the act has evolved since its inception and amended as late as 2008. However even under the assumption--be it questionable or not--that the act as it stands requires that the wood acquired from India by Gibson must comply with Indian law has never been established that Indian law was violated. Further supporting this contention is the fact that India has never made any statement, or remotely taken any legal action to that effect.

Some have accused the Justice Department of selective targeting companies that do not share the administration's political views and perhaps there may be a morsel of truth to this, particularly given that in this case Gibson's CEO is a known supporter of conservative causes with Republican Party leanings. Obviously this is in opposition to the current administration's general bend. This is merely speculation and certainly not provable. Nevertheless, Gibson CEO Henry Juszkiewicz did make his views and sentiments, even if indirectly, known in this regard, as reported by the Memphis Daily News: "The federal bureaucracy is just out of hand. And it seems to me there's almost a class warfare of companies versus people, rich versus poor, Republicans versus Democrats…and there's just a lack of somebody that stands up and says. 'I'm about everyone. I'm really about America and doing what's good for the country and not fighting these little battles'."

At the press conference that was held the day following the August 24 raid Juszkiewicz also expressed his criticism of the government in terms of the economic impact of their actions at a time of high unemployment. He underscored that Gibson "hired over 580 American workers" over the past two years. "We are one company manufacturing in the United States that's hiring people," he added, "and yet the government is spending millions of dollars on this issue." If the government's actions against Gibson are successful, Juszkiewicz opined, the end result will be that the wood that Gibson needs to produce its products will have to be finished in a foreign country employing that country's workers instead of American workers.

The final word on this evolving case has yet to be written of course, particularly given that the Federal Government has not yet filed specific charges against Gibson Guitar. But the overarching question is whether the American federal government is now extending its environmental reach worldwide based on its interpretation of environmental protection even in circumstances where a given country does not deem its environmental laws have been violated or its environment harmed. For those who are often critical of American involvement outside its borders or accuse the United States of needlessly interfering in other nations' internal affairs, this case seems to fall right into that category, at least on its surface and based on the known facts surrounding the case.

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

# *Pro Bono* *(Continued from page 4)*

case per month, sometimes more. But this work does not take away from his private practice. He explained the work that he does for the Pro Bono Project is very much like the work he has been doing in his private practice in Deer Park for over 30 years since being admitted to the New York State Bar. He is a graduate of New York Law School and Boston College and brings to the Pro Bono Project the experience gained from his many years of working on matters such as bankruptcies, family law, divorce, child custody, matrimonial, real estate and commercial law. He has been married to his wife Darlene for 33 years and together they raised four children, Anthony, Nick, Amanda and Mike.

When asked what attracted him to the Pro Bono Project, Persichilli simply stated, "They asked, so I try to help." He encourages other attorneys to become involved with the Project, "because you are helping people who otherwise could not afford legal services, you gain additional experience, and of course there is always the possibility of referrals. But more importantly the people who come through Pro Bono are really down on their luck, have few assets, and really need help."

We are very grateful to have committed attorneys like Mr. Persichilli on our pro bono panel. Due to his many years of dedicated service, we are pleased to honor Thomas Persichilli as Pro Bono Attorney of the Month.

For more information about Nassau Suffolk Law Services' Bankruptcy Clinic please call 631 232-2400.

*Note: Nancy Zukowski is a paralegal volunteer with Nassau Suffolk Law Services.*

# Bench Briefs (Continued from page 5)

discovered evidence would not change the basic issues of the case and Action Target had not demonstrated that its inclusion would hinder preparation of its case.

The motion for default judgment was denied; complaint insufficient to demonstrate facts constituting the claim.

In *Jeffrey Puma v. Ronald Jones and Bunker Hill & Valley Forge MHC,* Index No.: 11092/09, decided on August 23, 2010, the court denied plaintiff's motion for a default judgment against defendant, Bunker Hill & Valley Forge MHC. In denying the motion the court noted that allegations in the complaint regarding the corporate status of said defendant were on "information and belief."

In view of the assertions in the opposing affirmation that the named defendant was a non-jural entity incapable of being sued and because the source of information was not identified in the complaint, the complaint alone was insufficient to demonstrate the facts constituting the claim.

**HONORABLE THOMAS F. WHELAN**

Motion for a preliminary injunction enjoining defendant's prosecution of an eviction proceeding denied; likelihood of success on the merits were not apparent from the moving papers.

In *Rosaria Biondo v. Sally Biondo,* Index No.: 40018/10, decided on January 20, 2011, the court denied plaintiff's motion for equitable relief for an order staying and enjoining defendant's prosecution of an eviction proceeding against plaintiff in the Third District Court under CPLR §§ 2201 and 6311. The court noted that plaintiff instituted the instant action for a judgment imposing a constructive trust in the form of a life estate in favor of the plaintiff on a residential real property that was titled in the name of the defendant. Alternatively, plaintiff sought recovery of monies allegedly expended by her to improve the subject premises after the defendant's purchase from a non-party to this action. These expenditures, which allegedly total some $75,000.00, coupled with alleged promises by the defendant that the plaintiff would enjoy a life estate in the subject premises, served as the basis for the plaintiff's demands for relief in this action. Here, the court found that plaintiff failed to establish her entitlement to the preliminary injunction demanded.

A likelihood of success on the merits was not apparent from the moving papers as the record demonstrated that the plaintiff had neither legal title nor any cognizable beneficial interest in the subject premises prior to the defendant's purported promise to convey the claimed life estate. Under the circumstances, the plaintiff was required to establish that her transfer of money, labor and/or services to the acquisition, improvement, and/or maintenance of the premises in reliance upon a promise by the defendant to convey a life estate therein to the plaintiff.

Cross-motion to dismiss complaint based upon in proper service denied; defendant William Yip did not submit an affidavit denying receipt of the summons and complaint nor rebut the specific factual averments in the affidavit of plaintiff's process server.

In *Verla Gray-Joseph v. Shuhai Liu and William Yip, I*ndex No.: 31322/09 decided on April 21, 2011, the court denied defendant William Yip's cross motion seeking dismissal of the plaintiff's complaint. The cross motion was based upon the grounds that the court lacked in personam jurisdiction over the defendants due to improper service of the summons and complaint. In support of his cross-motion, defendant Shuhai Liu submitted several affidavits in which he disputed among other things, factual averments set forth in the affidavit of the plaintiff's process server with respect to the two dates on which substituted service of the summons and complaint was purportedly affected upon defendant Shuhai Liu. Defendant, William Yip, who allegedly returned to his native homeland in China prior to the institution of this suit, had not personally participated in the cross motion by way of affidavit or otherwise.

The court noted that those portions of the defendants' cross motion wherein defendant, William Yip sought an order dismissing the plaintiff's complaint insofar as it was asserted against him was denied. The court reasoned that it was well settled that a process server's affidavit constitutes prima facie evidence of due service. To rebut same, the party served must provide a substantial and specific denial of service. Since defendant William Yip did not submit an affidavit denying receipt of the summons and complaint nor rebut the specific factual averments in the affidavit of plaintiff's process server, defendant Yip failed to establish improper service so as to warrant either a traverse hearing or dismissal of the plaintiff's complaint.

Motion to compel production of medical record authorizations denied; plaintiff did not demand damages for exacerbation of any preexisting mental condition nor were there any demands or recovery of psychological trauma or injuries asserted in the bill of particulars.

In *Devin K. O'Rourke, Erin Jacobs by her mother and natural guardian, Lynn Jacobs, Lynn Jacobs individually and Anthony DePaola v. Kendra J. Chew, Hess Mart, Inc., Hess Realty Corp. and Hess Corporation,* Index No.: 28538/06, decided on April 5, 2010, the court denied defendants' motion for relief pursuant to CPLR §§ 3126, and 3124. In denying the motion, the court noted that the corporate defendants sought an order compelling plaintiff to provide medical record authorizations related to his bipolar disorder, which was noted in a hospital discharge summary following the accident. The court found that the record revealed that said plaintiff was not demanding damages for an exacerbation of any preexisting mental condition nor were there any demands or recovery of psychological trauma or injuries asserted in the bill of particulars. Thus, the court found that the corporate defendant failed to demonstrate entitlement to an order compelling plaintiff to provide medical authorizations for his psychological history.

Please send future decisions to appear in "Decisions of Interest" column to Elaine M. Colavito at elaine_colavito@live.com. There is no guarantee that decisions received will be published. Submissions are limited to decisions from Suffolk County trial courts. To be considered for inclusion in the January 2012 issue, submission must be received on or before December 1, 2011. Submissions are accepted on a continual basis.

*Note: Elaine Colavito graduated from Touro Law Center in 2007 in the top 6% of her class. She can be contacted at (631)582-5753.*

# Labor Relatioins Act (Continued from page 10)

not to do any of these activities.

The notice promulgated by the NLRB also advises employees that employers may not engage in specified anti-union measures, including prohibiting employees from: talking about or soliciting for a union or distributing union literature during non-work times, including breaks; questioning employees about union support or activities; firing, transferring or demoting employees for union activities; offering inducements to discourage (or encourage) union support; and wearing union clothing and pins in the workplace.

According to the U.S. Department of Labor, failure to post can constitute an Unfair Labor Practice under the NLRA, and "may be considered evidence of unlawful motive in an unfair labor practice case involving other alleged violations of the NLRA." The notice provides employees with contact information to make complaints to the NLRB.

While it remains to be seen how employees will react, employers should anticipate an upsurge in employee questioning and perhaps concerted activity. Supervisors and managers should be prepared to address questions and employee activity in a manner consistent with the NLRA.

*Note: Russell G. Tisman, a partner at Forchelli, Curto, Deegan, Schwartz, Mineo, Cohn & Terrana LLP, specializes in complex corporate, commercial, defense, employment, labor and Surrogate's Court litigation. He has tried cases and argued appeals in Federal and State courts and administrative agencies throughout the United States, and in arbitration and other alternate dispute resolution fora. Mr. Tisman also actively counsels management and human resource professionals on employment and labor matters. He represents public companies, privately held businesses, insurers, financial institutions and individuals in all types of business related disputes.*

# Among Us (Continued from page 7)

tion to post-judgment. *The Bench Guide* is intended for use by both members of the judiciary and practicing attorneys as well as litigants. *The Bench Guide to Landlord & Tenant Disputes in New York* is available for sale on Amazon.com and can also be obtained at www.benchguideny.com

**Sharon N. Berlin**, of Lamb & Barnosky, LLP participated on a panel on the topic, "Employment Issues," at the program "Marriage, Divorce, Estate Planning and Employment Issues for Same-Sex Couples," sponsored by the Nassau Academy of Law, which was held on September 21, 2011 at the Nassau County Bar Association.

On December 2, 2011, **Alyson Mathews**, of Lamb & Barnosky, LLP, will be speaking at a program entitled "Employment at Will and New York State Exceptions" co-sponsored by the Labor and Employment Law Section and the Committee on Continuing Legal Education of the New York State Bar Association.

The Long Island Alzheimer's Foundation (LIAF) will honor **Jennifer Cona**, and **Jack Genser**, partners at Genser Dubow Genser & Cona (GDGC) at their 24th Annual Remembrance Ball on Friday, October 21 at the Garden City Hotel.

## *Condolences….*

The members of the SCBA send their heartfelt sympathy to **Howard Baker** and his family on the passing of Howard's mother, Ruth Baker.

To the **Honorable Marilyn Friedenberg (ret.)** upon the passing of her beloved husband, Justice Stanley Friedenberg (ret.).

