MATRIMONIAL/FAMILY LAW

What's the Net Worth to You? Avoiding Pitfalls Before and During Trial

By Vesselin Mitev

The most likely culprit for why matrimonial trials get a bad rap for being tedious is the affidavit of net worth, or net worth statement, a form designed to give the court a "snapshot" of a party's finances, but which in reality seems to provide more fodder for cross-examination than any other document in the matrimonial trial lawyer's quiver, if used properly.

Financial disclosure in matrimonial actions is "compulsory" and the Domestic Relations Law specifically requires that a party shall provide a "sworn statement of net worth" either 20 days after a demand for such or file one with the court within 10 days of issue having been joined.

Section 202.16 (k) of the Uniform Rules for the Supreme and County courts provides that motions for alimony, maintenance, interim counsel fees and child support in a pending action must include a copy of the net worth statement (unless waived by the court for good cause shown). Parenthetically, this requirement does not apply to motions seeking counsel fees under DRL § 237 (c) (counsel fees are mandatory in an action or proceeding for failure to obey an order compelling payment of support or maintenance, if the court finds the failure was willful) or DRL § 238 (an action or proceeding to enforce or modify any provision of a judgment or order in a matrimonial action).

The standard net worth form provides two dates that are important and useful for cross-examination. The first is the date to which the party swore, according to the form itself, that its net worth affidavit was true and accurate (usually at the end); the second date is the date purporting to reflect

the assets and liabilities as they existed, i.e., "Plaintiff herein, being duly sworn, deposes and says that the following is an accurate statement as of November 23, 2015, of my net worth..."

It is common for "updated" net worth statements to be filed, with an updated so-sworn date at the end, but the "as of" date is never changed. By its terms,

such a document is not "updated" since it gives the court the assets and liabilities as they existed (usually) many months, or even years ago. Thus, it can be cogently argued, a party who failed to file an updated net worth, should be precluded from offering or contesting financial information at trial, especially if it is seeking counsel fees, as the failure to file an updated net worth has been held fatal to a counsel fee application².

Omissions, gross exaggerations and inflated expenses are usually par for the course in any net worth; but going line by line at trial may quickly sap the attention of the triers of fact, who often quietly warn that they will "bust" what is essentially turning into a deposition at trial. Instead, using the net worth to attack the credibility of the witness is best done by hitting a few major points and saving the rhetoric for summation.

Q: You told the court the truth on your direct examination, correct?

A: Yes.

Q: And you've told the court the truth throughout this litigation even if you weren't on the witness stand, am I correct?

A: Yes.

Q: And all the papers and documents that you have signed and put in to the court, no doubt those were all true, am I correct?



Vesselin Mite

A: Yes

Q: That's because you would never sign anything that wasn't true, am I correct?

A: Of course.

Q: And you carefully reviewed each document before you signed it to make sure you weren't putting in false claims to the court, am I correct?

A: Yes.

Q: With that thought in mind, take a look at page six of your net worth; you claim you spend \$1,000.00 a month on clothes for your husband; that's not true, am I correct? You folks haven't lived together in three years?

A: That's a mistake...

Q: Mistake or not, can we agree, that the \$1,000.00 per month you claimed to spend on clothes for your husband in this sworn affidavit is simply not true?

A: That's correct.

Every once in a while (whether out of best-intentioned yet misguided puritanical adherence to the rules of evidence or just to shake things up) an adversary will object to the net worth statement being put in on a party's direct case, under a strict (framer's intent?) construction of the hearsay rule: an out of court statement offered for its truth; and secondarily, as unnecessary cumulative bolstering.

While technically true, since a party can simply tell the court its expenses, liabilities and assets, the statute (DRL § 236B(4)) and the Uniform Rules § 202.16 et seq. both explicitly require that net worth statements be prepared and filed with the court, as part of the compulsory financial disclosure mandated by the Legislature. Thus, the technical hearsay and bolstering objection is improper and

should be summarily overruled.

In the unlikely, yet not-unheard-of event that it is sustained, an exception should be taken, then permission sought to take the opposing party out of turn on a brief issue. The opposing party, once seated, can be asked:

Q: Sir, do you agree that your wife should be awarded maintenance?

A: What? No, I don't think so at all.

Q: How about counsel fees? Do you think you should have to pay my counsel fees?

A: Absolutely not.

Q: And do you believe you should be required to pay for the marital debt, which is around \$60,000.00?

A: No. Not one cent.

Q: And therefore it's your position that your wife's claims are not true, am I correct?

A: Yes.

Q: Because if they were true, we wouldn't be here, correct?

A: You got it.

Q: And in fact you filed an answer to the complaint, denying all of her claims, and further seeking a dismissal of this action and all the requested relief, am I correct?

A: Yes.

Now, the other side has put the amounts sought in issue; and, parenthetically, raised a claim of recent fabrication by your client which can be rebutted by the introduction of the affidavit of net worth.

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

¹DRL § 236 B(4)(a)

²Bertone v. Bertone, 15 AD3d 326 (2d Dept. 2005)

CRIMINAL /CONSTITUTION

Confrontation Clause Concerns after Clark

By Cory Morris

The Supreme Court held that no Confrontation Clause violation occurred when the statements of a three-year-old child, who did not testify, were admitted into evidence against a defendant. The court held that these statements by a child to a teacher were made to address an ongoing emergency: child abuse. Criminal defense attorneys beware. Since Crawford v. Washington, courts have struggled with what is barred by the Sixth Amendment's Confrontation Clause.

This article discusses the recent

Supreme Court case *Ohio v. Clark* and concerns for criminal defendants moving forward.

The Sixth Amendment's Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." Like any good rule, there are exceptions. In *Ohio v*.

Clark, 135 S.CT. ___ (June 18, 2015), the Supreme Court of the United States reversed, holding that the introduction at



Cory Morris

trial of statements made by a three-year-old boy to his teachers identifying his mother's boyfriend as the source of his injuries did not violate the Confrontation Clause, when the child did not testify at trial, because the statements were not made with the primary purpose of creating evidence for prosecution. To understand what happened here we need to

look back at recent Supreme Court decisions discussing the Confrontation Clause.

In *Ohio v. Roberts*, the Supreme Court interpreted the Confrontation Clause to permit the admission of out-of-court statements by an unavailable witness, so long as the statements bore "adequate 'indicia of reliability.'" Such indicia are present if "the evidence falls within a firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness." *Crawford v Washington*, 541 U.S. 36 (2004) overruled *Ohio v. Roberts*, 448 U.S. 56 (1980), holding that the Confrontation Clause generally prohibits

the introduction of "testimonial" statements by a non-testifying witness, unless the witness is "unavailable to testify, and the defendant had had a prior opportunity for cross-examination." Writing for the majority, Justice Scalia indicated that this new rule would be one that would cure the uncertainty of a judicial determination of reliability.

In a lengthy opinion, Justice Scalia reviewed the history of the Sixth Amendment and how the test of cross-examination was a vital constitutional protection. Justice Scalia explained that a statement qualifies as testimonial if the "primary purpose" of the conversation was to "creat[e] an out-of-court substitute for trial testimony." One of the major critiques of *Crawford* was the failure to elaborate and define what is "testimonial." Although interrogations by law enforcement would fall within this scheme, the situation occurring in *Ohio v. Clark* was not contemplated.

Later decisions would clarify what was and what was not testimonial. The Supreme Court made clear that "if an out-

(Continued on page 31)

What is Freeze Frame and how can SCBA members be included

They say a good picture tells a story. Why not share your good news with your colleagues at the Suffolk County Bar Association. Send photos of the important events or people in your lives to *The Suffolk Lawyer*. Did you have a baby? Are you a new grandparent? Did your child graduate? Was there a marriage celebration in your family? These are but a few examples of the types of photos that can be included in Freeze Frame. Get the word out by sending photos and captions to Editor-in-Chief Laura Lane at scbanews@optonline.net.

The 15th Annual Ira P. Block Memorial Golf Classic, Par for the Course

The Lawyer Assistance Foundation sponsored its 15th annual golf outing named for the Honorable Ira P. Block, under sunny skies on Monday Sept. 21, 2015 at the Westhampton Country Club, Westhampton Beach, NY. Managing Director David Besso, who encouraged many of his golf enthusiast buddies and colleagues to participate in this annual fund raising event, deemed it a big success.

This year our honored guest was the Honorable John J. Toomey, Jr. who is in charge, among his other duties as a County Court Judge and an Acting Surrogate Judge, of the Veterans Court, with court appearances every two weeks in the Central Islip courthouse. Cheering Judge Toomey on at the awards dinner were the Veterans Court Mentors (who are all veterans themselves) Ron Pacchiana (who also was our photographer for the evening), Frank D'Aversa, Adam Jankowski, Ralph Zanchelli, Clarence Simpson and Dan Eagan. The Mission of the Veteran's Mentoring Program is to support the veteran through their readjustment to civilian life and to act as a friend and ally through this difficult time. The vision of the Veteran's Mentoring Program is that "No Veteran is left behind."

A special thank you to our sponsors Long Tuminello and Fred Johs. Thank you Mike Capasso who won the raffle and graciously donated his winnings back to the Foundation.

And the winners are: Mr. Dougherty won first Low Net with a 70; first Low Gross with a 74 was won by M. Romeo; Closest to the Pin winner was Rob Meraldi and the Longest Drive winner was John Erra. Our highest score winner was Ira Weissman.

— Sarah Jane LaCova









FREEZE FRAME



Walter Donovan, Jr. and SCBA member Annamarie Donovan, at the wedding of their son, Walter Donovan, III.

Wedding bells for Walter Donovan, III

SCBA member Annamarie and husband Walter Donovan couldn't have been happier than they were at the wedding of their son Walter Donovan, III, who married the lovely Jennifer last spring.



Welcome to the World, TJ

Travis James, "TJ," Nader, was born on Sept. 24, weighing 8 lbs. 13 oz., at 20-1/2 inches. SCBA member Mara Harvey couldn't be prouder.

Happy Birthday Cooper!

Cooper Block, son of SCBA Second Vice President Justin Block and his wife Sheila, celebrated his first birthday.



District Administrative Judge C. Randall Hinrichs Commemorates the 14th Anniversary of Sept. 11

By Sarah Jane LaCova

Justice C. Randall Hinrichs issued a clarion call to commemorate the 14th anniversary of the tragic events of September 11, 2001, both at the Riverhead and Central Islip courthouses.

The ceremonies included a special invocation by Sgt. Frank Barry who was assigned to the Court Officers Academy on September 11, 2001 and was a first responder that day. Sgt. Barry is also the Chaplain for the Fraternal Order of Court Officers. On Sept. 11th, Sgt. Barry was assigned to the Court Officer's Academy in lower Manhattan and responded to the World Trade Center along with Captain William Harry Thompson, who perished on that day as did senior court officers Mitchel Wallace and Thomas Jurgens. Both men were promoted to Sergeant posthumously.

Justice Hinrichs said this ceremony provides us with an opportunity to pause and reflect as we move forward 14 years later. He mentioned that the losses continue to touch all of us as the people who worked on the recovery efforts succumb from sickness.

In his concluding remarks, Judge Hinrichs' thanked all who had attended both the Riverhead and Central Islip Sept. 11th observance and added special

appreciation to the bagpipers from the Suffolk County Police Department Emerald Society Pipe Band and Darlene Reis for her outstanding rendition of the Star-Spangled Banner. He also added a special thank you to Captain David Santiago, the Color Guard and to Judge Phil Goglas and his friends from the Knights of Columbus who worked with Bill Dobbins and the Court Employees Association in sprucing up the memorial. Judge Hinrichs added, "The passage of time seems to only magnify the extent of the heroism and sacrifice displayed by so many on September 11, 2001.

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





ADR

Injunctive Relief in Aid of Arbitration

By Lisa Renee Pomerantz

Benihana of Tokyo, LLC (Licensee) operated a restaurant in Hawaii pursuant to a 1995 license agreement with Benihana, Inc. (Licensor) giving the Licensor control over the Licensee's menu offerings. Without the Licensor's consent, Licensee began serving hamburgers and other unapproved items. Licensor sent Licensee a notice of termination, effective if Licensee failed to cure within 30 days.