## *New Members…*

The Suffolk County Bar Association extends a warm welcome to its newest members: **Tracy Auguste, Susan Beckett, Debra A. Brown, Lisa M. Catapano, Joseph M. Charchalis, Daphne B. Cohen, Debra Jo Grimaldo, Robert F. Kozakiewicz, Gary S. Marshall, Robert Meyers, Richard M. Santos, Lawrence Schimmel, Joseph D. Turano** and **Linda M. Zukaitis.**

The SCBA also welcomes its newest student members and wishes them success in their progress towards a career in the Law: **Lisa Marie Catapano, Andrew Colascione, Jon-Paul Gabriele, Daniel Gilley, Warren C. George, Nicole Rynston, Brendan Sihksnel** and **Jonathan Warner.**

## *On the Move – Looking to Move*

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

### *Firms Offering Employment*

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

Attorney with West Sayville office, looking to expand his practice, seeking newly admitted or experienced attorney. Will look at all resumes of interested parties. **Reference Law #4.**

### *Members Seeking Employment*

Attorney practicing since 1992 in the areas of matrimonial litigation and small claims arbitration seeking full-time employment.
Reference Att. #11

Attorney, fully experienced in all phases of personal injury, no-fault and SUM litigation, seeks full-time position.
**Reference Att #21**

Newly admitted attorney seeking associate position in family/matrimonial or criminal law fields. I also have experience in general civil litigation, including foreclosure defense. **Reference Att #32**

**Keep on the alert for additional career opportunity listings on the SCBA Website and each month in *The Suffolk Lawyer.***

# *Wrongful Neglect Referral* *(Continued from page 6)*

check the referred attorney's qualifications. *Id.* The court stated that the referring attorney's responsibility arose from his "duties as an agent toward his [clients] and from his affirmative conduct in bringing his clients into contact with a person of previously unknown character under circumstances affording the opportunity for crime." *Id.* It noted that the referring attorney, who was from New York, might not be required to know of the other attorney's indictment, in New Jersey (*Id.* at 1170-71) but that a jury could conclude that the referring attorney was negligent because he should have been suspicious of the other attorney's solicitation of clients in violation of the Code of Professional Responsibility. (*Id.* at 1171) The court found that the alleged negligence selecting the attorney could be a proximate cause of plaintiff's damages and allowed the negligent referral claim to proceed. (*Id.* at 1172-73)

Recent New York appellate cases have questioned what was previously considered settled law that "[t]he mere recommendation of a person for potential employment is not a proper basis for asserting a claim of negligence where another party is responsible for the actual hiring." *Cohen v. Wales*, 133 A.D.2d 94, 95, 518 N.Y.S.2d 633 (2d Dep't 1987).[1] In *Bryant v. New York,* 805 N.Y.S.2d 634 (2d Dep't 2005), the Second Department held that where an individual voluntarily provides a recommendation or referral, that individual must perform the duty with due care. (*Id.* at 636) *Bryant* involved defendant Department of Labor's recommendation of prospective employees for the claimant's business. *Id.* at 635. The Department of Labor advised claimant that prospective employees would be recruited, screened and interviewed by the Department. *Id.* The court held that the Department's screening process was voluntarily undertaken and must be performed with due care. (*Id.* at 636) It held that such duty was performed negligently, resulting in a theft at claimant's business by an employee recommended by the Department who was previously involved in thefts, and thus warranted plaintiff's recovery of damages. *Id.*

Of even more concern to referring parties is the First Department's decision in *Friedman v. Anderson*, 803 N.Y.S.2d 514 (1st Dep't 2005), denying an accountant's motion to dismiss based upon the recommendation of a financial manager. In *Friedman*, the court referred to Rule 201 of the American Institute of Certified Public Accountants (AICPA), which states that accountants "shall obtain sufficient relevant data to afford a reasonable basis for ... recommendations in relation to any professional services performed." (*Id.* at 516) The court found that the AICPA promulgated ethical and practical rules and measures professional standards requiring accountants to "obtain sufficient data to afford a reasonable basis for conclusions or recommendations in relation to any professional services performed." *Id.* The court further held that by recommending the money manager to plaintiff, defendant accountants were required to perform professional services with due care. The potential breach of that duty and damages resulting might form a "proper basis for claims of negligence and negligent representation." *Id*.

Notably, ethical violations by attorneys have not yet been conclusive grounds for civil liability. Under prior rules, the New York Court of Appeals held that, even if an attorney's conduct was contrary to the standards set forth in DR 9-102 (also known as, section 1200.46 of the New York Code of Professional Responsibility), "an ethical violation will not, in and of itself, create a duty that gives rise to a cause of action that would otherwise not exist at law." *Shapiro v. McNeill*, 92 N.Y.2d 91, 97 (1998). Nevertheless, as demonstrated in *Bryant* and *Friedman*, the First and Second Departments now recognize such independent causes of action. In making referrals, an attorney must act with due care, such as has been found for accountants. *See Friedman*. At the very least, an attorney should advise clients in writing that the referral is not an express endorsement or representation of actual services to be rendered and that the client must make that decision independently.

On April 1, 2009, New York joined 47 other by States adopting ABA's "Model Rules." The new rules thoroughly regulate fee splitting. Rule 1.5(g) governs fee splitting between attorneys. An attorney must advise his/her client that fees will be split, including the share each lawyer will receive. The fee cannot be excessive and bear a relationship to services rendered and the client must give written consent and, significantly, both attorneys are jointly responsible for the work.

More jurisdictions are expanding the duties of other professions involving referrals and recommendations. Courts in Connecticut and Ohio have recognized causes of action against real estate agents for "negligently" recommending home inspection companies. The New London Superior Court in Connecticut denied a motion to strike negligent referral as a cause of action. *Marx v. McLaughlin*, 2001 WL 837921 (Conn. Super. Ct. 2001). It held that plaintiff purchasers and defendant real estate agent entered into an agreement creating a relationship obligating defendant to exercise reasonable care in its recommendations. (*Id.* at *4) The court held that where a real estate agent recommends a home inspector, "it is not an unfair burden to place on the party making the recommendation to do an appropriate investigation of the person recommended before the party makes the recommendation." *Id.* The court also noted that, although the Restatement of Torts § 323 concerning the failure to exercise reasonable care only allows recovery for physical harm, the cause of action is not defeated because defendant caused plaintiff's emotional and physical distress. (*Id.* at *5)

Despite settled law that insurance companies are not responsible for acts of independent contractors they recommend, a claims adjuster's exaggerated recommendation can open the door to a negligent recommendation or negligent misrepresentation claim. Analogous to New York's *Bryant* case, *affirmative* referrals or recommendations can lead to liability. An Arkansas court examined whether an insurance agent who provides a list of "competent" building contractors to an insured can charge the insurer with the duty to determine the competency and qualifications of such contractors. *Capel v. Allstate Insurance Co.,* 77 S.W.3d 533 (Ark. Ct. App. 2002). The court held that the "gratuitous undertaking to represent the competence, insured, and bonded status of contractors created a duty . . . to exercise ordinary care to ensure that the information it communicated was true." (*Id.* at 543) The court remanded the case to determine whether the evidence yielded proof of a causal connection between the alleged negligent recommendation and the plaintiff's injury. (*Id. a*t 42)

The Illinois courts have also examined possible liability for negligent referral. An Appellate Court held that the Chicago Bar Association (CBA) was not liable for negligent referral, but presciently detailed the potential loopholes wherein an individual attorney could be impliedly liable for negligent referral. *Weisblatt v. Chicago Bar Assoc.*, 684 N.E.2d 984 (Ill. Ct. Cl. 1997). Plaintiff argued that defendant (CBA) lawyer referral service acted as a "referring lawyer" under the Illinois Rules of Professional Conduct and owed plaintiff the same duty for the performance of services as the referred attorney. (*Id.* at 989) Rejecting this argument, the court found that the CBA was not a "lawyer" subject to the provisions of the Illinois Code of Professional Responsibility and stated, "[o]nly where the referring entity is a lawyer can such a responsibility and is such a responsibility imposed." *Id.* Thus, the *Weisblatt* court like *Friedman* and *Tormo*, did not shut the door to using ethical violations as a basis for civil liability when one attorney negligently refers another. Furthermore, in response to plaintiff's argument that she had pled a cause of action for negligent performance of a voluntary undertaking, the court was constrained to limit recovery under such circumstances, based on case precedent and general tort recovery, to non-economic damages. (*Id.* at 988) It stated that the exceptions to the general rule for economic loss recovery are permitted only when there is an "intimate nexus . . . by contractual privity or its equivalent."[2] *Id.* Lastly, the *Weisblatt C*ourt considered but denied liability under a negligent misrepresentation theory. Plaintiff, failing to assert a statement of false information, and the single occurrence of her recommended attorneys' mishandling of her case, does "not establish a lack of expertise or experience" so as to make the CBA's representations false.[3] (*Id.* at 990-91) Apparently, if plaintiff actually alleged that the CBA told her the attorney recommended actually lacked "expertise" (contrary to CBA's representations) or was deemed incompetent on other legal malpractice matters, her cause of action for negligent misrepresentation might have been recognized.

The case of *Aiello v. Adar*, 750 N.Y.S.2d 457 (N.Y. Sup. Ct. 2002), suggests that a cause of action for "negligent referral" exists in a fee-sharing agreement. In *Aiello*, plaintiffs retained the services of attorney Issler to assert medical malpractice claims. (*Id.* at 459) After preparing the claims, Issler referred the case to attorney Starr, pursuant to a written fee sharing agreement. *Id.* The attorneys agreed to share 50 percent of the contingency fee. *Id.* Starr was to have "primary responsibility," but Issler agreed to remain the attorney on record. *Id.* A fee dispute arose between Issler and Starr when Starr filed a petition to prevent Issler from recovering the agreed 50 percent. Starr argued that he performed 96 percent of the work and accordingly, Issler should only receive his *quantum meruit* share. (*Id.* at 460)

The court found the lawyers' agreement valid because it confirmed Issler would assume responsibility of the action and in no way limited the client's rights against Issler only. (*Id.* at 465-66)

A recent case in the New York Appellate Division Third Department suggests that a cause of action for "negligent referral" for failure to supervise applies to a law firm recommending or referring its client to another attorney to perform a portion of legal services for the client. *Whalen v. DeGraff, Foy, Conway, Holt-Harris & Mealey,* 2008 WL 2756834 (3rd Dep't 2008). Plaintiff initially retained defendant to recover her interest in a partnership against Julius Gerzof, which defendant successfully accomplished. (*Id.* at 1) However, Gerzof died a resident of Florida before judgment was satisfied. *Id.* Defendants, attempting to recover from the estate, sought the assistance of Florida counsel, Scott Cagan, and the law firm of Bailey. Bailey did not file a notice of claim with the Gerzof estate during the required time period and thus plaintiff was unable to recover from the estate. Plaintiff claimed and the court agreed that "defendant (the referring law firm) is liable for damages resulting from Bailey's failure to file the notice of claim either on the basis that defendant had a nondelegable duty to file such notice of claim or based upon defendant's negligent supervision of Bailey." *Id.*

The court explained that the

> general rule is that "[a] firm is not ordinarily liable ... for the acts or omissions of a lawyer outside the firm who is working with the firm lawyers as co-counsel or in a similar arrangement" (*Restatement [Third] of Law Governing Lawyers §§ 58*, Comment *e* ), as such a lawyer is usually an independent agent of the client. Here, however, defendant solicited Cagan and Bailey and obtained their assistance without plaintiff's knowledge. Although plaintiff was later advised that Bailey had been retained by defendant, she had no contact with Bailey and did not enter into a retainer agreement with that firm. Defendant concedes that plaintiff completely relied on defendant to take the necessary steps to satisfy her judgment against Gerzof. Under these circumstances, defendant assumed responsibility to plaintiff for the filing of the Florida estate claim and Bailey became defendant's subagent. (*See* Restatement [Third] of Law Governing Lawyers §§ 58, Comment *e*). Therefore, defendant had a duty to supervise Bailey's actions. (*See* Restatement [Third] Agency §§ 3.15; Restatement [Second] Agency §§§§ 5, 406).

The *Whalen* decision supports the principle that law firms can be liable for failure to supervise and/or for the negligence of a referred attorney.

Although New York courts remain generally unsympathetic to causes of

*(Continued on page 22)*

# ABA Annual Meeting (Continued from page 8)

ship telemarketing campaign, a "member gets a member" program, and a new website that is more user-friendly. President Zack reported that the ABA has stabilized its membership and had actually achieved increases in membership in the judicial division, the solo and small firm division and the law student division. President Zack expressed his appreciation for the hard work of the membership committee. He told us that "we are on the right path and the future is indeed bright."

President Zack emphasized the important work that has been done during his year in office in connection with four specific initiatives. First, he described the crisis facing our courts and lauded the work of the Task Force on the Preservation of the Justice System. He explained that our democracy depends on maintaining the judiciary as a co-equal branch of government, so we must ensure that our courts are protected. Second, he praised the work of the Commission on Civics Education. The ABA has fought for funding of civics education, has established academies to teach civics, and has provided lesson plans to lawyers to teach a civics class in high schools across the country. Third, he thanked the Commission on Hispanic Legal Rights and Responsibilities for its work in promoting the largest minority in the United States within our profession. President Zack noted that our country will lose respect for the legal profession and the rule of law if the demographics of the legal profession do not reflect those of the country at large. Lastly, President Zack said we have focused on disaster preparedness by developing a rule that is now being adopted by the supreme courts of many states to allow short-term assistance by lawyers from other jurisdictions in emergencies.

In closing, President Zack urged the ABA to continue the work of defending liberty and pursuing justice, as it has done for 133 years.

### Presentation of the ABA Medal

President Zack introduced this year's co-recipients of the ABA Medal, the Association's highest award: David Boies and Theodore Olson. President Zack praised their enthusiastic willingness to chair the ABA Task Force on the Preservation of the Justice System and described them as "our own dream team." He touted their storied legal careers and referred to them collectively as "a force of nature." He said that both Mr. Boies and Mr. Olson stand for honesty, integrity, and civility.

In accepting his award, Mr. Boies stated that there is no greater honor for a lawyer. He praised the law as a wonderful profession but one that faces many challenges. He urged us to reinvigorate the profession and use the opportunity to make our society more just, fair and democratic. He also praised his co-recipient, Mr. Olson, saying that there could not be a better lawyer and friend. Mr. Boies said that although he and Mr. Olson passionately disagree on many issues, they can also work together on issues where they have common ground. He reminded us that our society works where we advocate with passion but always recognizes our higher duty to the courts and the justice system.

Mr. Olson also expressed his gratitude for the honor of receiving the ABA Medal. He acknowledged the importance of the award to both the Association and the profession. He stated that he felt privileged to be part of such a rewarding profession that focuses on service to others and to the rule of law. He noted the practicality of and the need for civility and explained that civility sometimes requires us to say "no" to a client. He also noted the current crisis in the courts, asking delegates to support the resolution sponsored by the Commission on the Preservation of the Justice System and urging us to use our advocacy for necessary change. Mr. Olson praised Mr. Boies and stated that the award sends a message that people of differing viewpoints should and must work together.

### Statement by Treasurer Alice E. Richmond

In her final report to the House, ABA Treasurer Alice E. Richmond of Massachusetts summarized the Association's financial progress during the three years of her term. Treasurer Richmond outlined the ABA's current real estate strategy, including the renegotiation of the lease for the ABA's Chicago headquarters which resulted in approximately $12 million in savings, and the ABA's decision to market and sell its Washington D.C. building. She thanked members for the opportunity to have served and introduced her successor, Lucian T. Pera of Tennessee.

### Passing of the President's Gavel to William T. Robinson III

One of the highlights of every Annual Meeting is the passing of the President's Gavel from the outgoing president to the incoming president. In Toronto, ABA President Zack passed the gavel to President-Elect William T. (Bill) Robinson III of Kentucky. Pursuant to the Association's Bylaws, Mr. Robinson assumed the presidency of the ABA at the conclusion of the Annual Meeting.

President-Elect Robinson thanked members for the opportunity to serve. He expressed his gratitude to President Zack for all of his work in representing both the Association and the lawyers in America with enthusiasm and honor. President-Elect Robinson recognized his family and his law firm, thanking them for their support. He then emphasized the profound value of the Association's work, giving numerous examples. He cited the work of the Commission on Immigration and the lawyers who represent individuals facing the dire consequences of deportation. He said that we are now able to reassure lawyers that they can practice law without the intrusion of federal agencies, with the defeat of the FTC and Dodd-Frank's regulation efforts. He highlighted the importance of diversity, proudly noting that his stellar appointments committee under the leadership of Gene Vance of Kentucky helped assure increased diversity in every category of appointments. President-Elect Robinson stated that even though volunteer service and leadership are part of who we are as lawyers, he will be continuing to encourage lawyers in their volunteer service.

President-Elect Robinson spoke about Association membership. He told delegates that prospective members believe that the Association has ably advanced the rule of law but think the ABA will continue doing so, regardless of whether they actually become members. He emphasized that if we want to increase membership, we need to develop a compelling answer as to why lawyers should join the Association. He quickly pointed out that we already have the answer in our sections, divisions, and forums, which produce and deliver state-of-the-art content. We must support them in continuing that important work.

President-Elect Robinson then spoke about the ABA's over-all role. He said that when we speak out on issues of general interest, our voice is diluted. On the other hand, when we advocate for the rule of law, the ABA becomes the dominant player. He said that is where we need to be. As the most pressing illustration, he pointed to the current crisis in our courts, which threatens the viability of the entire justice system and puts our constitutional democracy at risk. President-Elect Robinson emphatically stated that this underfunding of the state courts presents an issue that gives us an opportunity to demonstrate that the ABA can make a positive difference but that we cannot do it alone. We must reach out and partner with the community at large and work to ensure access to the courts. He urged ABA action on this critical issue.

President-Elect Robinson committed to working to cultivate a greater appreciation of the ABA as the bar association that is the voice of the legal profession and emphasized it is a great professional honor to assume leadership of the Association.

### Election of Officers of the Association and Members of the Board of Governors

The Nominating Committee reported to the House on the nominations for officer of the Association and members of the Board of Governors. The House elected Laurel G. Bellows of Illinois as President Elect for 2011-2012, and it was also determined that James Silkenat of New York will succeed Ms. Bellows as President Elect in 2012-2013. When Mr. Silkenat becomes ABA President in 2013-2014, he will be the first President from New York since Robert MacCrate held that office in 1987-1988.

### Resolutions Acted on by the House of Delegates

Over the course of its two-day meeting, the House debated and voted on more than 50 resolutions covering a variety of legal topics. Among the resolutions approved by the House:

Revised Resolution 104B urging Congress to update and strengthen federal lobbying laws by requiring fuller reporting of lobbying activities, forbidding certain conflicts of interest and providing for more effective enforcement of the Lobbying Disclosure Act of 1995.

Resolution 300 recommending that state, local, and territorial bar associations urge state and local legislatures, education commissions and school boards to mandate civic education classes/courses in elementary, middle and secondary public schools.

Resolution 108 affirming the principle of civility as a foundation for democracy and the rule of law and urging lawyers, ABA member entities and other bar associations to take meaningful steps to enhance the constructive role of lawyers in promoting a more civil and deliberative public discourse.

Resolution 107 urging states to establish clearly articulated procedures for judicial disqualification determinations and prompt review of denials of requests to disqualify a judge.

Revised Resolution 123 adopting the Model Time Standards for State Courts, dated August 2011, and urging state judicial systems to adopt and implement the Standards.

Resolution 302 urging state, territorial, and local bar associations to document the impact of funding cutbacks to the judicial systems in their jurisdictions, to publicize the effects of those cutbacks to create coalitions to address and respond to the ramifications of funding shortages to their justice systems.

Resolution 10A urging applicable governmental entities to take all appropriate measures to ensure that the National Criminal Instant Background Check System (NICS) is as complete and accurate as possible, so that all persons properly categorized as prohibited persons under 18 U.S.C. § 922(g) are included in the NICS system.

Revised Resolution 105A urging the U.S. Sentencing Commission to complete a comprehensive assessment of the guidelines for child pornography offenses, taking into account the severity of each offense.

Resolution 105C urging the Bureau of Prisons, the U.S. Marshals Service, Immigration and Customs Enforcement, and state, tribal and local correctional authorities to develop and implement gender-responsive needs assessments that account for women's specific needs, including parenting responsibilities, the importance of their relationships, their histories of domestic violence and abuse, and their distinctive patterns and prevalence of mental health issues.

Resolution 105D urging governments to adopt disclosure rules in courts requiring the prosecution to obtain from its agents and to make timely disclosure to the defense before the commencement of trial or a guilty plea all information known to the prosecution that tends to negate the guilt of the accused, mitigate the offense charged or sentence, or impeach the prosecution's witnesses or evidence, except when relieved of this responsibility by a protective order.

Revised Resolution 109 urging governments to enact legislation and appropriate funds to protect sexual crime victims' rights by eliminating the substantial backlog of rape kits collected from crime scenes and convicted offenders.

Revised Resolution 115 supporting federal, state, territorial and local laws that give law enforcement authorities broad discretion to determine whether a permit or license to engage in concealed carry should be issued in jurisdictions that allow the carrying of concealed weapons, and opposing laws that limit such discretion by mandating the issuance of a concealed carry permit or license to persons simply because they satisfy minimum prescribed requirements.

(Continued on Page 21)

# ABA Annual Meeting (Continued from page 20)

Resolution 116 urging all lawyers to regularly assess their practice environment to identify and address risks that arise from any natural or manmade disaster that may compromise their ability to diligently and competently protect their clients' interests and maintain the security of their clients' property.

Revised Resolution 125 opposing federal, state, territorial and tribal laws that would alter the duty of care owed to victims of a natural or manmade disaster by relief organizations and health care practitioners and supporting programs to educate relief organizations and health care practitioners about their duty of care owed to victims in a natural or manmade disaster.

Revised Resolution 124 urging the President, Congress, the Chair and Commissioners of the Equal Employment Opportunity Commission (EEOC) to adopt measures to provide that employment discrimination hearings conducted by the EEOC comply with the Administrative Procedure Act.

Resolution 101A adopting the Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings, dated August 2011.

Revised Resolution 103B urging Congress to modify immigration laws to take into account the best interests of minor children who may be affected by a parent, legal guardian, or primary caregiver's immigration detention or removal.

Resolution 103C urging the Department of Homeland Security to revise its policies so that detained parents, legal guardians, and primary caregivers of children have meaningful participation with their attorneys at judicial proceedings involving their children; and that those involved in family and juvenile courts be educated regarding the connection between state child welfare laws and immigration laws.

Revised Resolution 103D urging that unaccompanied and undocumented immigrant children in the United States, upon their apprehension by immigration authorities, be screened by independent experts to determine if they are eligible for immigration relief.

Resolution 104A supporting application of the Immigration and Nationality Act to allow persons outside the United States to pursue motions to reopen or motions to reconsider removal (deportation) proceedings on the same basis and subject to the same restrictions that apply to persons who file such petitions from within the United States.

Resolution 118 supporting measures to improve access to counsel for individuals in immigration removal proceedings.

Revised Resolution 303 urging Congress to reject any resolution proposing an amendment to the United States Constitution that would alter, in any way, the granting of United States citizenship under the Fourteenth Amendment to any persons born in the United States (including territories, possessions and commonwealths) based upon the citizenship or immigration status of one or both parents at the time of the person's birth.

Revised Resolution 117 supporting the continued application by courts of the legal principles to determine if an issued patent claim meets the definiteness requirement under 35 U.S.C. section 112.