Prior to expiration of the cure period, Licensee filed a claim with the American Arbitration Association under the License Agreement's arbitration clause seeking declaratory relief that it was not in violation of the agreement and, in the alternative, for an extension of the cure period. Contrary to its assurances, Licensee continued to serve hamburgers and other forbidden items.

Licensor then filed suit in New York State Supreme Court for injunctive relief in aid of arbitration pursuant to N.Y.C.P.L.R. §7502(c) which provides as follows: "The supreme court in the county in which an arbitration is pending or in a county specified in subdivi-

sion (a) of this section, may entertain an application for an order of attachment or for a preliminary injunction in connection with an arbitration that is pending or that is to be commenced inside or outside this state, whether or not it is subject to the United Nations convention on the

recognition and enforcement of foreign arbitral awards, but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief. "Licensor sought to enjoin Licensee from (1) continuing to serve hamburgers and other forbidden menu items; (2) using the licensed trademarks in a manner not permitted by the License Agreement; and (3) arguing to the arbitrators for an extension of the cure period.

Licensor removed the action to federal court on diversity grounds which granted the requested injunctive relief, observing that "[w]here the parties have agreed to arbitrate a dispute, a district court has jurisdiction to preserve the status quo pending arbitration" and



Lisa Pomerantz

that the usual standards for issuance of such relief applied. Licensee appealed.

In Benihana, Inc. v. Benihana of Tokyo, LLC (2d Cir. 2015), the Court of Appeals affirmed the grant of injunctive relief as to the menu and trademark issues, but reversed the grant of the

injunction prohibiting the Licensee from making certain arguments to the arbitrators. Finding that the License Agreement provided for arbitration as to the termination decision and permitted either party to opt for arbitration of "any other dispute" under the agreement, the court concluded that it was for the arbitrators to decide whether the claim for an extended cure period was arbitrable. Even though the parties appeared to agree that the arbitrability question was for the court to decide, the court nevertheless held that since the determination of arbitrability depended on the interpretation of the contract, that issue as well as the merits of the claim should be left to the arbitrator.

Prior to 2013, parties to an AAA

arbitration agreement had to include the Optional Rules for Emergency Measures of Protection to grant the arbitrator authority to issue injunctive relief. In 2013, the AAA revised the rules, and Rule 37 now grants arbitrators the authority to grant such relief unless the parties agree otherwise. However, the rule also preserves the parties' ability to sue for preliminary injunctive relief, providing that "[a] request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with this rule, the agreement to arbitrate or a waiver of the right to arbitrate. "Given this provision, it will be interesting to see whether courts may be less likely to conclude that preliminary injunctive relief is necessary or appropriate where the parties either have not sought relief under Rule 37 or their request for such relief has been denied by the arbitrator.

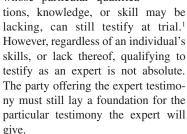
Note: Lisa Renee Pomerantz is an attorney in Suffolk County. She is a mediator and arbitrator on the AAA Commercial Panel and serves on the Board of Directors of the Association for Conflict Resolution.

WHO'S YOUR EXPERT

Not Everyone Qualifies

By Hillary A. Frommer

As a general rule, the degree of an expert's particular expertise or skill goes to the weight of the expert's testimony, and not the admissibility. Thus, courts have consistently held that an expert, whose particular qualifica-



The need to lay a foundation for expert testimony, and thus qualify an expert witness is discussed in two decisions involving an expert in the use and operations of the Intoxilyzer 5000 EN breathalyzer machine. First, in People v Ivasyuk,2 the District Court of Nassau County refused to qualify a criminal defendant's expert witness, and precluded him from testifying. The defendant was accused of driving while intoxicated and various traffic violations. At trial, the prosecution offered evidence that, following his arrest the defendant was brought to the police precinct where he was given a breathalyzer test that measured 0.11. The defendant testified that due to his employment earlier that day, he had been exposed to acetone and toluene; and he sought to present the testimony of an expert in the operation of the particular breathalyzer machine as to the effects of acetone and toluene in the defendant's breath. The District Court refused to qualify that expert, however, finding that the defense failed to lay the proper foundation for his testimony. Specifically, the defendant's expert was not competent to testify that the defendant had in fact inhaled acetone and/or toluene vapors at work on the day of his arrest; that such chemicals could be absorbed through the breath or skin; or that they would in fact be present when the breathalyzer was administered 11 hours later. The court also determined that because the defendant never challenged the machine's operations, the reliability of the breathalyzer reading, or the procedures offered by the prosecution to detect acetone in a breath sample, there was no basis for the expert to testify as to them.



Hillary A. Frommer

In *People v Burnet*,³ the defendant charged with driving while intoxicated moved to preclude the court from qualifying the police officer who administered the breathalyzer test to the defendant as an expert in the scientific operation of the Intoxilyzer 5000 EN. The

people sought to argue that alcohol vapors caused the machine to experience "ambient air failure." This testimony was critical because when the officer (seeking to testify as an expert) determined that there was ambient air failure, he directed the defendant to step away from the machine and then he recalibrated it. The defendant's second attempt to blow did not register a sufficient sample, and so he was deemed to have constructively refused the test.

The court granted the defendant's motion and refused to qualify the officer as an expert witness. It found that while the officer was trained and qualified to operate the machine, he possessed none of the skills, experience, or knowledge necessary to support the prosecution's unique theory regarding ambient air failure. Indeed, the officer could testify only that the machine experienced the ambient air failure. Thus, the court found that the prosecution was required, yet failed to present any evidence of the scientific reliability of the supposed ambient air failure, and could not rely solely on common sense.

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



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¹ Rojas v Palese, 94 AD3d 557 (1st Dept. 2012); Stanley Tuchin Assoc., Inc. v Grossman, 2002 NY Slip Op 50428(U) (Sup Ct, Nassau County 2002).

 ² 2012-1640 N CR, NYLJ 1202731804981, at
 *1 (App. Tm, 2nd, Decided June 22, 2015).
 ³ NYLJ 7/17/09 at 26 [col. 3] (Criminal Court Bronx County).

PRACTICE MANAGEMENT

Creating a Business Development Culture in Your Firm

By Allison C. Shields

Business development is an important skill for lawyers to learn, but one that isn't taught in law school. While these skills do not come naturally to all lawvers, in an era in which there are often more lawvers available than jobs to be filled, it is increasingly important for lawyers to develop their business development muscles.

Often, when lawyers have found themselves unemployed due to cuts or downsizing at their firms, they are baffled that they were let go; they had experience and were good lawyers who did their work well, kept their noses to the grindstone, made sure the work they were given by their practice groups or supervising partners got done, and met their billable hour requirements. They didn't waste time socializing and kept out of the way, focusing on their billable work. But the very things that these lawyers thought should have kept them employed may have put them first in line when the firm needed to downsize.

These lawvers made the classic mistake of focusing completely on doing their legal work and not cultivating relationships or business development skills, which may have made them more valuable to their firms. Ironically, as these

lawyers enter the job market or seek to open their own practices, it is these very skills and relationships that may determine their success or

But the blame for lack of business development skills cannot be placed entirely on the shoulders of the lawvers

themselves: some of the blame must be shared by the firms who failed to help their lawyers cultivate business generation skills. These firms have been so focused on leveraging associate time and maximizing billable hours that they have failed to build a culture of business development within their firms.

What can firms do to foster a culture of business development?

Law firms that want their attorneys to generate business must develop a business development culture. Marketing and business development must be a way of life for the entire firm; they must be part of the day-to-day fabric of the firm. Unfortunately, too many firms leave business development to a rarified few, the "rainmakers" who seem to have been born with magical powers. The message to young lawyers is, "you either have it or you don't," as if business development



Allison C. Shields

of business development is to change the approach to rainmaking and business development in general. Dispel the notion that rainmakers are a secret society whose practices are a closely guarded secret. Make business development a part of everything the firm does, and something that is the responsibility - and part of the job description - of everyone in the firm (including staff).

isn't a skill that can be learned

and nurtured, but instead is

bestowed from above upon a

lucky few. If that is the case,

why try to develop business if

Advance a new mindset. The

first step to fostering a culture

you don't already have it?

Set clear expectations. Each individual within your firm must understand what the firm expects from them with respect to business development, just as they must understand what is expected of them when it comes to their substantive legal work. Merely saying that all lawyers are expected to make efforts to develop and cultivate business is not enough.

Create expectations for each individual lawyer based upon their strengths and weaknesses. Develop a plan for them to follow with benchmarks to be

reached and consistent monitoring to keep them on track and accountable. Make this a part of everyone's job description and periodic reviews.

Reward effort, not just outcome.

Business development is a process that takes time, particularly when you are starting out, whether you are a new lawyer or an experienced one marketing to a new industry or target audience. Results do not come overnight, which makes it even more important to reward those who contribute to the firm's marketing and business development efforts, not just outcome. The lack of immediate results will be less discouraging if the lawyer understands that it is expected and understood that results will take time - and if there is an incentive to continue with the behaviors that will ultimately bring results.

It isn't enough for the lawver to look ahead to some unknown time in the future and continue working for some vague notion that business will come and bring compensation with it - there must be rewards in the shorter term in order to foster additional business development efforts. Rewarding those efforts will also encourage innovation and testing of new methods or ideas to generate or retain business.

(Continued on page 26)

FUTURE LAWYERS' FORUM

Do You Even Network Bro?

By George Pammer

There is a class that is not offered at any law school, no law firm specializes in it, and everyone will tell you, you have to do it. Networking. One of the most important parts of your law school career will involve an inordinate amount of time and really requires you to be proactive, outgoing and social. It is not about whom you know, but who knows you!

Most law school students have three vears to complete their degree program. Law schools have been looking to vary programs and have introduced programs that can take as little as two years and as much as five years. The overwhelming majority of law students still complete their degree plan in three years, and in the scheme of things, is not a lot of time.

Being in class all day and maybe attending some school functions does not qualify as networking. This is the proactive part. Many of the bar associations, such as the Suffolk County Bar Association and the New York Bar Association offer free membership for law students. This is a good place to

start. You can even join online, a couple of clicks and you are registered. Once you join these associations, you will be able to select different divisions or sections you want to be involved with. The Suffolk County Bar Association has several different areas that you can join

and are usually areas that you are interested in practicing in. After you sign up for different divisions, you will receive emails of different events for that specific area. Practitioners and judges attend these events and frequently these events will be at no cost or a lowered cost to law students.

You will also hear about Continuing Legal Education Classes (CLE) for practicing attorneys. Of course, being a law student you will not receive the CLE credit if you attend, but you will certainly learn new information, usually about an area of law you have interest in, and you may possibly be one of only a handful of law students in attendance. This provides you the opportunity to engage in the second component, being outgoing. It is as



George Pammer

simple as walking up to someone on a break and introducing yourself. Always make sure you have your student business cards and certainly always request a business card with whom you have spoken. Most practitioners, whether they are attorneys or judges, are more

than willing to spend a few minutes talking to a law student. As a rule, you should always send an email (or even snail mail) to the individual you met and thank them for their time. Try to recall something from their conversation with you; it will help them remember who you are.

Yes, there is an app for that. CamCard is an app on all phone operating systems. It will allow you to take a picture of the business card, save it in your contacts and allows you to edit or make notes. A simple note of where you met the individual, and if anyone introduced you, will make it much easier to recall and send a "nice to meet vou" email.

Which brings about the third component, be social. Once you start to know a couple of people in the bar associations, you may start receiving invitations to bar association events. These are normally larger gatherings with a purpose, whether it is an awards dinner or installation of officers, these events are top notch and are the perfect time to introduce yourself. In fact, someone that already knows you may want to introduce you to others. The bar association will even subsidize the cost for a number of law students to attend these types of events where they can cost upwards of \$200 a plate

Touro Law School, the only law school in Suffolk County, has several student organizations directly linked to different bar associations. The Suffolk County Bar Association -Student Committee, The Federal Bar Association and the American Bar Association all have a presence at Touro, holding meetings and planning events, and invite you to become active in these organizations. These student organizations are unique in their access to the associations and their physical proximity to the school. There are endless net-

(Continued on page 25)

LAND USE/APPELLATE

Merger, Single and Separate, and the Back-to-Back Split

By Robert J. Flynn, Jr.