Resolution 304A adopting policy relating to the right of a patent applicant to obtain judicial relief after being denied a patent by the U.S. Patent and Trademark Office.

Resolution 304B adopting policy supporting the principle that laws of nature, physical phenomena, and abstract ideas are not eligible for patenting under 35 U.S.C. §101.

Resolution 113A opposing federal or state laws that impose blanket prohibitions on consideration or use of foreign or international law and opposing federal or state laws that impose blanket prohibitions on consideration or use of the entire body of law or doctrine of a particular religion.

Resolution 106C encouraging the United States Department of State and the United Nations and its member states to support the ongoing processes at the United Nations and the Organization of American States to strengthen protection of the rights of older persons, including the efforts and consultations towards an international and regional human rights instrument on the rights of older persons.

Resolution 10B (sponsored by the New York State Bar Association) recommending that law schools, law firms, CLE providers and others concerned with continued professional development provide the knowledge, skills and values that are required of the successful modern lawyer.

Revised Resolution 111A urging Congress to enact legislation that assists individuals who are experiencing financial hardship due to excessive levels of student loan debt but are not covered by the provisions of the student loan overhaul passed into law on March 30, 2010.

Revised Resolution 111B urging all ABA-Approved Law Schools to report employment data that identifies whether graduates have obtained full-time or part-time employment within the legal profession, whether in the private or public sector, or whether in alternative professions and whether such employment is permanent or temporary.

Revised Resolution 103A urging state legislatures to enact laws that effectively aid minors who are victims of human trafficking.

Among the resolutions which were not acted on favorably by the House were the following:

The House voted to postpone indefinitely consideration of Resolution 122, which would have adopted the ABA Standards for Language Access in Courts, dated August 2011, and would have urged courts and other tribunals to give high priority to the prompt implementation of these Standards.

The House defeated Resolution 110B which would have approved the Uniform Collaborative Law Rules Act, promulgated by the National Conference of Commissioners on Uniform State Laws in 2010, as appropriate legislation or rules for those states desiring to adopt the specific substantive law suggested therein.

**Closing Business**

As is customary at the conclusion of each meeting of the House, the delegation which will be hosting the next meeting made a welcoming presentation. In this case, David F. Bienvenu of Louisiana invited delegates to attend the February 2012 Midyear Meeting to be held in New Orleans.

Tracy A. Giles of Virginia moved a resolution expressing appreciation to the lawyers and judges of Toronto for hosting the Annual Meeting. The motion was approved.

Finally, Chair Klein recognized Palmer Gene Vance II of Kentucky who moved that the House adjourn sine die. The motion was approved.

*Note: Scott Karson is a partner at Lamb & Barnosky, LLP in Melville. He concentrates his practice in municipal, commercial, land title and appellate litigation. He is a former president of the SCBA.*

# When Limited Liability is Not So "Limited" (Continued from page 11)

is to safeguard corporate employees from corporate insolvency. Under BCL § 630, the 10 largest shareholders of a New York corporation are jointly and severally liable for wages or salaries due to any of the corporation's employees for services performed for the corporation. The 10 largest shareholders are determined by the fair value of their interest at the beginning of the period during which the unpaid services were performed. Notably, since the 10 shareholders are jointly and severally liable, an employee may choose to go after the one wealthiest shareholder, increasing the chances for greater personal exposure for this shareholder. In this event, the targeted shareholder may seek contribution from the other "Top 10" shareholders, pro rata.

Before a corporate employee can pursue the corporation's shareholders for unpaid wages personally, he must attempt to collect directly from the corporation. It follows that the corporation must fail to satisfy his demand. If the employee decides to then pursue the corporation's shareholders, he must notify them in writing that he intends to hold them personally liable.

'Wages' include all compensation and benefits the corporation owes the employee for his services to the corporation. Under the statute's broad definition, wages can include: salary, overtime, vacation, holiday, and severance pay; employer contributions to insurance or welfare benefits; employer contributions to pensions or annuities; and any other money due for services rendered by the employee.

**Environmental regulations**

Another notable instance in which business owners or operators may be personally responsible for a company's obligations relates to environmental regulatory law. In 1980, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). CERCLA addresses the release or threatened release of hazardous materials into the environment. Parties responsible for the release of such substances are liable for the costs associated with the cleanup. The "owner or operator" of a facility that stores or uses hazardous waste is strictly liable for these costs.

New York has a similar statute, commonly known as the "Oil Spill Act," which relates to the discharge of petroleum, specifically. Under New York's law, a business owner or operator must be directly, actively, and knowingly involved in the action or inaction which led to the spill of petroleum. Therefore, some direct culpable individual conduct is required before the owner or operator will be held personally responsible.

**Personal Conduct**

Although a relatively self-evident exception, it is worth mentioning that neither corporate nor LLC form will protect individual business owners and operators from their own wrongful or fraudulent conduct. Individuals who engage in such conduct in their business practices face exposure both criminally and civilly on a personal level. Further, doing business in an entity form does not insulate individuals from personal tort liability, e.g., negligent operation of an automobile.

Business owners and operators, for the most part, should be confident that they will not be held personally responsible for their company's debts or obligations. This fundamental principle of corporate law is well entrenched in New York. There are, however, several important exceptions to this general principle, which this article has briefly laid out. In these few limited instances, individuals owning and operating businesses should be aware of their potential personal exposure and plan and govern their conduct accordingly. Is it important to note, however, that even the best planning cannot always limit the exposure such individuals may face to getting sued.

*Note: Anthony V. Curto, a partner at Forchelli, Curto, Deegan, Schwartz, Mineo, Cohn & Terrana, LLP, counsels public and private corporations in major transactional matters, including mergers and acquisitions, joint ventures, partnering arrangements and the reorganization of business enterprises and assets, across a variety of industries. His work centers on structuring, negotiating and documenting a variety of complex transactions on behalf of regionally and nationally known clients.*

*Note: Joseph V. Cuomo, a partner at Forchelli, Curto, Deegan, Schwartz, Mineo, Cohn & Terrana, LLP, concentrates his practice on the representation of private and public companies and emerging businesses with respect to business law and transactional matters. He also serves as "outside" general counsel to numerous middle market private companies.*

# OIG's Broad Powers to Sanction (Continued from page 11)

Security Act ("SSA"), the OIG is permitted, but is not required, to exclude an individual from participation in federal health care programs if the individual: (i) has a direct or indirect ownership or control interest in a "sanctioned entity" and knows or should know of the action constituting the basis for the entity's conviction or exclusion or (ii) is an officer or managing employee of such an entity. A "sanctioned entity" is defined as any entity that has been convicted of a pertinent crime or that has been excluded from participation. In this case, Forest Labs qualifies as a sanctioned entity, which triggered Mr. Solomon's eligibility for exclusion under 1128(b)(15)(ii).

**OIG's Exclusion Guidance**

In October 2010, the OIG issued a "Guidance for Implementing Permission Exclusion Authority Under Section 1128(b)(15) of the Social Security Act," (the "Guidance") . The Guidance states that under certain circumstances OIG will operate under a presumption in favor of exclusion when dealing with owners, officers, and managing employees of sanctioned entities. For owners, if the evidence shows that an owner knew or should have known of conduct that formed the basis for the sanction, it will trigger the exclusion presumption. For officers and managing employees, as defined in SSA § 1126(b), the statute contains no knowledge element, and thus is a strict liability statute. To make matters worse, the OIG has the authority to exclude every officer and managing employee of a sanctioned entity.

The OIG states that it does not wish to exclude every officer and managing employee of a sanctioned entity, and it will operate with the exclusion presumption in cases in which the officer or managing employee knew or should have known of the sanctioned conduct.

Once the presumption is triggered, an individual must present mitigating evidence to the OIG to overcome the presumption. Factors that the OIG will evaluate are:

- Circumstances of the Misconduct and Seriousness of the Offense
- The Individual's Role in the Sanctioned Entity
- The Individual's Actions in Response to the Misconduct
- Information About the Entity

**Forest Labs' Mitigating Factors**

Using the above four factors, Mr. Solomon's attorneys argued that his minimal involvement in the sanctioned conduct as well as his scrupulous implementation of a robust compliance plan even before criminal charges were filed overcame OIG's exclusion presumption. Considering the swift corrective action that Mr. Solomon took and the devastation his loss would cause to Forest Labs, the OIG issued its determination not to exclude Mr. Solomon.

Forest Labs' example highlights the pivotal role that counsel conversant in both white collar criminal defense as well as health law can play to avoid potentially devastating OIG sanctions that can follow even minor criminal cases. With the stakes so potentially high, corporations would be wise to invest in a robust corporate compliance program, and they should not hesitate to conduct thorough internal investigations if any questions arise about violations of federal law. Anything less could make a corporation a ship without a captain.

*Note: William J. McDonald, Esq. is an associate in the Health Law Department and White Collar Crime and Investigations practice group at the law firm Ruskin Moscou Faltischek, P.C. in Uniondale, NY. He can be reached at (516) 663-6635 or wmcdonald@rmfpc.com.*

# SCPA 2307-A Disclosures (Continued from page 10)

executor shall be entitled to one-half the commissions he or she would otherwise be entitled to receive;" and "if such attorney or an affiliated attorney renders legal services in connection with the executor's official duties, such attorney or a then affiliated attorney is entitled to receive just and reasonable compensation for such legal services, in addition to the executor's statutory commissions." Absent a writing, separate and apart from the will, that is signed by the testator and acknowledges, in the presence of a witness other than the nominated fiduciary, that the SCPA 2307-a disclosures were made to the testator, the nominated executor's commissions generally will be reduced by one-half.

As virtually all fiduciaries wish to receive their full commissions, attorneys and other executors affected by SCPA 2307-a should be careful to ensure that the testator has executed an SCPA 2307-a-compliant disclosure form. The failure to do so likely will result in the executor receiving commissions that have been reduced by one-half.

***Matter of Beybom***

Although SCPA 2307-a requires that at least one person other than the nominated executor witness the testator's signature on a disclosure form, the statute does not address whether the witness may be affiliated with the nominated fiduciary. However, Surrogate Czygier recently addressed the issue in *Matter of Beybom.*

There, the decedent died, leaving a last will and testament in which he nominated the petitioner, the instrument's attorney-draftsperson, to serve as executor. After the decedent's death, the petitioner sought to have the will admitted to probate. The petitioner also presented to the court an SCPA 2307-a disclosure form, which was signed by the decedent and witnessed by an attorney affiliated with the petitioner's law firm.

Surrogate Czygier addressed the issue of whether the witness to the disclosure form could be affiliated with the nominated fiduciary without tainting the disclosures memorialized in the form. Opining that the "better course of action may have dictated using someone other than an attorney affiliated with the nominated executor" to witness the SCPA 2307-a disclosure form, the Surrogate, nonetheless, concluded that the witness's affiliation with the petitioner did not, in and of itself, taint the disclosure form with "the self-interest of the witness" and the petitioner. As a result, the petitioner was entitled to full executor's commissions.

In reaching that conclusion, Surrogate Czygier noted that SCPA 2307-a was devoid of a "standard of relationship or affiliation" which would disqualify anyone other than the nominated fiduciary from witnessing the signing of a disclosure form. The Surrogate's decision also was premised, at least in part, on the notion that a bright-line prohibition against having anyone affiliated with the nominated fiduciary serve as a witness would force law firms to use strangers as witnesses whenever the statute applied. Surrogate Czygier recognized that such a bright-line prohibition could prove impractical and was not mandated by SCPA 2307-a.