The doctrines of merger, single and separate and the back-to-back split are some of the most confusing theories in the field of land use. The land use practitioner must be knowledgeable on the subject and careful in guiding his or her client, especially when the purchase involves vacant lots.

Recently, in the case of Matter of Patrick v. Village of Russell Gardens, the Appellate Division, Second Department, upheld the denial by the Zoning Board of Appeals of the Village of Russell Gardens for area variances for lots in a back-to-back formation.1 The court found that the lots had been merged, used in conjunction with one another, and, that the requested variances in this unique neighborhood were substantial, and therefore properly denied.

The merger doctrine recognizes that adjoining substantial parcels owned by a common owner merge by operation of law to form a standard parcel. It is well settled that there cannot be a merger of parcels in absence of a specific merger clause in the ordinance.2

A back-to-back split occurs when a common rear boundary line joins two lots with frontage along parallel streets.3 Parcels with frontage on separate public streets are separate and distinct plots where they substantially meet the depth characteristics of the area as it has developed notwithstanding their common ownership and rear contiguity.4 Lots in a back-to-back split formation are deemed not to have merged where it is shown that, during the period of common ownership, the parcels were never used in conjunction with one another and neither parcel materially enhances the value or utility of the other.5

Prior to 1996, the back-to-back split of parcels that were not used in conjunction with one another and did not materially enhance the value of one another benefitted from the single and separate ownership doctrine. The lower courts of the state recognized that where it was demonstrated that adjoining lots held in common ownership with a common rear boundary line enjoyed a single and separate status at the time the zoning ordinance was adopted or an up-zoning amendment to the zoning ordinance enacted, the owner was entitled to an area variance.6 In fact, the denial of the variance was deemed to be a constitutional deprivation resulting in a virtual confiscation of property.7

The routine recognition of common law single and separate ownership came to an abrupt halt in 1996 when the New York Court of Appeals ruled on the subject. In Matter of Khan v. Village of Irvington, the court stated it had never recognized the common law single and sep-

arate doctrine and would not do so.8 The court reasoned that if a municipality wished to provide for an exemption in the ordinance recognizing the single and separate status of lots, it could exercise its police powers and do so. Alternatively, the owner still had the right to apply for an area

While the courts have held that a merger is not effected merely because adjoining parcels come into common ownership,9 certainly a zoning code can provide for a merger under such circumstances.10 Furthermore, the mere fact that parcels are contiguous only in the rear, and, front on separate streets does not preclude a merger. Each case must be decided upon its own peculiar facts.11

The land use practitioner must always examine the applicable municipal zoning code to see if a merger clause exists, what constitutes a merger, and whether exemptions and exceptions to the merger clause apply. In Matter of Sakrel v. Roth, 12 the court was faced with a back-to-back split of parcels where the applicant maintained he was entitled to a variance as of right based on the single and separate ownership doctrine. The court found that while the parcels were indeed in a back-to-back formation, the owner failed to establish its single and separate ownership. Further, there was no proof in the record as to the use of the two parcels during the years the parcels were commonly owned. Finally, notwithstanding the above, the lots involved did not meet the minimum frontage or area requirements of the ordinance. The court upheld the denial of the variance.

If there is a merger clause in the ordinance, read the clause carefully. Since zoning regulations are in derogation of the common law, the regulations must be strictly construed against the municipality, which has enacted the ordinance. Any ambiguity must be construed in favor of the property owner. Whether the lots will be deemed merged, will depend on the ordinance before you and the facts and circumstances of the case.



Robert J. Flynn, Jr.

involved provides anv exemptions. An example of an exemption would be that lots held in single and separate ownership prior to the enactment of the ordinance would be exempt from the

exist.

the

Presuming a merger clause

determine

ordinance

merger clause.

does

whether

In a back-to-back split of lots, merger will be found where the lots have been used in conjunction with one another or one lot materially enhances the value or utility of the other.13 This was the result in Matter of Patrick v. Zoning Board of Appeals of Village of Russell Gardens.14 There, the court recognized that separate parcels of land in common ownership which have frontage on parallel streets and a common rear boundary line are deemed not to have merged where it was shown that during the period of common ownership, the parcels were never used in conjunction with one another and neither parcel materially enhanced the value or utility of the other. However, the court in Patrick found the variance was properly denied where substantial evidence demonstrated the parcels were in fact used in conjunction with one another for over 60 years.

Here are some suggestions to consider in determining whether a lot has been used in conjunction with the lot in common ownership to the rear or whether the lot has materially enhanced the value of the other lot;

- 1) Has one lot been improved with a dwelling while the other lot is landscaped and used as a backyard for the improved lot?
- 2) Is there a shed, patio, outdoor barbeque grill, playground, septic system, etc. on the lot adjacent to the improved lot?
- 3) Is the vacant unimproved lot wooded, overgrown with trees and other brush, or used by neighbors as a dumping area for grass clippings?
- 4) Is there a fence along the common rear yard line, which separates
- 5) Has there been a common source of funding in the purchase and/or maintenance of the lots?
 - 6) Where one lot is improved and the

other vacant, does the certificate of occupancy for the structures on the improved lot actually identify both lots?15

If there is a question as to whether the lots have been used in conjunction with one another, or have materially enhanced one another, an interpretation of the ordinance as applied to the facts will be required from the Zoning Board. Of course, if the back-to-back split of lot requires a variance to overcome some other dimensional deficiency, a variance will be required. The nature of that variance is an area variance and the applicant must meet the balancing test set forth in Town Law Section 267-b. The decision by the board will be sustained if it is rational, not arbitrary or capricious.16

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

¹ Matter of Patrick v. Zoning Board of Appeals of Village of Russell Gardens, 201 NYSlipOp 0595 [Second Dept. July, 2015].

Allen v. Adami, 39 NY2d 275.

³ Matter of Matherson v. Scheyer, 20 AD3d 425 [Second Dept. 2005]; Matter of Martino v. DeChance, 2009 NYSlipOp 32731 [Sup. Ct. Suff. Co., Cohalan, J. 20091.

Matter of Guazzo v. Chave, 59 Misc.2d 1050 [Sup. Ct. Nass. Co. 1969, Harmett, J].

Matter of Matherson v. Scheyer, supra; Matter of Barretto v. Zoning Board of Appeals of the Village of Bayville, 123 AD2d 692 [Second Dept. 1986].

⁶ Matter of Morin v. Zoning Board of Appeals of the Village of Irvington, 163 AD2d 389 [Second Dept. 1990]; Matter of Barretto v. Zoning Board of Appeals of the Village of Bayville, surpa.

Matter of McDermott v. Rose, 148 AD2d 615 [Second Dept. 1989].

8 Matter of Kahn v. Village of Irvington, 87

- NY2d 344.
- Allen v. Adami, supra.
- 10 Mecca v. Kern, 193 AD2d 746 [Second Dept. 1993].
- 11 Hemlock v. McGuire Development Corp., 35 AD2d 567 [Second Dept. 1970].

 12 Matter of Sakrel v Roth, 176 AD2d 732
- [Second Dept. 1991]. Matter of Matherson v. Schever, supra.
- ¹⁴ Matter of Patrick v. Zoning Board of Appeals of Village of Russell Gardens, supra.; Matter of Barrett v. Rose, 152 AD2d 525 [Second Dept. 1989].
- Matter of Matherson v. Schever, supra.
- ¹⁶ Matter of Ifrah v. Utschig, 89 NY2d 304.

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TRUSTS AND ESTATES

By Ilene Sherwyn Cooper

Discovery of Assets

In *Matter of Perelman*, the Appellate Division, First Department, unanimously reversed an Order of the Surrogate's Court, New York County (Anderson, S.), which, *inter alia*, denied the respondents' motion to dismiss the executor's amended petition to the extent it sought discovery, pursuant to SCPA §2103, of the decedent's ownership interests, if any, in family-owned businesses.

The court held that the amended petition, insofar as it sought the foregoing discovery, should have been dismissed on the ground that the executor "failed to demonstrate the existence of any specific personal property or money which belong[ed] to the estate" (citing Matter of Castaldo, 180 AD2d 421 (1st Dept 1992), or even a reasonable likelihood that such specific property or money might exist. Significantly, the court noted that, in support of their motion to dismiss, the respondents offered contemporaneous documentary evidence indicating that. in 1990, the decedent had sold her interest, in the family-owned Hudson County News Company, for \$28,500 cash, and a \$200,000 promissory note payable in installments over five years. Following that sale, the record revealed that the decedent had no interest in that entity, or its successors, or in any other family enterprises.

In the face of this proof, the court found that the executor had failed to come forward with any evidence suggesting that, aside from a 401(k) account not at issue on the appeal, the decedent may have held any interest in the family businesses after 1990. The court opined that, notwithstanding the executor's suggestion of the possibility that the decedent may not have been paid in full for her interest in Hudson, his claims that the decedent might have held some interest

after the 1990 sale transaction were speculative. Moreover, the court held that any alleged cause of action based on a breach of contract or fraud in connection with the sale transaction would not confer a right to possession of specific personal property or money as required by the provisions of SCPA §2103.

Additionally, although the executor alleged that the respondents' converted the decedent's interest in the family businesses, and that the estate had the right to inquire into any such conversion, the court found that any such cause of action would have accrued long before the decedent's death in 2007, and thus was barred by the threevear statute of limitations set forth in CPLR 214(3). Finally, the court concluded that any claim for breach of contract based on the 1990 sale transaction was subject to the six year statute of limitations for breach of contract, and thus became time barred in 2001, i.e. six years after 1995, the year in which the last installment payment for decedent's interest in Hudson was due.

Matter of Perelman, 123 AD3d 436 (1st Dep't 2014), mot. for lv. to app. denied with costs, 2015 NY Slip Op 72200 (2015).

Reformation of Trust

Before the Surrogate's Court, Suffolk County, was an uncontested application by the petitioner, the decedent's niece, as successor trustee/beneficiary of the Victor Larson Revocable Trust, the trustee/beneficiary of the Victor Larson Irrevocable Trust, and beneficiary of the decedent's will for a construction of certain enumerated dispositions of the three instruments.

The record revealed that pursuant to the terms of his Revocable Trust, created on July 1, 2008, the decedent directed that \$25,000 of the trust funds be



Ilene S. Cooper

distributed to each of his two grandsons, and the remainder thereof be distributed to his niece and nephew. It also appeared that the same day he executed the Revocable Trust, the decedent executed his will, wherein he directed that the residue of his estate pour over and be distributed

in accordance with the terms of his Revocable Trust, or, in the event the trust could not be located, in accordance with the same dispositive scheme as set forth in the Revocable Trust instrument.

Several years after the execution of the foregoing documents, the petitioner, acting under decedent's power of attorney, met with counsel to discuss Medicaid planning on the decedent's behalf. As a result of that meeting, the petitioner created the Irrevocable Trust on behalf of the decedent, the terms of which mirrored the terms of the Revocable Trust and will.

Unfortunately, the decedent died one month later, without all of his assets having been transferred into the Irrevocable Trust. The unintended result thereof was the existence of assets remaining in the decedent's name for disposition under both the Revocable and Irrevocable Trusts, and a duplication of the bequests to the decedent's nephews; i.e. pursuant to the terms of the Revocable Trust, as well as the terms of the Irrevocable Trust. Accordingly, the petitioner requested that the Irrevocable Trust be amended to delete the bequests thereunder to the nephews.

The court opined that while it may be reluctant to construe a trust instrument when the language is unambiguous, it would be within its purview to reform the instrument in order to effectuate the settlor's intent. Towards that end, the court observed that it was required to review the dispositive scheme set forth in the decedent's will and trust instruments, and all the facts and circumstances surrounding the preparation of those documents. With this in mind, the court held that it was clear that the Irrevocable Trust was intended to maintain the integrity of the decedent's testamentary plan, and as such, to insure that the decedent's nephews receive bequests of only \$25,000 each from the decedent's estate.

Accordingly, in order to effectuate the settlor's intent, the court held that the Irrevocable Trust should be reformed in order to delete the specific bequests to the decedent's nephews.

In re Larson Irrevocable Trusts, NYLJ, June 26, 2015, at p. 43 (Sur. Ct. Suffolk County).

Revocation of will

In *Matter of Powers*, the Surrogate's Court, Oneida County, was confronted

with objections by the decedent's surviving spouse, who alleged that the propounded instrument had been revoked by the decedent prior to his death. Simultaneous with the filing of her objections, the decedent's spouse moved for summary judgment denying the will probate, and the proponent cross-moved for summary judgment striking the objections.

The propounded will was a typewritten instrument, but at the top of the first page, there was handwritten and dated, in red, by the testator, the words: "This Will is no longer valid." In addition, the testator indicated that after two years of consideration, she handwrote a new will, which she requested be "honored," until she was able to get the instrument "officially changed" and typed. Attached to the instrument, were 12 sheets of paper containing the testator's handwriting and signed by her. Notably, these handwritten sheets were never re-done in typed form prior to the testator's death. Moreover, none of the words of the testator on the top of the propounded instrument touched or obliterated any part of her will. Nevertheless, the objectant maintained that the testator revoked her will pursuant to the provisions of EPTL 3-4.1. which allows a will to be revoked by an act of burning, tearing, cancelling, or obliteration by the testator.

The court opined that when words of revocation and the signature of the testator are written directly across the face of a will, it obliterates the words on the instrument, thereby reflecting the intent of the testator to revoke it. However, in view of the fact that none of the words written by the testator at the top of the instrument defaced the subject will, it could not be concluded that she revoked the instrument by physical act in conformity with the statute. Further, in response to the objectant's claim that the instrument had been cancelled by a writing, the court held that in order to be effective, such writing had to be executed in accordance with the statutory formalities of a duly executed will. Inasmuch as those formalities had not been complied with, objectant's argument failed.

Accordingly, based upon the foregoing, the proponent's motion for summary judgment was granted, and the objections to probate were dismissed.

In re Powers, NYLJ, July 14, 2015, at p. 29 (Sur. Ct. Oneida County).

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

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ENVIRONMENTAL

SAPA and Timely and Sufficient DEC Permit Renewal Applications

By Frederick Eisenbud

Newsday reported on Aug. 27, 2015 that Baykeeper, an environmental group, intends to commence a lawsuit against the New York State Department of Environmental Conservation ("DEC") and National Grid because the effluent from the Northport power plant is killing millions of fish each year. The article notes that the DEC's permit for the power plant expired in 2011, "but under state rules it can operate while its application is reviewed."

The referenced "state rules" are the subject of this article, but the focus is on clients you may have who require permits from the DEC, not the potential lawsuit discussed in the *Newsday* article. If your clients have such permits, they are issued for finite periods of time and require renewals or they lapse. Whether the renewal application is timely filed and sufficient may be of critical importance to your client.

Section 401(2) of the State Administrative Review Act ("SAPA") states:

2. When a licensee has made timely and sufficient application for the renewal of a license or a new license with reference to any activity of a continuing nature, the existing license does not expire until the application has been finally determined by the agency, and, in case the application is denied or the terms of the new license limited, until the last day for seek-

ing review of the agency order or a later date fixed by order of the reviewing court, "License" includes permits.¹

Why is it important that your client's DEC permit continue until a determination is made? First, of course, is the obvious reason that the permit will lapse upon the expiration date of the permit if renewal has not been granted. If DEC does not promptly make a determination, the old permit will continue to authorize the permit holder to operate if a timely and sufficient renewal application was filed.² More importantly, however, is that the DEC's Uniform Procedures permit the Department to suspend permit review if there is an outstanding enforcement action. See 6 NYCRR §621.3(e). Thus,



Frederick Eisenbud

if your client has made "timely and sufficient" application for renewal of the DEC permit, the expiring permit will continue in effect even if the enforcement action is not resolved until after the expiration date of the permit.³

An enforcement hearing is commenced by service of a

Notice of Hearing and Complaint. 6 NYCRR §622.3. For a period of years, Region 1 of the DEC took the position that service of a Notice of Violation commenced an enforcement action for purposes of invoking its right to suspend permit review. This position left permit holders in an impossible negotiating position when they tried to resolve DEC's alleged violations. Without a Notice of Violation and Complaint, they had no administrative vehicle to challenge the validity of the violations alleged in the Notice of Violation, and their permit would expire unless they had filed a timely and sufficient renewal application.4

"Timely renewal" turns on the type of DEC permit in question. Permits for Hazardous Waste Management Facilities, Solid Waste Management

Facilities, Air Permits, and Remedial Action Plans require that the renewal application be submitted 180 days before permit expiration in order to be timely. All other permit renewals must be submitted at least 30 days before expiration.⁵

The protection of SAPA §401(2) also requires that the application be "sufficient." DEC defines a "sufficient application for renewal" to mean "properly completed application forms, supplemental information and plans required by specific program regulations for renewing permits, and identification of any material changes in regulated operations or environmental conditions at the permitted facility or site." 6 NYCRR §621.2(ad). Requirements for specific DEC permit applications can be found at 6 NYCRR §621.4.

Failure to provide all required information does not necessarily deprive the applicant of the protection against the permit lapsing while renewal applications are being considered. The DEC is required to notify the applicant whether the application is complete or incomplete within 60 days for permits delegated by the Federal Government (generally, RCRA, Clean Water Act,

(Continued on page 31)

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CONSUMER BANKRUPTCY

Bankruptcy Stays and the Chap 13 Repeat Filer

Recent decision helps debtors who neglect to reinstate stay

By Craig D. Robins

Before Congress drastically modified the Bankruptcy Code in 2005, a number of debtors abused the bankruptcy system by filing serial Chapter 13 cases, always on the eve of foreclosure, to stay the foreclosure sale.

This placed the burden on the lender to bring a motion for relief from the stay. However, some debtors learned that they could game the system by filing again and again, causing great anguish to the lenders, some of whom had to wait years to get relief.

BAPCPA addressed this problem by shifting the burden to the debtor when there are repeat filings. Now, pursuant to section 362(c)(3), if a debtor files a second Chapter 13 petition within a year, the automatic stay only lasts for 30 days. The debtor then has the burden of bringing a motion to extend the automatic stay and must demonstrate to the court that he or she is entitled to have the stay continued.

However, the requirements for successfully bringing this motion can be quite tricky, and many a practitioner has learned this the hard way. If counsel does not bring the application correctly, then the stay will not be extended.

In order to extend the 30-day stay, section 362(c)(3)(B) requires the debtor to bring a motion, which is heard and granted before the expiration of the 30-day period.

If the debtor neglects to do that, then according to the statute, the stay automatically terminates with respect to the debtor on the 30th day after filing. As will be seen, these highlighted words have great significance.

The statute creates tremendous pressure on debtor's counsel, who must essentially file such a motion within days of filing the petition. In addition, counsel must obtain a hearing date that is within the 30-day period, and cannot adjourn the hearing date unless the new date is also within that 30-day period.

At the hearing, counsel must demonstrate that the debtor filed the current bankruptcy in good faith. This usually involves showing that there has been a change in circumstances such that the debtor has overcome whatever the problems were that caused the prior case to be dismissed.

If the debtor does not bring the 30-day motion in a timely manner, even if it is unopposed, the court will not grant the requested relief. That was the lesson that counsel recently learned in a pending Central Islip Bankruptcy Court case. Counsel must have been most upset – if there is no stay, then a

foreclosing mortgagee can continue a foreclosure proceeding and the bankruptcy becomes for naught.

However, it was not the end of the world, as counsel saw in the written decision from Judge Louis A. Scarcella, sitting in the Central Islip Bankruptcy Court, who decid-

ed that motion. *In re Hale*, (U.S.B.C. E.D.N.Y., Case No. 15-71021-las, August 3, 2015).

In the *Hale* case, the debtor had a previous Chapter 13 petition dismissed in the one-year period prior to filing. Debtor's counsel filed his motion to extend the stay about six weeks after filing. This was clearly two weeks too late. Thus, the automatic stay had already expired on the 30th day after the petition was filed.

Accordingly, Judge Scarcella denied the motion because it was not filed nor heard within the 30-day period.

Yet all was not lost. Judge Scarcella pointed out that there is controversy, based on the wording of section 362(c)(3)(A), whether termination of the stay applies to property of the estate as well as to the debtor. He found that the automatic stay only terminates with respect to the debtor and his property, but not property of the estate.

Consequently, a mortgagee would still be required to bring a motion for relief from the stay, as a debtor's home is property of the estate.

In reaching this holding, Judge Scarcella noted that even though the Second Circuit has not yet addressed this issue, there is an emerging majority view that termination of the automatic stay under section 362(c)(3) does not extend to actions against the property of the estate, which, as a practical matter, encompasses the lion's share of assets in play.

This is all due to the wording of the statute, which states, "the stay automatically terminates with respect to the debtor on the 30th day after filing.

Judge Scarcella and other judges analyzing this statutory language find this wording clear, plain and unambiguous. "We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there ..."

This flies in the face of the minority view, which seeks to preserve the congressional intent behind the statute of deterring and preventing abusive serial filings.

However, Judge Scarcella commented that at first blush, the minority view has some appeal, given the objectives



Craig Robins

of the 2005 Amendments to abusive serial filings. However, he observes that BAPCPA's drafting was inartful and the framework labyrinthine. Accordingly, he went with the view that places greater importance upon the plain meaning of the statutory language.

The decision is clearly a win for debtors as it essentially preserves the stay regardless of whether counsel brings the 30-day motion properly and perhaps acts as an indictment of the poorly worded BAPCPA statute.

Thus, in *Hale*, even though counsel failed to bring the 30-day motion in a

timely manner, there is still a stay against property of the estate, which effectively prevents a mortgagee from continuing a foreclosure proceeding without first bringing a motion for relief.

Note: Craig D. Robins, Esq., a regular columnist, is a Long Island bankruptcy lawyer who has represented thousands of consumer and business clients during the past 29 years. He has offices in Melville, Coram, and Valley Stream. (516) 496-0800. He can be reached at CraigR@CraigRobinsLaw.com. Visit his Bankruptcy Website: BankruptcyCan-Help.com and his Bankruptcy Blog: LongIslandBankruptcyBlog.com.

Confidentiality Obligations for Real Estate Brokers and Attorneys (Continued from page 6)

estate attorneys and real estate brokers is customary in the professional community, the disclosure will likely fail the second prong because of a broker's affirmative disclosure obligations.

Real Property Law §443(4)(a) states:

In dealings with the buyer, a seller's agent should ... (c) disclose all facts known to the agent materially affecting the value or desirability of property, except as otherwise provided by law.

In dealings with the seller, a buyer's agent should ... (c) disclose all facts known to the agent materially affecting the buyer's ability and/or willingness to perform a contract to acquire seller's property that are not inconsistent with the agent's fiduciary duties to the buyer.

Consequently, a real estate broker must disclose facts affecting the value and desirability of real estate, plus the buyer's ability and willingness to close transaction. Further, the term "known" is not limited to "actual knowledge," as such a term is defined in attorney's ethics at Rule 1.0(k). Instead, the Department of State defines "known" in the context of real estate brokerage to include facts that a broker "knew or should have known," or constructively knowing. See DOS v. Yearsley and Weeks, 683 DOS 08, In fact, the Civil Court, Richmond County, recently defined "should have known" by holding that "salespersons are charged with knowledge and responsibility to check the public records to confirm any information the broker is conveying to the potential purchasers" in creating an ever expansive understanding of what a broker must disclose. *McDermott v. Related Assets, LLC*, 45 Misc.3d 1205(A) (2014); See also by Andrew Lieb, "Real Estate Brokers and Disclosure Requirements," *The Suffolk Lawyer*, May 2015, page 17 and 25. In contrast to the obligations of a real estate broker, a seller and the seller's attorney are not liable for non-disclosure absent active concealment. *See Schomaker v. Pecoraro*, 237 A.D.2d 424 (2nd Dept., 1997).

It should now be understood that transactional real estate attorneys have a duty to screen the information that they share with an aligned real estate broker within the context of a transaction. In fact, real estate attorneys would be best served by providing an informed consent letter to their client that explains a broker's affirmative disclosure obligation before such attorney discloses anything at all to the real estate broker, except the closing date. More so, should attorneys and brokers have diverging disclosure obligations in this context where an alignment could benefit their mutual

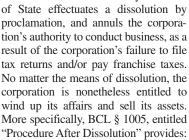
Note: Andrew M. Lieb is the Managing Attorney at Lieb at Law, P.C., a law firm with offices in Center Moriches and Manhasset. Mr. Lieb serves as a Co-Chair of the Real Property Committee of the Suffolk Bar Association and has been the Special Section Editor for Real Property in The Suffolk Lawyer for several years.