Against the backdrop of *Beybom*, there are a few additional practical considerations of which attorneys should be aware. Most notably, a court might find that SCPA 2307-a disqualifies an individual who is not merely affiliated with or employed by the attorney-fiduciary from serving as a witness to a disclosure form. Indeed, a court might conclude that an attorney-fiduciary's law partner is precluded from witnessing the disclosure form when the law firm's partnership agreement calls for the attorney-fiduciary to split commissions with his or her partners. Such a result would be consistent with former New York County Surrogate Renee R. Roth's decision in *Matter of Moss,* wherein Surrogate Roth found that SCPA 2307-a prohibited the attorney-fiduciary's law partner from witnessing the disclosure form.

The lesson to take away is that SCPA 2307-a does not necessarily prohibit someone affiliated with or even employed by an attorney-fiduciary from witnessing an SCPA 2307-a disclosure form. When the witness is merely affiliated with or employed by the attorney-fiduciary, but does not have a personal financial interest in the fiduciary's commissions, the witness likely will suffice for the purposes of SCPA 2307-a.

*Note: Robert M. Harper is an associate at Farrell Fritz, P.C., concentrating in the field of trusts and estates litigation. Mr. Harper serves as Co-Chair of the Bar Association's Membership Services and Activities Committee and a Vice-Chair of the New York State Bar Association's Trusts and Estates Law Section's Governmental Relations and Legislation Committee. He can be reached at rharper@farrellfritz.com.*

# Employment Discrimination (Continued from page 20)

action for negligent referral or recommendation, given recent Appellate Division decisions, practitioners should be cautious and diligent with referrals and affirmative recommendations. Real estate attorneys may be responsible for referring clients to brokers, engineers or mortgage companies. Courts may hold the referring attorney liable under tort theories of negligent misrepresentation or where a duty is voluntarily undertaken, giving rise to an obligation to undertake such duty with due care. *Caveat Advocatus.*

*Note: Abraham B. Krieger is a real estate partner in the firm of Meyer, Suozzi, English & Klein, P.C.*

**1**. In *Cohen*, plaintiff alleged that the board of education was negligent for recommending a former employee for a position as a grammar school teacher without disclosing that the former employee had been charged with sexual misconduct. *Id.* The plaintiff was injured by the teacher. *Id.* at 634. The court held that the common law imposes no duty to control the conduct of another or to warn those endangered by such conduct in the absence of a special relationship between either the person who threatens harmful conduct or the foreseeable victim. *Id*. The court concluded that no special relationship existed; rather a cause of action lies with the school district which had custody over plaintiff and hired the wrongdoer. *Id.* See also *Bell v. Perrino*, 490 N.Y.S.2d 821 (N.Y. App. Div. 2d Dep't 1985), where plaintiff was injured by a taxicab driver and sued the company that had dispatched the driver alleging the company was negligent in failing to supply, dispatch, and/or hire competent, skilled, and licensed drivers and knew or should have known that the driver was prone to violence and the use of firearms. The court held that since the company was an independent entity providing dispatching services to more than 20 cab companies in the area, it was not responsible for hiring the driver. Merely recommending the driver was insufficient to hold the company accountable for the driver's actions. *Id*. at 822.

**2**. Citing to *Chew v. Paul D. Meyer M.D., P.A.,* 527 A.2d 828, 832 (Md. Ct. Spec. App. 1987).

**3**. Plaintiffs alleged that the CBA "provid[ed] an attorney referral service by which members of the public may obtain from this service the names of attorneys with purported expertise in specified areas of law." *Weisblatt,* 292 Ill. App. 3d at 52.

*Note: Reprinted with permission from: NY Real Property Law Journal, Summer 2010, Vol. 38, No. 3, published by the New York State Bar Association, One Elk Street, Albany, NY 12207.*

# National Hispanic Heritage Month

**By Sarah Jane LaCova**

National Hispanic Heritage Month was celebrated on Friday, October 14th by our courts and the Long Island Hispanic Bar Association who hosted a reception in the Central Jury Room. Following the resentation of the Colors, the Star Spangled Banner was sung beautifully by the Mulligan Intermediate School Select Chorus. The Invocation was administered by the Honorable Stephen Behar and the Mistress of Ceremony, District Court Judge Toni Bean, introduced our District Administrative Judge C. Randall Hinrichs who gave the Welcome Address. Judge Hinrichs, noting that the celebration recognized the wonderful contributions of Hispanic and Latino Americans in the United States gave a special recognition to the Program Planning Committee that included the Honorable Hector D. LaSalle, Honorable Toni A. Bean, Honorable Philip Goglas, Carmen Palermo, Millie Rios, Captain David Santiago and Raymond Negron, Esq. the current President of the Long Island Hispanic Bar Association. As part of his remarks, Justice Hinrichs read a portion of President Barack Obama's 2011 Proclamation wherein he said that Hispanics have had a profound and positive influence on our country through their strong commitment to family, faith, hard work, and service. He said they have enhanced and shaped our national character with centuries-old traditions that reflect the multiethnic and multicultural customs of their community.

Justice Hinrichs introduced many Hispanic members in the court family who are outstanding role models who show positive visibility of their heritage, their history, their ancestor's accomplishments and contributions to humanity.

The Mulligan Intermediate School Select Chorus presented two extraordinary musical selections and District Court Judge Philip Goglas gave the concluding remarks.

All who attended and participated in the afternoon event enjoyed a delicious Latin American cuisine as prepared by members of the court family.

*Note: Sarah Jane LaCova is the Executive Director of the SCBA.*

Photo by Arthur Schulman

**Those attending the National Hispanic Heritage Month celebration included: Hon. Theresa Whelan, Family Court; Hon. John Kelly, Acting Supreme Court Justice; Hon. Philip P. Goglas; Hon. Stephen M. Behar, Acting Supreme Court Justice; Hon. Toni A. Bean, District Court Judge and Mistress of Ceremony; Hon. C. Randall Hinrichs, District Administrative Judge; Sarah Jane LaCova, SCBA Executive Director; Hon. William G. Ford, District Court Judge; Hon. Armand Araujo, District Court Judge (ret.); Hon. Paul M. Hensley, Acting County Court Judge; and Hon. Richard Hoffmann, Family Court Judge.**

# *Social Networks and the Rights of Employees* *(Continued from page 1)*

should communicate the foregoing to their employees in a policy that clearly states that employees should have no expectation of privacy in their web-based postings.

A private employer does not need to be unionized in order for it to be subject to Section 7 of the NLRA. Section 7 protects private industry workers' rights to discuss terms and conditions of their employment with their co-workers.

In a recent decision, ALJ Arthur Amchan, of the NLRB, Buffalo, New York region, ruled that a Buffalo non-profit organization unlawfully discharged five employees after they posted comments on Facebook concerning working conditions, including work load and staffing issues.[10] The case involved employees of "Hispanics United of Buffalo," which provides social services to low-income clients. After hearing a coworker criticize her fellow employees for not doing enough to help the organizations' client, an employee posted those allegations to her Facebook page. The posting generated responses from other employees who defended their performance and criticized working conditions, including work load and staffing issues. "Hispanics United of Buffalo" discharged the five employees who participated, claiming that their comments constituted harassment of the employee originally mentioned in the post.

Judge Amchan's September 2, 2011, decision found that the employees' Facebook discussion was protected concerted activity within the meaning of Section 7 of the NLRA because it involved a conversation among coworkers about their terms and conditions of employment. The judge ordered "Hispanics United of Buffalo" to reinstate the five employees with full back-pay because they were unlawfully discharged.[11]

This case is not an isolated incident brought before the NLRB. A recent report from the Acting General Counsel's office noted 14 recent cases involving the use of social media and employers' social and general media policies. According to the report, four cases involved employees' use of Facebook where it was found that the employees were engaged in "protected concerted activity" because they were discussing terms and conditions of employment with fellow employees. In five other cases involving Facebook or Twitter posts, it was found that the employees' activity was not protected. Additionally, in five other cases, some provisions of the employers' social media policies were found to be unlawfully overly-broad. The entire August 18, 2011, report of the Acting General Counsel may be found on the NLRB's website, at http://nlrb.gov/news/acting-general-counsel-releases-report-social-media-cases.

As more and more speech is transmitted through social media, employers in both the public and private sectors can expect more instances of statements by employees that do not meet with the employer's expectations of professionalism. However, employers must be aware of the balance struck by the courts and the NLRB between employees' and employers' rights. The employer's expectations should be clearly spelled out through the use of a narrowly tailored policy, created with the oversight of legal counsel.

*Note: Gary L. Steffanetta, is a partner at Guercio & Guercio, LLP, and is actively engaged in administrative and court litigation and appellate practice in school related matters both as general and labor counsel to school districts, as well as various other municipal corporations. He is currently serving as Co-Chair of the Suffolk County Bar Association School Law Committee.*

*Note: Nancy M Hark, is an associate at Guercio & Guercio, LLP. Ms. Hark's area of concentration is in Education Law and Employment Law. She is experienced in defending employment discrimination claims and in defending unfair labor practice charges brought pursuant to the National Labor Relations Act.*

1. http://www.employeerightspost.com-/tags/richerson-v-beckon/.
2. See *National Association for the Advancement of Colored People v Alabama,* 357 US 449 (1958).
3. See *Tinker v Des Moines Ind. Comm. Sch. Dist.,* 393 US 503 (1969).
4. *Griswold v Connecticut,* 381 US 479 (1965).
5. 42 USC § 1983.
6. Hispanics United of Buffalo, Inc., 3-CA-27872; JD-53-11, Buffalo, NY September 2, 2011
7. *Garcetti v. Ceballos,* 547 U.S. 410 (2006)
8. Id. at 423.
9. *Connick v. Meyers,* 461 U.S. 138, 147 (1983)
10. *Hispanics United of Buffalo, Inc.,* supra.
11. Id.

# *Trusts and Estates* *(Continued from page 8)*

**NYLJ, May 10, 2011, at p. 39 (Sur. Ct. Kings County).**
**Attorney-Fiduciary**

In a probate proceeding, the attorney co-fiduciary and draftsman of the propounded instrument filed a separate written acknowledgment of disclosure signed by the testator in the presence of a witness. The acknowledgement was dated the same date as the will, but contained only three of the four required disclosures set forth in SCPA §2307-a. Specifically, the acknowledgment omitted the requisite statement, added to the statute by virtue of a 2004 amendment, that "absent execution of the disclosure acknowledgment the attorney who prepared the will…and who serves as an executor shall be entitled to one-half the commissions he or she would otherwise be entitled to receive.

Accordingly, based on the failure of the acknowledgment to comport with the statutory language, the commissions of the attorney-fiduciary were limited to one-half the statutory entitlement pursuant to SCPA §2307-a(5).

**In re *Estate of Mayer,* NYLJ, Aug. 11, 2011, at p. 27 (Sur. Ct. Bronx County)**

**Attorneys Fees**

Before the court was an application by the petitioners for attorneys fees and disbursements incurred in connection with a proceeding to hold the respondents in contempt.

The court opined that pursuant to the provisions of Judiciary Law §773, the amount of a contempt fine must be sufficient to indemnify the aggrieved party for actual loss or injury caused by reason of the misconduct. While criminal contempt penalties are punitive in nature, civil contempt fines are intended to compensate victims for their losses. Absent proof of actual damages, the court may impose a fine which includes the aggrieved party's costs and expenses, including reasonable legal fees and disbursements incurred.

In support of the requested fees and disbursements, petitioners' counsel submitted contemporaneous time records, reflecting that he spent over 46 hours on the contempt proceeding, at the rate of $350 per hour. To this extent, the court noted that when an aggrieved party has documented the costs and expenses caused by another party's contempt, the amounts are considered prima facie reasonable, and the sums documented should be awarded unless the opposing party can prove with particularity that [s]he should be obligated to pay less, or the court finds a basis for diminishing or reducing certain fees.