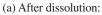
COMMERCIAL LITIGATION

Court Supervision of a Dissolved Corporation Pursuant to BCL 1008

By Leo K. Barnes Jr.

Dissolution of a domestic corporation can be achieved by the shareholders on consent, via judicial order pursuant to Business Corporation Law § 1104-a, or in accordance with Tax Law § 203-a when the New York Secretary





- (1) The corporation shall carry on no business except for the purpose of winding up its affairs.
- (2) The corporation shall proceed to wind up its affairs, with power to fulfill or discharge its contracts, collect its assets, sell its assets for cash at public or private sale, discharge or pay its liabilities, and do all other acts appropriate to liquidate its business.

However, despite the fact that a corporation is *legally entitled* to sell its assets, the authority to act does not serve to undermine a shareholder agreement, which provides that majority vote is required to act. Indeed, Business Corporation Law § 614,¹ entitled "Vote of Shareholders" provides as follows:

(b) Whenever any corporate action, other than the election of directors, is to be taken under this chapter by vote of the shareholders, it shall, except as otherwise required by this chapter or



Leo K. Barnes

by the certificate of incorporation as permitted by this chapter or by the specific provisions of a by-law adopted by the shareholders, be authorized by a majority of the votes cast in favor of or against such action at a meeting of shareholders by the holders of shares entitled to vote there-

on. Except as otherwise provided in the certificate of incorporation or the specific provision of a by-law adopted by the shareholders, an abstention shall not constitute a vote cast [underlining added].

Indeed, the BCL confirms that dissolution of a corporation does not affect the majority vote requirement of a Shareholders' Agreement or the Business Corporation Law § 614 requirements. More specifically, BCL § 1006(a)(2) provides:

(a) A dissolved corporation, its directors, officers and shareholders may continue to function for the purpose of winding up the affairs of the corporation in the same manner as if the dissolution had not taken place, except as otherwise provided in this chapter or by court order. In particular, and without limiting the generality of the foregoing:

(2) Dissolution shall not change quorum or voting requirements for the board or shareholders, or provisions regarding election, appointment, resignation or removal of, or filling vacancies among, directors or officers, or provisions regarding amendment or repeal of by-laws or adoption of new by-laws.

Assume that post-dissolution, a corpo-(Continued on page 22)

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Commission Holds Downstate Hearing on Grievance Process (Continued from page 1)

complaints involve escrow violations. Mr. Krinsky urged that the Commission not revamp the entire disciplinary system to address the less frequent occurrences but rather, that the existing safeguards in place such as self-reporting and mandatory bank reporting are sufficient to address those situations. He noted that the Second Department accounts for 20-25 percent of all attorneys in the state and 50-56 percent of all allegations of escrow violations. Noting that empirical data, he emphasized that the Academy would oppose any plan that would represent mechanistic and uniform rules throughout the state, because each disciplinary matter is separate, unique, and considers mitigating factors, and there is no "one size fits all" disciplinary process. Since there is a certain pattern of conduct in certain geographical locations but not others, having separate departmental discretion allows the taking into account of issues facing lawyers in that geographic area.

Many of those who testified agreed that we could improve upon the system we already have, for example, by investing more money in the budget to provide resources.

One very hot button issue was the question of whether there should be public disclosure of disciplinary proceedings at the charging stage. The Academy opposed such public disclosure to protect the attorney's reputation from unsubstantiated claims.

Daniel Morotta and Allyn Crawford of the Richmond County Bar Association aptly noted, "It is a tough job to be an attorney." He noted that while it is impossible for an honest attorney to "compete with lawyers who treat escrow accounts like their own personal piggy banks," that "we need to make sure that we have a system that is fair and balanced to every one involved and to increase the efficiency of this system and achieve dispositions more quickly. Any complaints that are false or unfounded on their face must be weeded out and discouraged from clogging the system."

The panel also noted the ability of clients to leverage threats of making a complaint if made public, particularly in fee disputes, and that "there are many clients that are much more powerful than the lawyer [..]" that will threaten a grievance if the lawyer pursues the fee that he or she has earned. Mr. Marotta addressed the problem of making the complaints public before the committee has had an opportunity to determine whether the heart of the complaint is really a fee dispute that should be referred to the arbitration panel, at which point the damage will have already been done to the attorney over what is really a fee dispute and not a substantive grievance.

The Committee on Professional Discipline for the Association of the Bar of the City of New York (of which I am

a member) urged that only the procedural rules for the grievance process should be uniform. The Committee proposed improving the system by adopting new rules to obtain discovery and non-privileged information for the respondent. It also recommended mediation for complaints, particularly where the gravamen of the complaint was a failure to communicate.

For reform

Karen Winner, Esq., who said that she was instrumental in drafting the "Client's Bill of Rights," testified in favor of reform. She claimed that consumers of legal services are impacted by "secrecy" surrounding the disciplinary process, and that the current system fails to protect the public from unscrupulous attorneys. She said that the public is "held captive to the vested interests of lawyers who have no interest in disrupting the status quo." She denied that the public would use the process to retaliate saying, "most people are sincere." When pressed by Judge Skelos for empirical evidence about the pattern of recidivism among attorneys and the likelihood of an attorney committing further unethical acts or violation while under investigation, she conceded that it was only anecdotal. Judge Skelos asked again if she had any empirical evidence from other states that had an open system that she had previously cited, like Oregon and West Virginia. Much applause and shouts erupted from the Americans for Legal Reform when she retorted that she "can't collect empirical data because the system is secret,"3 even though the question was directed at states with open systems.

Mr. Marotta aptly noted following Ms. Winner's testimony that "a great majority of [the complaints] are simply unfounded," and that "I have been a New Yorker my whole life [and] I don't think any one here is naïve to think that people will not file complaints that are not true or have allegations that are just false." He proposed a minimum filing fee in an effort to weed out some of the unfounded complaints.

What was most disturbing as an observer of the proceedings was the dearth of attorneys in the audience. The question of procedural and substantive changes to our disciplinary system strikes at the heart of lawyers' livelihoods. In this day and age of the Internet, one unsubstantiated complaint to a grievance committee that is made public could destroy, if not significantly dilute, our reputation and ability to obtain clients. It can also perpetuate more unsubstantiated complaints by disgruntled clients who are merely unhappy about the outcome of the matter, or about the fee charged.

Ms. Wenner testified that opening the process is needed because the "unsus-

pecting client won't know of any discipline and think it is perfectly safe to hire an attorney," and that the attorney can keep practicing during the pendency of a complaint. Yet, that seems to be the very reason for keeping the process confidential unless and until public discipline is imposed - to do otherwise would be to convict the attorney before due process was ever fulfilled, preventing her or him from generating business simply because a complaint was brought, whether or not it had merit in the first instance. It would also give unscrupulous clients leverage over lawyers with the threat of a baseless complaint, knowing that it would be made public. And, in this day and age where social media allows information to spread like wildfire, the risk to a lawyer's reputation and livelihood far outweighs the perceived harm to the public, especially in light of the empirical data.

Although written testimony was supposed to be submitted to the Commission by late August, it is not too late to voice your opinion on this very important issue. Anyone may do so by sending a written submission to AttorneyDiscipline@nycourts.gov or by mailing to The Commission on Statewide Attorney Discipline, 25 Beaver Street, Eleventh Floor, New York, NY 10004-2310.

Note: Alison Arden Besunder is the founder of Arden Besunder P.C., a law firm focusing in the areas of trusts, estate planning, and surrogate's court practice and litigation. She advises clients in Manhattan, Brooklyn, and Suffolk, Nassau and Queens Counties. Follow Alison on Twitter @estatetrustplan and on her blog estatetrustplan.wordpress.com.

¹ Press Release, May 30, 215, www.nycourts.gov/press/pdfs/pr15_03.pdf. ² Materials relating to the commission, together with transcripts of the three public hearings, are

available online at www.nycourts.gov/attorneys/discipline/resources.shtml

³ The statement is not entirely accurate since the OCA website now includes a statement on each attorney's registration search as to whether that attorney has been publicly censured or suspended. In addition, the American Bar Association conducts an Annual Survey on Lawyer Discipline Systems (S.O.L.D.) which is accessible at no cost on the ABA website.

Court Supervision of a Dissolved Corporation (Continued from page 21)

ration is working to "wind up" its affairs by selling assets, but is unable to achieve a majority (or super-majority) vote in accordance with BCL § 614(b) or a Shareholders' Agreement? As a practical matter, any conduct of the corporation that was achieved without a majority vote would likely be subject to attack. In such an instance, the shareholder (or shareholders) may petition the Supreme Court to supervise the liquidation process. For example, BCL § 1008(a) permits the Supreme Court to supervise the liquidation of a corporation and make Orders in connection with the winding up of the corporation's affairs:

(a) At any time after the filing of a certificate of dissolution under this article the supreme court in the judicial district where the office of the corporation was located at the date of its dissolution, in a special proceeding instituted under this section, upon the petition of the corporation, or, in a situation approved by the court, upon the petition of a creditor, claimant, director, officer, shareholder, subscriber for shares, incorporator or the attorney-general, may suspend or annul the dissolution or continue the liquidation of the corporation under the supervision of the court and may make all such orders as it may deem proper in all matters in connection with the dissolution or the winding up of the affairs of the corporation... [underlining added].

Indeed, BCL § 1009 confirms that the supervision mechanism is available for a Tax Law § 203-a dissolution:

1009. Applicability to dissolution under other provisions.

The provisions of sections 1005 (Procedure after dissolution), 1006 (Corporate action and survival of remedies after dissolution), 1007 (Notice to creditors; filing or barring claims) and 1008 (Jurisdiction of supreme court to supervise dissolution and liquidation) shall apply to a corporation dissolved by expiration of its period of duration or under section two hundred three-a of the tax law.

Upon dissolution, the BCL provides a pragmatic means to effectuate, *inter alia*, the liquidation of a corporation's assets in a court-supervised manner, thereby shielding shareholders, and their counsel, from allegations that decisions were made, and conduct performed, in an *ultra vires* manner.

NOTE: Leo K. Barnes Jr. IS a member of BARNES & BARNES, P.C. in Melville, practices commercial litigation and can be reached at LKB@BARNESPC.COM

¹ It is important to take into account, however, that BCL § 614 makes an exception to the majority vote required where corporation action is governed by specific provisions in the certificate of incorporation or by the bylaws adopted by the shareholders (i.e. a super-majority provision).

President's Message (Continued from page 1)

not understand.

In 1991, David Besso and a handful of leaders from the Lawyers' Committee on Alcohol and Drug Abuse created the Lawyer Assistance Foundation, (the Foundation) as a fundraising entity to continue in their quest to provide assistance to lawyers in need.

The Foundation and our committee, now called "Lawyers Helping Lawyers," deal with substance abuse and the ramifications associated with those issues, which now include mental health, depression, and stress and gambling among its issues.

For many years the Grievance Committee for the Tenth Judicial District has used the Foundation, with the approval of the Appellate Division, Second Department, and together with the NYSBA Lawyers' Assistance Program to monitor diversion and alternatives to discipline dealing with matters involving alcohol and substance abuse. I was often told that our members, including Eugene O'Brien and Gus Ginocchio, were known to answer the call for help no matter the time of day or night. They would speak about 90 days 90 meetings and checking in everyday. This was the diversion program where someone was having a substance problem and had complaints made by clients. If they

made it thought the 90 days and maintained sobriety, the Appellate Division would order that the person continued to be monitored and their complaints would be resolved. The lawyer was permitted to maintain their license as long as they maintained their sobriety.

The program exists in total confidentially. So if I knew who was successful I could not tell you. But I can tell you that there are more successful persons then you would think. The success was due to the mentors who spent countless hours week after week to help a fellow colleagues get through the most difficult time of their life.