Within this context, the court found that the petitioners had sufficiently documented the fees and disbursements sought, and the respondents had failed to adequately demonstrate that they should not be awarded. Accordingly, petitioners request for an award of fees and disbursements was granted.

**In re *Estate of Passalacqua,* NYLJ, Apr. 1, 2011, at p. 38 (Sur. Ct. Kings County)**

*Note: Ilene Sherwyn Cooper is a partner with the law firm of Farrell Fritz, P.C. where she concentrates in the field of trusts and estates. In addition, she is a past president of the Suffolk County Bar Association and a member of the Advisory Committee of the Suffolk Academy of Law.*

# SUFFOLK ACADEMY OF LAW

## OF THE SUFFOLK COUNTY BAR ASSOCIATION

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

# LATE FALL CLE

The Suffolk Academy of Law, the educational arm of the Suffolk County Bar Association, provides a comprehensive curriculum of continuing legal education courses. Programs listed in this issue, for the most part, will be presented during October and the beginning of November, though a few take place later in the year. Watch for announcements of additional fall programs as the semester progresses.

**REAL TIME WEBCASTS: Many programs are available as both in-person seminars and as real-time webcasts. To determine if a program will be webcast, please check the SCBA website** (www.scba.org – Internet CLE)**.**

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

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

**NOTES:**

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

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

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

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

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

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

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

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

**INQUIRIES:** 631-234-5588.

# UPDATES

## REAL PROPERTY UPDATE

*Wednesday, November 2, 2011*

Residential property, commercial property, landlord-tenant issues, foreclosure developments, zoning...and more will be covered by a knowledgeable and highly respected presenter.
*Presenter:* **Scott E. Mollen, Esq.** (Partner–Herrick, Feinstein, LLP; Author "Realty Law Digest" for the *New York Law Journal)*
**Time:** 6:00–9:00 p.m. **Location:** SCBA Center **Refreshments:** Light Supper
**MCLE: 3 Hours** (professional practice)
[Non-Transitional and Transitional]

## DMV UPDATE

*Wednesday, November 9, 2011 on the East End*
*Wednesday, November 16 at the SCBA Center*

Presented twice – first on the East End, then at the SCBA Center, this program provides insights into new developments in Vehicle and Traffic Law and practice before the Department of Motor Vehicles.
*Presenter:* **David Mansfield, Esq.** (Islandia Practitioner; V&TL Columnist for *The Suffolk Lawyer)*
**MCLE: 2.5 Hours** (professional practice)
[Non-Transitional and Transitional]
***EAST END:***
**Time:** 5:00 – 7:30 p.m. (Sign-in from 4:30 p.m.)
**Location:** Four Seasons–Southampton
**Refreshments:** Light Supper
***SCBA CENTER:*** **Time:** 6:00 – 8:30 p.m. (Sign-in from 5:30 p.m.) **Location:** SCBA Center **Refreshments:** Light Supper

## FAMILY COURT UPDATE

*Wednesdays, November 30 & December 7, 2011*

This two-part update covers new developments affecting Family Court practice. The first session covers a variety of issues; the second focuses on Child Support.
**Session One Topics:**
- Guardianship and Kinship Proceedings
- Adoptions
- Mental Health Screenings
- More

**Session Two Topics:**
- Update on Support Issues
- Violations
- Paternity Issues
- 5015 Applications
- More

*Presenters:* **Hon. John Kelly** (Family Court Judge–Acting NYS Supreme Court); Academy Dean); **Hon. Isabel Buse** (Family Court Support Magistrate); **Hon. John Raimondi** (Family Court Support Magistrate); Others TBA.
***EACH NIGHT:*** **Time:** 6:00 – 9:00 p.m. (Sign-in from 5:30 p.m.) **Location:** SCBA Center **Refreshments:** Light Supper
**MCLE: 3 Hours** (professional practice) [Non-Transitional and Transitional]

## BANKRUPTCY LAW UPDATE

*Monday, December 19, 2011 – NOTE NEW DATE*

Experienced bankruptcy practitioners review case law, changes in the rules, trends in filings, economic and practical influences, and other factors that affect bankruptcy practice.
*Presenters:* **Christine H. Black, Esq.** (U.S. Department of Justice); **Salvatore LaMonica, Esq.** (LaMonica, Herbst & Maniscalco, LLP); **Marc Pergament, Esq.** (Weinberg Gross & Pergament, LLP); **Richard L. Stern** (Macco & Stern, LLP); Others TBA
*Program Coordinator:* **Richard L. Stern** (Immediate Past Academy Dean)
**Time:** 6:00 – 9:00 p.m. (Sign-in from 5:30 p.m.)
**Location:** SCBA Center **Refreshments:** Light Supper
**MCLE: 3 Hours** (professional practice) [Non-Transitional and Transitional]

# SERIES & SEMINARS

*Lunch 'n Learn Series*

## GETTING PAID

Three lunch-time seminars explore the issues lawyers face in setting and collecting fees. Each program may be taken alone, with a savings resulting from enrollment in the full series.

### Session One: Billing & Retainers-

*Wednesday, November 2, 2011*
Discussion of alternate billing practices; strategic use of retainer agreements; communicating value; dealing with difficult clients
*Faculty:* **Allison Shields, Esq.** (LegalEase Consulting, Inc.); **J. David Eldridge, Esq.; Mona Conway, Esq.**

### Session Two: Attorney Liens & Collections

*Wednesday, November 9, 2011*
How to use retaining and charging liens, plus collection rules and strategies.
*Faculty:* **Harvey B. Besunder, Esq.** (Bracken Margolin Besunder, LLP); **Todd Houslanger, Esq.**

### Session Three: Fee Disputes & Grievances

*Wednesday, November 16, 2011*
How to avoid, prepare for, and participate in fee dispute and grievance proceedings.
*Faculty:* **Eric Holtzman** (Co-Chair–SCBA Fee Disputes Committee); **Gary Weintraub** (Member–SCBA Grievance Committee; Others TBA
*Series Coordinator:* **Charles Berg** (Academy Advisory Committee)
Each Program:
**Time:** 12:30–2:35 p.m. (Sign-in from noon)
**Location:** SCBA Center
**Refreshments:** Lunch from Ben's Kosher Deli
**MCLE: 2.5 Hours** (`1 ethics; 1.5 professional practice) [Non-Transitional and Transitional]

*Extended Lunch 'n Learn*

## THE NEW DOMESTIC WORKERS LAW

*Thursday, November 3, 2011*
In late 2010, New York enacted the first law in the nation to provide specific labor protections for such domestic workers as **nannies, caregivers for the elderly**, and **housekeepers**. This seminar will review the specifics of the law, the rights it imparts, and the obligations for those who employ domestic workers. Topics include:
- Domestic Worker Rights Pursuant to Wage and Hour Laws
- Current Laws, Rules and Regulations and How They Mirror Other Discrimination Laws
- Immigration Issues

*Faculty:* **Irv Miljoner** (U.S. Department of Labor); **Jeffrey N. Naness, Esq.** (Naness, Chaiet & Naness, LLP); **Mitchell C. Zwaik, Esq.** (Bohemia)
*Moderator:* **Scott Michael Mishkin, Esq.** (Islandia)
*Coordinator:* **Eileen Coen Cacioppo, Esq.** (Academy Curriculum Chair)
**Time:** 12:30–2:35 p.m. (Sign-in from Noon)
**Location:** SCBA Center **Refreshments:** Lunch Buffet
**MCLE: 2.5 Hours** (professional practice) [Non-Transitional and Transitional]

## LANDLORD-TENANT PRACTICE

*Thursday, November 3, 2011*

This presentation is a must-attend for those who represent tenants. An in-depth discussion of law and procedure will focus on **affirmative defenses to eviction proceedings.**
*Presenters:* **Hon. Stephen Ukeiley** (District Court); **Hon. Andrea Schiavoni** (Southampton Village Justice);**Victor Ambrose, Esq.** (Nassau-Suffolk Law Committee); **Marissa Luchs Kindler, Esq.** (Nassau-Suffolk Law Committee); **Warren Berger, Esq.; Michael McCarthy, Esq.; Stanley Somer, Esq.**
*Coordinator:* **Hon. Stephen Ukeiley** (Academy Officer)
**Time:** 6:00 – 9:00 p.m. (Sign-in from 5:30 p.m.)
**Location:** SCBA Center **Refreshments:** Light Supper
**MCLE: 3 Hours** (professional practice) [Non-Transitional and Transitional]

## PJI & VERDICT SHEETS

*Thursday, November 10, 2011*

An illustrious faculty will provide practical advice you will find invaluable at your next jury trial.
*Presenters:* **Hon. Leon Lazer; Hon. Emily Pines; Hon. Jerry Garguilo; Hon. James Flanagan; Matthew Hughes, Esq.**
*Coordinator:* **Hon. James Flanagan** (Academy Officer)
**Time:** 6:00 – 9:00 p.m. (Sign-in from 5:30 p.m.)
**Location:** SCBA Center **Refreshments:** Light Supper
**MCLE: 3 Hours** (professional practice) [Non-Transitional and Transitional]

## FORECLOSURE DEFENSE: PART TWO – HAMP

*Tuesday, November 15, 2011*
Topics include:
- more practice tips
- HAMP: what the client will need to submit to a lender, guidelines, pitfalls, and timelines to complete a modification

*Presenters:* **Gerard J. McCreight** (Bracken Margolin Besunder); **Peter D. Tamsen, Esq.** (Bay Shore); **Michael Wigutow, Esq.** (Nassau-Suffolk Law Services' Foreclosure Program Supervising Attorney)
*Series Coordinators:* **Glenn Warmuth, Esq.** and **Gerard McCreight, Esq.** – Academy Officers

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**NOTE:** Part One of this series (**Answers & Settlement Conferences**) is available on DVD, audio CD, and as an on-line video replay
**Time:** 6:00 – 8:00 p.m. (Sign-in from 5:30 p.m.)
**Location:** SCBA Center **Refreshments:** Light Supper
**MCLE: 2 Hours** (professional practice) [Non-Transitional and Transitional]

### NEUROSCIENCE & THE LAW

*Thursday, November 17, 2011*

Don't miss this inaugural meeting of the SCBA's new committee, Neuroscience & the Law, that will feature a three-credit CLE presentation and an airing of the film, *King's Park: Stories from an American Mental Institution.* The discussion will be invaluable for lawyers who practice in the fields of criminal law, elder law, mental health, family law, education law, guardianships, insurance, and health-and-hospital law.
*Presenters:* **Hon. Madeleine A. Fitzgibbon; Hon. Richard I. Horowitz; Robert I. Goldman, Esq.; Lucy Winer** (film-maker)
*Coordinator:* **Hon. Madeleine Fitzgibbon**
**Time:** 6:00 – 9:00 p.m. (Sign-in from 5:30 p.m.)
**Location:** SCBA Center **Refreshments:** Light Supper
**MCLE: 3 Hours** (professional practice) [Non-Transitional and Transitional]

*NEWLY ANNOUNCED*

### TREATMENT COURT UPDATE: PRACTICING IN THE DRUG & VETERANS COURTS

*Wednesday, November 30, 2011*

This tuition-free program will be held at the courthouse in Central Islip. Learn the ins and outs of these important problem-solving courts. Topics include:

- Types of cases and eligibility
- Referral process
- Screening process
- Contract process
- Participation / Treatment
- Termination from program

*Faculty:* **Hon. Madeleine Fitzgibbon; Hon. John Iliou; Hon. John J. Toomey; Edward Gialella** (Project Director); **Maria Troulakis, Esq.** (ADA); **Patrick O'Connell, Esq.**; **Sabato Caponi, Esq.** (Legal Aid)
*Coordinator:* Hon. John Kelly (Academy Dean)
**Time:** 2:30–4:30 p.m.
**Location:** Central Jury Room – Central Islip
**MCLE: 2 Hours** (1.5 professional practice; 0.5 ethics) [Non-Transitional and Transitional]