The volunteers of the Lawyer Assistance Foundation help in many other ways. It was and is for all lawyers in need. The cause is not important. The volunteers determine what help is needed and then proceed to put help into place. One example is the situations where a lawyer, put on bed rest at six months due to a troubled pregnancy found that the bed rest interfered with the daily demands of her practice. Volunteers went to her office and took care of her files as per her direction until the attorney could put into place a permanent replacement. More than once an attorney suddenly died and the immediate family needed help to close the practice and distribute files to clients. Also attorney's who had been suspended or disbarred needed help to distribute files. An attorney died suddenly and his children did not have any money to bury their father. Volunteers helped to make arrangements and make a contribution to the lawyer's burial. Another example is the attorney who died suddenly and left over 300 executed wills to be distributed to the testators.

As time went on, I proudly took over the reins as Managing Director of the Lawyer Assistance Foundation and found the satisfaction that Judge Block promised it would be.

With the small amount of funds our Lawyer Assistance Foundation has we've managed to use these monies to help attorney's pay their most urgent bills, help pay for a lawyer to go into rehab, help a lawyer pay for medical insurance and many other life threatening needs.

The only fundraising the Lawyer Assistance Foundation does is at the annual golf tournament at the Westhampton Country Club (and we have to thank Gair Betts for this wonderful location). The people who play know what the Lawyer Assistance Foundation does for their profession.

This year Judge Jack Toomey is being honored for the wonderful service he performs at the Veterans Court. It is all in the spirit of Lawyers Helping Lawyers. Dave Besso serves as the current Managing Director and this is the second time around that David has been its Director. He works and has worked extremely hard to make the golf outing a success since its beginning. Most people know how Dave loves to play golf and know that the golfers who come year after year are not all lawyers, but they are friends of David and this too is indeed a tribute to him.

Judge Ira Block never spoke about what he did for lawyers and neither did Gene O'Brien, or Gus Ginocchio or any of the members on the Committee or the Foundation. Judge Toomey and David Besso and the band of volunteers quietly do whatever has to be done in the moment.

Now that our best kept secret is out there we have to ask for your help if the Foundation is to continue. There are many ways to participate in the Lawyer Assistance Foundation. You can be a volunteer and give of your time working on the golf outing or you can go to the outing and enjoy a wonderful day of playing golf at a premier golf course. Please consider making a contribution. All contributions are tax deductible. Perhaps your donation will mark a special occasion or memorialize a particular person. Whatever the motivation, any help you can provide would be greatly appreciated.

Court Notes (Continued from page 4)

otherwise unblemished career spanning 30 years, his volunteer service, and the substantial evidence of the respondent's good character. Accordingly, under the totality of circumstances, the respondent was publicly censured for his professional misconduct.

Attorneys suspended

Linda Marie Cronin: By decision and order of the court, the Grievance Committee was authorized to institute a disciplinary proceeding against the respondent and the matter was referred to a Special Referee. The referee sustained all four charges against the respondent and the Grievance Committee moved to confirm. The respondent cross-moved to disaffirm the report or in the alternative, requested that if a violation was found the sanction be limited so as to authorize her to continue to practice law. The charges alleged, inter alia, that as an experienced trial attorney and the partner in charge of the litigation practice for her firm, the respondent, was responsible for engaging in a concerted effort to circumvent a court ordered temporary restraining order, and for filing an affirmation containing a false

statement with the court, with the intent of misleading the court. Based on the evidence adduced, and the respondent's admissions, the court granted the motion by the Grievance Committee and denied the crossmotion by the respondent. In mitigation, the respondent asked the court to consider, inter alia, her unblemished disciplinary history, as well as the evidence of her charitable endeavors, pro bono legal service and good character. Nevertheless, the court expressed concern with the serious misconduct in which the respondent engaged, including her acts of dishonesty, fraud and deceit. Accordingly, under the totality of circumstances, respondent was suspended from the practice of law for a period of one year.

Attorneys disbarred

Matthew B. Kogan: On July 18, 2014, the respondent pled guilty in the Supreme Court, Nassau County, to one count of grand larceny in the third degree, a class D felony. Thereafter, on December 3, 2014, the respondent pled guilty in the Supreme Court, Nassau County to one count of criminal possession of a forged instrument in the second degree, a class D felony. He was

sentenced to five years probation on both convictions, the terms to run concurrently. The Grievance Committee moved to strike the respondent's name from the roll of attorneys based upon his felony conviction. The respondent failed to oppose the relief. 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.

Joel C. Schneider: By decision and order of the court, the Grievance Committee was authorized to institute a disciplinary proceeding based upon 10 charges of professional misconduct against the respondent and the matter was referred to a Special Referee. Following a hearing, the Special Referee sustained the charges and the Grievance Committee moved to confirm. The respondent did not oppose the motion. The charges against the respondent included allegations, inter alia, that the respondent misappropriated funds entrusted to him, violated his fiduciary duties as an escrow agent by abdicating control over his escrow account to a non-attorney, failing to maintain required bookkeeping records, and commingling personal

funds with funds entrusted to his charge. Based on the respondent's admissions and the evidence adduced, the court found that the Special Referee properly sustained charges 1 through 6 and 8 through 10, but that charge 7 was duplicative of another charge. In mitigation, the respondent claimed that he never intended to prejudice a client, that the charges did not involve client funds incident to the practice of law, and that he intended to pay back the balance of funds owed a third party with whom he had no professional relationship as counsel. Notwithstanding same, the court found that respondent demonstrated an utter disregard for his fiduciary obligations, and determined that disbarment was warranted. Additionally, the court held that any future application for reinstatement was to be accompanied by proof that he repaid the balance due.

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 past President of the Suffolk County Bar Association and past Chair of the New York State Bar Association Trusts and Estates Law Section.

ABLE Act Coming to New York (Continued from page 5)

paid in satisfaction of such a claim is not a taxable distribution from the ABLE account. Further, the amount is to be paid only after the payment of all outstanding payments due for the qualified disability expenses of the designated beneficiary and is to be reduced by the amount of all premiums paid by or on behalf of the designated beneficiary to a Medicaid Buy-In program under that state's Medicaid plan."1

This provision makes it less attractive to gift to an ABLE account. It is recommended that any family member and/or third party wishing to gift any substantial assets to an individual with a disability use a Third Party SNT, which does not have a contribution limit and does not require a payback upon the beneficiary's death.

One significant advantage, however, is that these new accounts can be opened directly by the individual with a disability as compared to a First Party SNT (aka Pay Back), which requires a parent,

grandparent or court order to establish. An ABLE account can be used over the lifetime of the individual beneficiary and the 529A account is not limited to education or medical expenses. "Qualified disability expenses" are more broadly interpreted as expenses that relate to the individual's disability and are for the benefit of that designated beneficiary in maintaining or improving his health, independence, or quality of life. Among the expenses that qualify are housing, employment training and support, transportation, assistive technology, personal support services, health prevention and wellness, financial management, legal fees, administrative services and funeral and burial expenses. Furthermore. the account owner, or a person appointed to make decisions on his or her behalf, can select from the plan's investment options.

As a rule of thumb, an ABLE account is best suited to those individuals with disabilities who are able and want to save some of their SSI payments or their

wages to accumulate assets over \$2.000 in order to purchase and/or use these funds for an individual goal, such as buying their own automobile. The ABLE account allows those disabled individuals to control some amount of assets themselves without jeopardizing their government benefits.

The accounts are also ideal when families, who are applying for SSI with a disabled son or daughter, realize they have assets greater than \$2,000 - which can be a simple solution for those pesky savings bonds or Grandma's forgotten custodial savings account that are in the disabled individual's name. In such a case, they can now transfer those funds to an ABLE account (up to \$14,000) without having to spend down or scramble to open a First Party SNT.

The ABLE Act is an important piece of legislation and a good example of legislators working to directly address the real world needs of the disabled. The result is a pending law that will impact many families in our state by presenting new options to a population that is too often When Governor deprived of them. Cuomo puts pen to legislative paper, New Yorkers with disabilities will have another important program to save for their own future without penalizing their government benefits.

Note: Regina Brandow of Brandow Law concentrates her practice on Elder Law, Special Needs Planning, and Trust and Estates and is an advocate for families and individuals with disabilities. Based ina Stony Brook, NY, she can be contacted at (631) 675-2540 or regina@brandowlaw.com.

¹ Proposed regulations under section 529A of the Internal Revenue Code as reported in the Federal Register dated June 22, 2015. Commentary period up until September 21, 2015. Public hearing scheduled for October 14, 2015, at 10

Bench Briefs (Continued from page 4)

Motion seeking class action status denied: application was untimely.

In Delfina Urias, as the Guardian of the Person & Property of Manuel Urias and Delfina Urias, individually v. Daniel P. Buttafuoco & Associates, PLLC, Daniel P. Buttafuoco, LLC, Daniel P. Buttafuoco, Esq. and John Newman, Esq., Index No.: 7186/2011, decided on June 24, 2015, the court denied the motion of plaintiffs seeking class action status. The court noted that pursuant to CPLR §902, within 60 days after the time to serve a responsive pleading expired for all persons named as defendants in an action brought as a class action, the plaintiff shall move for an order to determine whether it is to be so maintained. This filing was mandatory. Herein, the court found that it appeared that the defendants were served on or around June 9, 2011 although no affidavit of service had been proffered in support of either the within motion or cross motion. After a decision and order was rendered on a pre answer motion to dismiss, issue was joined by the defendants answer on or about December 3, 2012.

The plaintiffs now moved, over two years after that, for an order granting class status. The court concluded that their argument that the application as timely was without merit. The court further noted that an appeal of this court's prior decision and order, which dismissed some of the causes of actions of the complaint did not extend their time to seek class status.

Motion to compel denied; motion for protective order granted to the extent provided in the decision; defendants failed to proffer anything other than speculation that the plaintiff's injuries

may be related to a hereditary condition of migraines; no showing that the requested personnel file was in any way material and necessary.

In Emily Watson, Olivia Cunningham and Douglas Cunningham v. Southampton Brick d/b/a Southampton Masonry and August Bouker, Index No.: 18327/2011, decided on April 16, 2015, the defendants' motion to compel was denied and the plaintiff's cross motion for a protective order was granted to the extent provided for in the decision.

The case at bar was one sounding in negligence, which arose from a motor vehicle accident. The court noted the relevant facts as follows: by Stipulations of discontinuance dated August 29, 2012 and November 3, 2012, Laurie and Joseph Watson discontinued their derivative claims. On September13, 2013, the defendants served a Notice for Discovery and Inspection on Joseph Watson and Laurie Watson. The defendants now moved for an order directing them to comply with said Demands and the plaintiff cross moved for a protective order. Here, in rendering its decision, the court noted that for disclosure purposes a party was distinguished from a nonparty, usually referred to as a witness. CPLR §3010 (a) (1) and (2) allow full disclosure against a party, a party's agent or a person who previously possessed a cause of action or defense asserted in the action, Consequently, Joseph Watson and Laurie Watson, as former parties to the within action were, accordingly, subject to full disclosure. The plaintiff objected to the defendants' demand for a copy of Joseph Watson's personnel file as well as for authorizations for physicians that treated him for migraines. In issuing a

protective order, the court noted that the defendants failed to proffer anything other than speculation that the plaintiff's injuries may be related to a hereditary condition of migraines from her father. The court further stated that clearly such speculation did not warrant directing of discovery of Mr. Watson's medical records. The court also denied defendants' demand for Mr. Watson's personnel file, finding that there had been no showing that the requested file was in any way material and necessary to the defense of the within action.

Honorable Joseph C. Pastoressa

Motion to compel discovery denied; from submissions, impossible to determine what discovery was outstanding.

In Robert Nalewajk and Susan Nalewajk v. Kolbe & Kolbe Millwork, Co. Inc., Dimensional Millwork, Inc., Millwork Solutions, Corporation d/b/a Florence Corporation d/b/a Florence Building Materials, Kolbe and Kolbe Millwork, Co., Inc. v. Ample Contracting Inc., Jim Makarius, Jim Makarius d/b/a Ample Contracting, J.Z. Woodworks, John Zotos d/b/a J.Z. Woodworks, Synergy Concrete Corp., Vince Capogna and Vince Capogna d/b/a Index Synergy Concrete, No.: 37842/2011, decided on April 17, 2015, the court denied motion by defendant Kolbe & Kolbe for dismissal of the complaint.