### RECOGNIZING & ELIMINATING ABUSE AMONG THE ELDERLY

*Friday, December 2, 2011*

This **Fourth Annual Symposium from the Suffolk County Task Force to Prevent Family Violence** is presented in conjunction with Touro Law Center – at Touro Law Center. Topics include:

- Recognizing and Identifying Abusive Behavior (financial, emotional, physical, criminal)
- Remedies and Legal Protections for Elderly Victims (legal and prosecution; guardianship, orders of protection; more)

*Presenters:* **DSS Commissioner Gregory J. Blass, Esq.; Edwin D. Robertson, Esq.; Raquel M. Romanick, Esq.; Segeant Nancie Byrne; Timothy Ferguson** (DSS); **Donna Planty Esq; Hon. H. Patrick Leis; Gail Bauer, LCSW**
*Coordinators:* Commissioner Gregory J. Blass; Professor Lewis Silverman (Director, Toro Family Law Clinic)
*Academy Liaison:* Hon. Isabel Buse
**Time:** 8:15 a.m.–1:00 p.m. **Location:** Touro Law Center
**Refreshments:** Continental Breakfast
**MCLE: 3 Hours** (professional practice) [Non-Transitional and Transitional]

***Check On-Line Calendar***

***(www.scba.org)***

***for additions, deletions and changes.***

### ANNUAL SCHOOL LAW CONFERENCE

*Monday, December 5, 2011*

This annual conference, presented in conjunction with the Nassau Academy of Law, covers all that is new and timely in the field of education law. It is intended for lawyers, school administrators, bargaining unit representatives, and others with an interest in the field.
*Suffolk Coordinators:* SCBA Education Law Committee Chairs Richard Guercio and Gary Lee Steffanetta
**Time:** 9:00 a.m.–3:00 p.m.
**Location:** Nassau County Bar Association–Mineola
**Refreshments:** Continental Breakfast / Buffet Lunch
**MCLE: 5.5 Hours** (professional practice) [Non-Transitional and Transitional]

*Extended Lunch 'n Learn*

### UNCONTESTED MATRIMONIALS

*Tuesday, December 6, 2011*

This in-depth program is a must-attend for both novice and experienced matrimonial attorneys. Checklists, forms, and advice for preparing papers properly the first time will be disseminated by a presenter with an incalculable amount of knowledge and expertise.
*Presenters:* **Frederick Crockett** (Management Analyst–Matrimonial Part); **Hon. John Kelly**
*Coordinator:* **Hon. John Kelly** (Academy Dean)
**Time:** 1:00–4:00 p.m. (Sign-in from 12:30 p.m.)
**Location:** SCBA Center **Refreshments:** Lunch
**MCLE: 3 Hours** (skills) [Non-Transitional and Transitional]

*Morning Seminar*

### IRA DISTRIBUTION RULES & IRS COMPLIANCE ISSUES

*Thursday, December 8, 2011*

Learn how to prevent headaches before they take place: IRS plans to implement a service-wide strategy to address growing noncompliance involving IRA excess contributions and violations of the minimum distribution rules. This program will help you to help your client stay clear of IRS problems.
*Presenter:* **Seymour Goldberg, CPA, MBA, JD**
*Coordinator:* **Eileen Coen Cacioppo, Esq.** (Academy Curriculum Co-Chair)
**Time:** 9:00 a.m.–12:45 p.m. (Sign-in from 8:30 a.m.)
**Location:** SCBA Center **Refreshments:** Breakfast Buffet
**MCLE: 4 Hours** (professional practice) [Non-Transitional only]

### NOVEMBER 2011 REGISTRATION FORM

Return to Suffolk Academy of Law, 560 Wheeler Road, Hauppauge, NY 11788
*Circle course choices & mail form with payment // Charged Registrations may be faxed (631-234-5899) or phoned in (631-234-5588).*
*Register on-line (www.scba.org) and take a $5 discount per course.*

Sales Tax Included in recording & material order

| COURSE | SCBA Member | SCBA Student Member | Non-Member Attorney | Season Pass | 12 Sess. Pass | MCLE Pass | New Lawyer MCLE Pass | DVD | Audio CD | Course Book |
|---|---|---|---|---|---|---|---|---|---|---|
| **UPDATES** | | | | | | | | | | |
| Real Property Update | $135 | $75 | $150 | Yes | Yes | 3 cpn | 3 cpn | $140 | $130 | $20 |
| DMV Update *(Choose venue)* East End or SCBA Center | $100 | $50 | $125 | Yes | Yes | 2 cpn | 2 cpn | $130 | $120 | $20 |
| Family Court Update (6 credits) | $150 | $75 | $200 | Yes | Yes | 5 cpn | 5 cpn | $185 | $175 | $40 |
| Bankruptcy Law Update | $120 | $50 | $140 | Yes | Yes | 3 cpn | 3 cpn | $140 | $130 | $20 |
| **SEMINARS & SERIES** | | | | | | | | | | |
| Getting Paid Trio | $115 | $75 | $165 | Yes | Yes - 1 ea. | 5 cpns | 5 cpns | $150 | $125 | $35 |
| 1. Retainers & Billing | $55 | $35 | $75 | | | 2 cpns | 2 cpns | $100 | $100 | $15 |
| 2. Attorney Liens & Collections | $55 | $35 | $75 | | | 2 cpns | 2 cpns | $100 | $100 | $15 |
| 3. Fee Disputes & Grievances | $55 | $35 | $75 | | | 2 cpns | 2 cpns | $100 | $100 | $15 |
| The New Domestic Workers Law | $50 | $35 | $60 | Yes | Yes | 2 cpn | 2 cpn | $100 | $95 | $20 |
| Landlord-Tenant: Affirmative Defenses | $85 | $45 | $95 | Yes | Yes | 3 cpn | 3 cpn | $110 | $100 | $25 |
| PJI & Verdict Sheets | $90 | $50 | $115 | Yes | Yes | 3 cpn | 3 cpn | $120 | $110 | $20 |
| Foreclosure Defense: HAMP | $60 | $30 | $70 | Yes | Yes | 2 cpn | 2 cpn | $75 | $70 | $20 |
| Neuroscience & the Law | $50 | $15 | $55 | Yes | Yes | 2 cpn | 2 cpn | $100 | $95 | $20 |
| Drug & Veterans Court | Free | Free | Free | N/A | N/A | N/A | N/A | N/A | N/A | N/A |
| Elder Abuse | $50 | $25 | $50 | N/A | N/A | N/A | N/A | N/A | N/A | N/A |
| School Law Conference | $175 | $175 | $175 | Yes | 2 uses | 5 cpns | 5 cpns | $175 | $170 | $50 |
| Uncontested Matrimonials | $65 | $40 | $75 | Yes | Yes | 3 cpns | 3 cpns | $100 | $90 | $25 |
| IRA Distribution Rules & IRS Issues | $149 | $149 | $149 | Yes | Yes | 4 cpn | 4 cpn | $150 | $145 | $75 |

Name: _____

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# Inaugural Meeting of SCBA's Neuroscience & the Law Committee Features a Riveting Documentary Film and a Three-Credit CLE Presentation

## *Save November 17 for an Enlightening, Unforgettable Evening*

In 1967, at the age of seventeen, Lucy Winer was committed to the female violent ward of Kings Park State Hospital following a series of failed suicide attempts. Over thirty years later, now a veteran documentary filmmaker, Lucy returned to Kings Park for the first time since her discharge. Her journey back sparked a decade-long odyssey to confront her past and learn the story of the now abandoned institution that once held her captive. Her meetings with other former patients, their families, and the hospital staff revealed the painful legacy of our state hospital system and the crisis left by its demise.

Lucy's journey of discovery – into her own past and into a vanishing world – are documented in the soon-to-be-released film, ***Kings Park: Stories from an American Mental Institution.*** This remarkable documentary will be screened at the inaugural meeting of the SCBA's new **Neuroscience & the Law Committee** on the evening of **Thursday, November 17.**

The showing of the film will be combined with a CLE panel discussion on neuroscience and the impact of physiological brain study on legal practice. The committee co-chairs, **Judge Madeleine A. Fitzgibbon,** Supervising Judge of the District Court, and **Judge Richard I. Horowitz,** Acting County Court Judge, plus attorney **Robert I. Goldman,** will address myriad issues of interest to attorneys in a variety of practice areas. Indeed, the committee chairs hope SCBA members will take this opportunity to join the committee and enhance their knowledge of neuroscience in a legal context.

The committee has already set forth its mission: to explore the legal implications of how the physiology of the brain affects human behavior in both scientific and social contexts. The committee will serve as a clearinghouse for lawyers representing individuals with mental illness, addictions, traumatic brain injury, cognitive disabilities, mental retardation, learning disabilities, and neurological disorders (e.g., Alzheimer's, Parkinson's, dementia, and autism). The lawyers' clients may include criminal defendants, senior citizens, students, veterans, juveniles, psychiatric patients, and the family members of individuals facing these issues. The areas of law addressed will include criminal, elder care, mental health, family, education, guardianship, insurance, and medical. The ultimate goal of the committee is to empower lawyers to better serve their clients and their families and thus improve the quality of their lives.

The November 17 panel discussion, which runs from 6:00 to 9:00 p.m., is presented in conjunction with the Academy of Law, and three MCLE credits will be awarded. See the CLE spread in this publication for more information and a registration form.

You may find out more about Lucy Winer's film and view trailers by visiting **kingsparkmovie.com.**


# *November CLE* *(Continued from page 28)*

video replays. Hence, the Internet can be your conduit to any CLE offerings you are too busy to attend or may have missed. Real-time webcasts allow you to participate almost as if you were there: you may download the course materials and even e-mail questions, which instructors will address during the course of the program. Archived video replays, on the other hand, allow you 24-7 access. If you suddenly need insight on, for example, how to handle a DWI case, advise a client on a reverse mortgage, or get an adjournment on a case...you'll undoubtedly find what you need among our Internet listings. Replays are also available as "CLE to Go" downloads to your IPOD; so if you're too busy to stay put, you can still access needed information. Check out what's available by clicking "Internet CLE" on the SCBA webpage (www.scba.org). Programs are conveniently listed under subject headings.