In rendering its decision, the court noted that counsel's good faith affirmation asserted that on May 4, 2012, defendant required that plaintiffs respond to a discovery demand dated, March 9, 2012, which was long overdue. No other good faith efforts to communicate and resolve

the discovery dispute was set forth and the movant had not outlined what discovery was currently outstanding. Moreover, the court found that after May 4, 1012, a second amended complaint was served on September 23, 2013 and the court had now addressed a total of nine motions by the parties. Finally, the court pointed out that substantial discovery was provided by CD rom and file review at plaintiff's office. Without the CD rom, it was impossible to determine from the parties' submissions what discovery had been provided and what remained outstanding. The motion was denied.

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

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

SCIN Alive?! A Tale of Death, Taxes, Doubt, and Redemption. (Continued from page 6)

trust will issue a promissory note to you in exchange for the shares."

"So let me get this straight, I sell my shares to a trust in exchange for a note? Don't I own the note? If I die before the note is paid off, won't the value of the note be included in my estate? Am I just substituting one asset in my estate for another?"

After a pause, he continued, "You know, I'm no spring chicken, I've had my share of health issues, some of them serious. You may have noticed that I'm sitting in a wheel chair? What would this note look like?"

The lawyers confirmed that, "without more," the note would be included in his estate upon his death if it were still outstanding at that time. Of course, they added, if the shares appreciated at a rate in excess of the interest accrued on the note, the net result would be positive insofar as removing value from his estate was concerned.

Sale to a trust for a Self-Canceling Note

After some further deliberation, the lawyers peppered him with all sorts of questions about his health. "I thought you guys were lawyers? You do know that it's illegal to practice medicine without a license?"

"Medicine? No. We're tax lawyers. We answer to a higher authority."

"What if we told you that there was a way to exclude the note from your estate upon your passing?" they asked him.

Picture the cartoon thought bubble that appeared above his head at that point. "I sure hope the chauffer has the limo running. These guys have had too much Kool-Aid."

"OK, I'm game," he humored them, "how does the note disappear?"

"It doesn't really disappear. It cancels itself if you die before the end of the note term. Based on your age, your life expectancy is almost six years. Assume the note has a term of 5 years (less than your life expectancy). You die in the second year of the term. The remaining balance of the note is canceled and never has to be satisfied. They're called self-cancelling installments notes, or 'SCINs'"

The devil is in the details

Well, the planning moved pretty quickly from there. Davidson was stuck, poked, prodded and probed by four physicians, each of whom concluded that he had a greater than 50 percent probability of living for at least one year. According to the lawyers, this was a key factor. With that prognosis, he was not deemed to be "terminally ill" within the meaning of those IRS regulations that would be used to calculate the actuarial fair market value of the notes based

upon his actuarial life expectancy. The regulations would not have been available otherwise.

The lawyers obtained appraisals for the shares to be transferred to the trusts, and prepared the documentation needed to effect the transfers, including the five-year SCINs.

Importantly, they also obtained valuations for the "premium" that each trust would have to pay in exchange for the self-canceling feature. After all, why would a note holder allow a self-cancelation provision in the note without being compensated for the actuarial risk of his or her premature death? In the case of some of the notes, this premium took the form of an increased amount of principal. In others, it was reflected as an increased rate of interest.

The notes were secured by the shares being transferred and by other assets that had been contributed to the trusts at their creation. They provided for annual payments of interest and a balloon payment of principal (either in cash or in kind) at the end of the five-year term.

Death waits for no one

In December 2008, the various trusts were created and "seeded" with some assets. The stock transfers to the trusts were completed in January 2009. Davidson died in March 2009 and as per the terms of the SCINs, the notes were canceled.

His estate filed his 2009 gift tax returns (on Form 709), on extension, in May of 2010. These disclosed the transfers of stock in exchange for the SCINs. (The Form 709 for 2008 disclosed the creation of the trusts.) His estate tax return was filed (on Form 706), on extension, in June of 2010.

Death and taxes

The IRS examined these returns. With respect to the estate tax return, the IRS determined an estate tax deficiency of over \$1.87 billion (not a typo). It also determined gift tax and generation-skipping transfer taxes of approximately \$846 million for 2009. Over \$2.7 billion in the aggregate (plus interest and penalties) — did Davidson roll over in his grave?

The IRS arrived at this figure, in part, by challenging (practically a given) the reported fair market value for Davidson's company.

It also refused to treat the SCINs as bona fide consideration equal in value to the Company stock he had transferred to the trusts in exchange for the SCINs.

The IRS asserted that the regulations utilized to calculate the actuarial fair market value of the notes were inapplicable because Davidson's life expectancy was less than the terms of

the notes. Instead, the IRS determined that his life expectancy was approximately 2.5 years. The IRS asserted that the SCINs should have been valued using this life expectancy, which would have significantly reduced their value.

According to the IRS, Davidson never intended or expected to collect all payments due under the SCINs. Moreover, the IRS said, the trusts would not have been able to make payments on the SCINs when due. Thus, the IRS concluded, the SCINs were not bona fide debt.

In June 2013, Davidson's estate filed a petition with the U.S. Tax Court (https://ustaxcourt.gov/UstcDockInq/DocumentViewer.aspx?IndexID=6610 435), in which it challenged the IRS's assertions. Trial was set for April 2014, but was subsequently continued (often done where the parties are engaged in serious settlement negotiations) and stricken from the court's calendar. The court, however, retained jurisdiction of the case, and required the parties to file a joint status report with the court every three months.

And so I face the final curtain

Davidson's estate and the IRS submitted a stipulated decision in July of 2015, in which they agreed to deficiencies of gift tax for 2009 of approximately \$178 million, of estate tax of approximately \$153 million, and of 2009 GST tax of approximately \$46 million. A total of \$377 million, as opposed to the approximately \$2.7 billion originally sought by the IRS.

Although the basis for the decision was not spelled out, it seems reasonable to surmise that the settlement was based upon a compromise regarding the valuation of the shares transferred — not at all unusual — and that the SCINs were otherwise not implicated in the decision.

The hereafter?

The story set out in this post is based upon a real taxpayer. The narrative, of course, is pure conjecture. It is, however, based upon discussions that I have had with many clients (except the part about the Kool-Aid).

There's a lesson in almost every story, fictional or not. The take-away here is straightforward: know all the rules, pay attention to the details, implement and document the plan completely, and educate the client. Having done this, you will be in a strong position to withstand any IRS scrutiny.

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

New Academy Dean (Continued from page 3)

Additionally, the strategic planning committee is looking at revising Academy bylaws to enable the Academy to have a more continuous leadership development. "We want to look at formalizing a process to see if we should have a dean elect," Mr. Tilis said.

Basically, the new dean is leading the charge to explore and test out new ideas, whether or not a decision is made to move forward. And he is reaching out to members for input. "There will be CLE's that we have not done in the recent past," said Mr. Tilis with assur-

ance. "We are lining up top quality speakers and are more than willing to reach beyond Suffolk to secure speakers. The Academy will continue to offer benefits for all, from the newer members to those who have been practicing forever."

Note: Laura Lane is an award-winning journalist who has written for The New York Law Journal, Newsday and various magazine publications. She is the editor of the Oyster Bay Guardian and the Editor-in-Chief of The Suffolk Lawyer

Do You Even Network Bro? (Continued from page 16)

working opportunities once you are involved in one of these organizations.

This is your time to make things happen. Do not sit by and watch your classmates shake hands with everyone and wonder how he or she knows so many people — be that person. The connections that you make now can last you a lifetime and may be your path to employment once you graduate. There is

only one chance at this. Leave nothing on the table.

Note: George Pammer is a 3L at Touro Law School. He is a part-time evening student and the President of the Student Bar Association. George has also held the position of Vice-President in the SBA as well as in the Suffolk County Bar Association — Student Committee.

Helping Lawyers Find the Path to Recovery (Continued from page 8)

- mental illness was approximately 18.5 percent (about 43 million people), with 6.7 percent having had a major depressive episode.
- At least one study has indicated that lawyers are 3.6 times more likely to suffer from depression than any other profession. See W.W. Eaton et al., "Occupations and the Prevalence of Major Depressive Disorder," Journal of Occupational Medicine 32 (1990):
- A study of 801 lawyers in Washington State found that 19 percent of the lawyers studied suffered from depression. See G.A.H. Benjamin, Id.
- It has been estimated by some studies that of the one million lawyers in this country, approximately 250,000 suffer from depression. See Daniel Lukasik, Depression is the Law's Occupational Hazard, The Complete Lawyer, (March 1, 2008).
- It is estimated that one out of every four lawyers suffers from increased psychological distress, including feelings of inadequacy,

- inferiority, anxiety, social alienation, isolation and depression. See Benjamin Sells, Facing the Facts About Depression in the Profession, Florida Bar News (March 1995).
- According to the 2013 National Survey on Drug Use and Health: Mental Health, women are more likely than men to suffer from any mental illness in a given year (23.2 percent vs. 14.4 percent for men).
- Suicide is the third leading cause of death among attorneys, after cancer and heart disease. This is six times as high as the general population. See Don Carroll, "Lawyer Suicide and Resources for Managing Stress," North Carolina Lawyer Assistance Program, http://www.nclap.org/article.asp?a rticleid=143 (accessed 9/5/2013).
- According to the Centers for Disease Control and Prevention, alcohol is a factor in over 30 percent of all completed suicides.
- According to the Centers for Disease Control and Prevention, substance use is a factor in over

- 20 percent of all completed suicides. (23 percent for antidepressants and 20.8 percent for opiates, including heroin and prescription pain killers).
- Depressive Disorders, Anxiety Disorders, and Substance-Related and Addictive Disorders are all classified under the Diagnostic and Statistical Manual (DSM-5) of the American Psychiatric Association as mental disorders.

Given these statistics, it is not hard to image that there are a significant number of legal professionals out there who suffer in silence. If you are struggling with alcohol, drugs, gambling, depression, anxiety, or any other mental illness, the LHL Committee can help. In most cases, the LHL Committee can put you in touch with another member of the profession who has struggled with the same or similar issues that you are facing. If you are currently suffering in silence I hope you take one thing away from this article - you are not alone and help is available. There are people in the profession who have been through what you are going through and are willing to help guide you to a path that leads to hope and freedom, if you are willing to let them.¹

Note: Rosemarie Bruno is an attorney and licensed social worker whose office is located at 4250 Veterans Memorial Hwy, Ste. 165E, Holbrook, NY 11741. Ms. Bruno focuses her legal practice on mediation in divorce and family matters. Ms. Bruno also practices clinical social work at Family Service League's mental health clinic in Mattituck, and she has a private counseling and coaching practice that focuses on helping people manage conflict and navigate life transitions more effectively. Ms. Bruno is co-chair of the SCBA LHL Committee and a member of the NYSBA Lawyer Assistance Committee. She can be reached at: rbruno@rosemariebruno.com.

¹ The LHL Committee Helpline Number is (631) 697-2499. The committee holds a 12-step support group meeting every Wednesday at 6pm at 119 Kings Highway, Hauppauge. The committee also holds a stress and depression support group meeting the first Wednesday of every month at 5 pm at 119 Kings Highway, Hauppauge.

Creating a Business Development Culture in Your Firm (Continued from page 16)

Provide support. Business development skills can be learned and cultivated, but lawyers need training, feedback and support in order to develop those skills – particularly since they are not skills that are taught in law school. Conduct regular meetings both individually and in groups to provide guidance and feedback, identify obstacles and brainstorm ideas, monitor progress and provide accountability.

Tie compensation to business development – and not just in the traditional way of giving a percentage of business to one who generates or originates the business. As noted above, since generating new business takes a long time and is difficult to see or predict, rewarding the development of skills and the reaching of certain goals and benchmarks will help keep lawyers on track and motivated to continue their business development efforts. Measurement, accountability and rewards must all be in place in order to reinforce the message and encourage desired behaviors.

Telling lawyers that business development is part of their job but compensating them only on billable hours sends a conflicting message. What gets measured gets done; if your firm values business development activities and relationship building, measure it and compensate it.

Walk your talk. Show your commitment to business development in all things the firm does. Paying lip service to business development efforts in an offhand way, commenting on business development infrequently or only as an aside, reminding lawyers that they are "expected" to develop business, but failing to follow through will negate your message. Show your commitment - if you tell associates and staff that they are expected to participate in specific activities or behaviors, make sure partners are doing it too. Hold partners, managers and supervisors accountable, not only for their own business development efforts, but also for cultivating business development skills and relationship behaviors and guiding the business development efforts of those whom they supervise.