We wish all our constituents and their families a **VERY HAPPY THANKSGIVING!**

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

# SUFFOLK ACADEMY OF LAW DONATION DRIVE

*Please give what you can to help support the efforts of the educational arm of your bar association:*

To: SUFFOLK ACADEMY OF LAW, 560 Wheeler Road, Hauppauge, NY 11788 (Fax: 631-234-5899)

From: _____
*(Your name or firm will appear in all acknowledgments as indicated above.)*

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Statement of Ownership, Management, and Circulation (All Periodicals Publications Except Requester Publications) 1. Publication Title The Suffolk Lawyer. 2. Publication No. 006-995. Filing Date 9/29/11. 4. Issue Frequency monthly-except July & Aug. 5. No. of Issues Published Annually 10. 6. Annual Subscription Price Part of Dues. 7. Complete Mailing Address of Known Office of Publication (Not printer) (Street, city, county, state, and ZIP+4 560 Wheeler Road, Hauppauge NY 11788. Contact Person Peter Sloggatt Telephone 631-427-7000. 8. Complete Mailing Address of Headquarters or General Business Offices of the Publisher (Not printer) 560 Wheeler Road, Hauppauge NY 11788 9. Full Names and Complete Mailing Addresses of Publisher, Editor, and Managing Editor (Do not leave blank) Publisher (Name and complete mailing address) Long Islander LLC 149 Main St. Huntington N.Y. 11743. Editor (Name and complete mailing address) Laura Lane 560 Wheeler Road, Hauppauge NY 11788. Managing Editor (Name and complete mailing address) Peter Sloggatt 149 Main St. Huntington N.Y. 11743 10. Owner (Do not leave blank. If the publication is owned by a corporation, give the name and address of the corporation immediately followed by the names and addresses of all stockholders owning or holding 1 percent or more of the total amount of stock. If not owned by a corporation, give the names and addresses of the individual owners. If owned by a partnership or other unincorporated firm, give its name and address, as well as those of each individual owner. If the publication is published by a nonprofit organization, give its name and address.) Full Name Suffolk County Bar Association Complete Mailing Address 560 Wheeler Road, Hauppauge NY 11788. 11. Known Bondholders, Mortgagees, and Other Security Holders Owning or Holding 1 Percent or More of Total Amount of Bonds, Mortgages or Other Securities. If none, check box. None Full Name Complete Mailing Address None. 12. Tax Status (For completion by nonprofit organizations authorized to mail at nonprofit rates) (Check one) The purpose, function, and nonprofit status of this organization and the exempt status for federal income tax purposes: x Has Not Changed During Preceding 12 Months Has Changed During Preceding 12 Months (Publisher must submit explanation of change with this statement.) 13. Publication Title The Suffolk Lawyer 14. Issue Date for Circulation Data Below Sept, 2011. 15. Extent and Nature of Circulation. Average No. Copies Each Issue During Preceding 12 Months. No. Copies of Single Issue Published Nearest to Filing Date. a. Total Number of Copies (Net press run) 3551, 3616. b. Paid Circulation (By Mail and Outside the Mail) (1) Mail Outside-County Paid Subscriptions Stated on PS Form 3541. (Include paid distribution above nominal rate, advertiser's proof copies, and exchange copies) 1124, 1147(2) Mailed In-County Paid Subscriptions Stated on Form 3541 (Include paid distribution above nominal rate, advertiser's proof copies, and exchange copies) 2027, 2069 (3) Paid Distribution Outside the Mails Including Sales Through Dealers and Carriers, Street Vendors, Counter Sales, and Other Paid Distribution Outside USPS® 0 0 (4) Paid Distribution by Other Classes of Mail Through the USPS (e.g. First-Class Mail®) 0 0 c. Total Paid Distribution (Sum of 15b (1), (2), (3), and (4)) 3151, 3216. d. Free or Nominal Rate Distribution (By Mail and Outside the Mail) (1) Free or Nominal Rate Outside-County Copies Included on PS Form 3541 0 0 (2) Free or Nominal Rate In-County Copies Included on PS Form 3541 0 0 (3) Free or Nominal Rate Copies Mailed at Other Classes Through the USPS (e.g. First-Class Mail) 0, 0. (4) Free or Nominal Rate Distribution Outside the Mail (Carriers or Other means) 350, 350 e. Total Free or Nominal Rate Distribution (Sum of 15d (1), (2), (3) and (4) 350, 350 f. Total Distribution (Sum of 15c and 15e) 3501, 3566. g. Copies not Distributed (See Instructions to Publishers #4 (page #3)) 50, 50 h. Total (Sum of 15f and g) 3551, 3566. i. Percent Paid (15c divided by 15f times 100) 90.00% 90.19% j. 16. Publication of Statement of Ownership x If the publication is a general publication, publication of this statement is required. Will be printed in the November 2011 issue of this publication. Publication not required. 17. Signature and Title of Editor, Publisher, Business Manager, or Owner Peter Sloggatt, 149 Main St., Huntington, N.Y. 11743 Date 10/1/10. certify that all information furnished on this form is true and complete. I understand that anyone who furnishes false or misleading information on this form or who omits material or information requested on the form may be subject to criminal sanctions (including fines and imprisonment) and/or civil sanctions (including civil penalties).

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# ACADEMY OF LAW NEWS

*More Academy News on pages 26; CLE Course Listings on pages 24-25*

# November News, Notes, & Nuances

**By Dorothy Paine Ceparano**

**Appreciation!**

In the more than three decades since the Suffolk Academy of Law came into being, many things have changed: the advent of *mandatory* CLE, the growth of technology, the ups and downs of the economy. All have influenced the way continuing legal education courses are developed and the content choices that are made. But, through changing times, one important constant has remained: the tremendous volunteer spirit that permeates and enables the Academy. Without an amazing corps of volunteers, there could be no Academy. Academy officers, advisors, and program coordinators devote countless volunteer hours to discussing, planning, and bringing to fruition scores of CLE programs...in recent times, more than 100 a year. CLE presenters share a wealth of knowledge and professional insights with colleagues, and do so on a volunteer basis. And Academy volunteers become involved with myriad tasks and activities, from participating in curriculum meetings, to crunching budget numbers, to helping with program logistics of all kinds. In this month of thanksgiving, we hope SCBA members will pause to think about how much Academy volunteers do and about the tremendous debt of gratitude they are owed.

**Donation Drive**

We also want to thank the many SCBA members who are responding to the Academy's request for financial help. As was noted in our recent donation-drive letter, the Academy continuously tries to meet the evolving needs of practitioners and to expand and enhance the services we provide. But in recognition of the harder financial times facing everyone, we have not raised tuition prices to keep pace with new services we provide. Moreover, we are faced with a growing number of requests for financial aid from those who need continuing legal education, but cannot afford to pay for it. Finally, the Academy shares with such non-profit institutes as symphony orchestras or art museums the reality that it is hard to sustain creative growth with attendance revenue alone. Contributions are all important. We hope, if you have not already done so, that you will give what you can to help support and sustain the educational arm of your bar association. (See contribution form in this issue.)

**Creative Collegiality**

As Academy volunteers can attest, working with other lawyers in a collegial, non-adversarial environment is rewarding, energizing, and fun! If you like to teach, to plan projects, to brainstorm with colleagues, you may find a home away from the office or courtroom at the Academy. Let us know if you would like to be a presenter or if you have a program idea you would like considered. And keep in mind that Academy meetings – first Friday of each month at 7:30 a.m. – are open to all SCBA members. This is the place to pitch an idea, propose a program, or join colleagues in bringing to fruition a program idea in motion.

**Programming Focus**

With the same economic awareness that has led the Academy to maintain or lower tuition prices, we have re-focused our programming efforts to include more CLE's that help practitioners to expand their areas of competency – i.e., programs that provide practical knowledge that lawyers can translate into new fee-paying clients. Watch for new "boot-camps" and "101" or "102" offerings, especially during the Academy's winter and spring semesters. Such programs are meant not only for the new lawyer, but for any lawyer who wants to learn to do something new.

**Late Fall Programming**

Our constituents can also learn something new right now! Late fall provides at least 17 opportunities to earn MCLE credits and gain important information and skills.

November brings a three part **Getting Paid Series** (lunch 'n learns on November 2, 9, 15); a lunch program on the new **Domestic Workers Law** (November 3); **Affirmative Answers in Landlord-Tenant Practice** (evening, November 3); David Mansfield's **DMV Update** (November 9 on the East End and November 16 at the SCBA Center); an in-depth program on the **PJI** (November 10, evening); Part II of the **Foreclosure Defense Series** (November 15, evening, on HAMP); a program on **Neuroscience and the Law** from the SCBA's new committee by that name (November 17, evening);**Practice in the Drug Court and Veterans Court** (November 30, afternoon, in the CI Courthouse); and Part I of the two-part **Family Court Update** (November 30, evening).

In December, the Academy co-sponsors a program on **Elder Abuse** with Touro Law Center (December 2, morning, at Touro) and the **Annual School Law Conference** with the Nassau Academy (December 5, all day, at Nassau Bar). We also present an extended lunch program on **Uncontested Matrimonials** (December 6); Part II of the **Family Court Update** (December 7, evening); a morning program on **IRA Distribution Rules and IRS Compliance Issues** (December 8); and the **Annual Bankruptcy Court Update** (evening, December 19–new date). An introduction to **Practice in the Drug Court and Veterans Court** will also be presented, at the courthouse, on a December date to be announced.

**Winter CLE Forecast**

The Academy has been brainstorming winter (January through March) programs, and has already scheduled some: a four-part series on **Criminal Practice in District Court** (January 5, 12, 19, 26, evenings); a four-credit primer entitled **Negligence 101** (January 18, evening); the

**Annual Law in the Workplace Conference** (February 10, full day); **George Roach's Elder Law Update** (February 14, matinee); the **2012 Matrimonial Series** (Monday evenings in March); and the **2012 Bridge-the-Gap Weekend for New Lawyers** (March 23 and 24, full-day programs). Much more will follow!

**Internet CLE**

These days, virtually all of the Academy's programs are also offered as real-time webcasts. Additionally, most programs presented within the last year or two have been archived, on-line, as

*(Continued on page 26)*

## ACADEMY Calendar of Meetings & Seminars

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

**November**

| | | |
|---|---|---|
| 2 | Wednesday | **Getting Paid.** Part 1–Billing & Retainers. 12:30–2:35 p.m. Sign-in and lunch from noon. |
| 2 | Wednesday | **Real Property Update. .** 6–9 p.m. Sign-in and light supper from 5:30 |
| 3 | Thursday | **Domestic Workers' Law.** 12:30–2:35 p.m. Sign-in and lunch from noon. |
| 3 | Thursday | **Landlord-Tenant: Affirmative Defenses.** 6–9 p.m. Sign-in and light supper from 5:30 |
| 4 | Friday | Meeting of Academy Officers & Volunteers. 7:30–9:00 a.m. Breakfast buffet. All SCBA members welcome. |
| 9 | Wednesday | **Getting Paid.** Part 2–Attorney Liens & Collections. 12:30–2:35 p.m. Sign-in and lunch from noon. |
| 9 | Wednesday | **DMV Update.** ***East End:*** Four Seasons Caterer (Southampton). 5–7:30 p.m. Sign-in and light supper from 5:30. |
| 10 | Thursday | **PJI & Verdict Sheets.** 6–9 p.m. Sign-in and light supper from 5:30 |
| 15 | Tuesday | **Foreclosure Practice** (Part 2)**: HAMP.** 6-8 p.m. Sign-in and light supper from 5:30. |
| 16 | Wednesday | **Getting Paid.** Part 3–Grievances & Fee Disputes. 12:30–2:35 p.m. Sign-in and lunch from noon. |
| 16 | Wednesday | **DMV Update.** ***SCBA Center.*** 6–8:30 p.m. Sign-in and light supper from 5:30. |
| 17 | Thursday | **Neuroscience & the Law.** 6–9 p.m. Sign-in and light supper from 5:30 |
| 30 | Wednesday | **Family Court Update.** Part 1. 6–9 p.m. Sign-in and light supper from 5:30 |
| 30 | Wednesday | Practicing in the Drug & Veterans Courts. 2:30-4:30 p.m. at the C.I. Courthouse |

**December**

| | | |
|---|---|---|
| 2 | Friday | Meeting of Academy Officers & Volunteers. 7:30–9:00 a.m. Breakfast buffet. All SCBA members welcome. |
| 2 | Friday | **Elder Abuse Conference.** 8:30 a.m.–1:00 p.m. Touro Law Center (Central Islip) |
| 5 | Monday | **School Law Conference.** 9:00 a.m.–3:00 p.m. Nassau Bar Association (Mineola) |
| 6 | Tuesday | **Uncontested Matrimonials.** 1:00–4:00 p.m. Sign-in and lunch from 12:30 p.m. |
| 7 | Wednesday | **Family Court Update.** Part 2. 6–9 p.m. Sign-in and light supper from 5:30 |
| 8 | Thursday | **IRA Distribution Rules & IRS Compliance Issues.** 9:00 a.m.–12:45 p.m. Breakfast buffet from 8:30 a.m. |
| 19 | Monday | **Bankruptcy Update.** 6–9 p.m. Sign-in and light supper from 5:30 |

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