Stop tolerating hoarding behavior. Don't allow originating partners to hoard work or keep their clients behind an iron curtain, protected from others in the firm. This behavior does not foster relationship building. In addition to potentially hurting the clients' interests by not allowing clients access to all of those in the firm working on a client's matter, the firm may be hurting itself by failing to create deep relationships within the firm with particular clients. Instead, let lawyers shadow the rainmakers to see how they work and how they build relationships with clients and referral sources. Require partners to allow others to accompany them to client meetings and business generation activities, and require them to share their efforts and results with others.

Seek client feedback, share it with the team and act on it. Retaining great

clients is just as important as developing new client relationships and generating new business. Studies have shown that while lawyers think they are delivering excellent service, clients don't always agree – and they won't necessarily speak up unless they are asked. Just because clients aren't leaving your firm does not mean that they are loyal to the firm or that they would recommend you to others or send you additional business.

Any great business development strategy should include obtaining regular client feedback to ensure that you are meeting clients' needs and to identify potential new areas of businesses. But simply obtaining that feedback is not enough. It needs to be shared with the team. Sharing the outcome with those who were involved with the matter or working with that client signals that their contribution is important and that they are an integral part of the firm's success. And you can't effectively walk your talk if you don't act on client feedback. Get your employees and attorneys involved during this process as well. Let them help brainstorm ideas for improvement, identify new services that can be provided and put client suggestions into place. Reward lawyers and staff who are actively involved in client retention just as you would reward those who actively seek new business.

Communicate the firm's marketing and business development goals and objectives, and regularly report to the firm about the progress being made

toward those goals and objectives. Give recognition to all of those who have contributed to the effort. Celebrate success and discuss how improvements or changes can be made in the areas in which the firm has fallen short. Make sure everyone knows the firm's business development plan *and* their role within that plan.

A firm that develops a culture of business development won't have to rely on a few "rainmakers" to feed the entire firm. Instead, each member of the firm, from the receptionist to the equity partners, can contribute their unique skills and insights to constantly improve relationships with existing clients and cultivate new business. When marketing and business development are an integral part of the firm's day-to-day activities, the firm is potentially insulated from the need to downsize in the future. The firm will also be more likely to retain talented lawyers and staff by providing them the guidance and support they need to develop their skills and build strong client relationships.

Note: Allison C. Shields, Esq. is the Executive Director of the Suffolk Academy of Law and the President of Legal Ease Consulting, Inc., which provides productivity, practice management, marketing, business development and social media training, coaching and consulting services for lawyers and law firms nationwide. A version of this article originally appeared on the website, Slaw.ca.

The Latest on Equitable Liens: What if the Money is Gone? (Continued from page 11)

Plan Description "clearly functioned as the plan document required by ERISA". Examining the SPD, the court found that it unambiguously conferred upon the plan all of the rights of recovery that the plan asserted in the action.

The court then addressed the appropriateness of reimbursement in the face of arguments by the defendant that the "common fund rule" and the "make whole doctrine" both precluded recovery in this case. The "common fund rule" allows for reimbursement to be proportionally offset by the costs and expenses incurred by the recovering party in securing the corpus out of which reimbursement is made, including attorney's fees, on the theory that but for the efforts of the recovering party there would be no funds from which reimbursement could

be made, hence no benefit to the party to be reimbursed. The "make whole" doctrine is a vestige of equity that sought to avoid double recoveries by allowing equitable liens to vest only against so much of a recovery as exceeded the recovering party's actual damages. Citing Supreme Court precedent, the court made quick work of both arguments: neither of these defenses can supersede the clear terms of a plan that are to the contrary. The plan set out the "expressed commitments" of the parties — one to pay medical bills and the other to reimburse on the clear terms and conditions stated — and "when parties demand what they bargained for in a valid agreement" one of the parties cannot later ignore the plain language of the agreement by applying equitable defenses (citing US Airways, Inc. v. McCutchen, 569 US , 133 S.Ct. 1537, 185 L. ED 2d 654 (2013)). (Interestingly, the court observed that since it was not being called upon to address how the plan's provisions would be applied if the debt to the plan exceeded the amount of the settlement then it would not. It noted, however, its concern over just how such a ruling, depending on how it comes down, might act to discourage injured parties from pursing compensation claims. I would add the obvious corollary concern: how it would discourage settlements and compel parties to proceed to verdict?)

The court then addressed the issue of whether an equitable lien may vest when there no longer is any identifiable corpus of funds. Out of the \$500,000 settlement some sums were deducted for attorney's fees, costs, medical expenses and a satisfaction of a variety of other liens, and the net was distributed to Mr. Montanile. As of the date of the filing of the instant litigation the funds were "dissipated." This gave rise to the argument, based on general principles of equity, that if there were no "separately identifiable" funds there could be no equitable lien.

The court found that although there is no controlling Eleventh Circuit precedent squarely on point, the "overwhelming majority" of circuits addressing the issue interpreted *Sereboff* to hold that a beneficiary's dissipation of assets is immaterial when a fiduciary asserts an equitable lien by agreement. It cited to the 2013 Second Circuit case of *Thurber v. Aetna Life Insurance Company*, 712 F. 3d 654 for the following:

In the context of an equitable lien by agreement, rather than an equitable lien sought as a matter of restitution, all that matters is that the beneficiary did, at some point, have possession and control of the specific portion of the particular funds sought by the insurer. (Citation omitted.)

The provisions of the Summary Plan Description documents put the defendant on clear notice that any third party recovery affected by any means first belonged to the plan. This pre-existing agreement gave rise to the equitable lien immediately upon the settlement, and the settlement proceeds constituted the "separately identifiable fund" to which the plan's lien attached. To hold otherwise not only would ignore the very rationale of *Sereboff*, but also would encourage deliberate dissipation in order to defeat an ERISA plan's clear right of recovery in any similar situation.

So, summary judgment was granted to the plaintiff health plan and denied to Mr. Montanile.

The court may have engaged in hyperbole in finding that the "overwhelming" majority of circuits (including our Second Circuit) hold accordingly; the figure was five to two. Upon the appeal of *Montanile* to the Eleventh Circuit the score became six to two (*affirmed*, 593 Fed. Appx. 903, 2014 US App. LEXIS 22438 (11-24-14)). It seems that in the

time between the grant of judgment and the decision on appeal the Eleventh Circuit had decided the same issue in an unrelated case, and simply applied its newly minted precedent here.

So why is this coming up on the radar screen now? The US Supreme Court granted *certiorari* to resolve the split among the circuits on March 30, 2015. Argument is scheduled for October.

Just as an aside ... in its discussions the trial court mentioned the "outrageous" conduct of the parties and counsel that "recently" (i.e. earlier in 2014) was sanctioned by the Seventh Circuit in Central States Etc. Health and Welfare Fund v. Lewis, 745 F. 3d 283 2014 US App LEXIS 4660. At the beginning of the proceeding the plan sought a preliminary injunction prohibiting any disposal of settlement proceeds pending a resolution on the merits. The court granted the order, directing the amount of the plan's claim to be paid into the escrow account of the settling party's attorney. There was no compliance with the order (the reason isn't made clear). Upon the subsequent contempt application the defendants stated merely that the money was gone. Upon the appeal of the trial court's finding of contempt, the Seventh Circuit held that a mere assertion of inability to pay does not preclude a finding of contempt, and it sustained the trial court's contempt order. It also found the appeal to be frivolous and ordered a hearing as to why the appellants should not be sanctioned for filing a frivolous appeal.

Leaving aside the issue of willful or contumacious conduct on the part of the settling party or counsel in violating a court order, just what is the liability of counsel if he or she distributes settlement proceeds with knowledge that a health plan is asserting an equitable lien by agreement? Will counsel be answerable under some sort of negligence theory? Must the health plan first pursue the settling party before seeking liability against the attorney? Will the health plan be able to state a claim if the US Supreme Court holds that this equitable remedy is not available if, at the time the action is filed, the money has been dissipated? Will such a ruling then relegate a health plan to a breach of contract action? If so, how is counsel exposed if there is no contractual privity; perhaps on some kind of "tortious interference" theory?

Stay tuned.

Note: James Fouassier, Esq. is the Associate Administrator of Managed Care for Stony Brook University Hospital and Co-Chair of the Association's Health and Hospital Law Committee. His opinions and comments are his own and may not reflect those of Stony Brook University Hospital, the State University of New York or the State of New York. He can be reached at, james.fouassier@stonybrookmedicine.edu

¹ AirTran Airways v. Elem, 767 F. 3d 1192 (2014)

Help is Closer Than You Think (Continued from page 10)

dire situation, but also to recognize the wisdom in reaching out to the help that is available.

The profession is in crisis. Part of the solution is fairly simple. Legal professionals must view their mental wellbeing as vital to their competence as their legal knowledge. Though not a panacea, general information such as what is provided by the eLAP website can help break down the barriers and reduce the stigma and shame that is fueled by lack of knowledge. The eLAP staff is dedicated to providing information that can educate and empower, and provides a portal for direct contact with our personal, confidential assistance.

Please visit www.nylap.org. Do it right now because: one, things may be worse than you realize and two, help is within easy reach.

Don't save us for an emergency when we can possibly prevent one.

Note: Patricia Spataro is Director of the New York State Bar Association's confidential Lawyer Assistance Program (LAP). The purpose of the LAP is to provide educational outreach and confidential assistance to attorneys, judges, law school students who are affected by addiction or mental health concerns. Ms. Spataro is a licensed Mental Health Counselor and certified Employee Assistance Professional with more than 20 years experience in the mental health field. As the LAP Director, Patricia works closely with the State Bar's lawyer Assistance Committee and the numerous local bars' Lawyers Helping lawyers Committees statewide. In addition, she collaborates with LAP Directors throughout New York State to develop and deliver outreach efforts, educational programs, and comprehensive assistance services to the legal community.

Fostering Lawyer Well-being (Continued from page 9)

experiencing unusual distress, be willing to discuss that delicate topic with the other lawyer or with a member of the SCBA's Lawyer's Helping Lawyers committee.

Most lawyers in Suffolk County fall into the "other" category — not a judge; not a prestigious (large firm) lawyer; not a service (public interest) lawyer — which Krieger and Sheldon's work show to be the group experiencing the lowest degree of well-being, so we need to make small steps to improve lawyer well-being to begin the self-feeding cycle of well-being promoting greater professionalism and ethical behavior which, in turn, promotes greater lawyer well-being.

We have the Lawyers Helping Lawyers Committee in place and can and

should use it and these more pedestrian steps to help lawyers achieve greater satisfaction

Note: Harry Tilis is the Dean of the Suffolk Academy of Law, the co-chair of the Lawyers Helping Lawyers Committee and a frequent contributor to the Suffolk Lawyer. The opinions expressed in this article belong to him and do not necessarily reflect the opinion of any of the organizations with which he is affiliated.

¹Lawrence S. Kreiger and Kennon M. Sheldon, Ph.D, What Makes Lawyers Happy?: A Data-Driven Prescription to Redefine Professional Success, 83 Geo Wash L Rev 554 (2015).

² *Id*. at 576-7.

³ *Id.* at 579. ⁴ *Id.* at e.g. 579, 583.



SUFFOLK ACADEMY OF LAW

OF THE SUFFOLK COUNTY BAR ASSOCIATION

FALL 2015 CLE

The Suffolk Academy of Law, the educational arm of the Suffolk County Bar Association, provides a comprehensive curriculum of continuing legal education courses. Programs listed in this issue are some of those that will be presented during the summer and early fall, 2015.

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

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

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

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.

the OCA's MCLE requirements.

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(c)(3) organization, the Academy can accept your tax deductible donation. Please take a moment, when registering, to add a contribution to your tuition payment.

Financial Aid: For information on needs-based scholarships, payment plans, or volunteer service in lieu of tuition, call the Academy at 631-233-5588. INQUIRIES: 631-234-5588.

SEMINARS & CONFERENCES Practice) [Transitional or Non-

Evening Program

HENRY MILLER - THE TRIAL: SUMMATIONS

September 30, 2015, 6:30-8:30 p.m.

This "can't miss" program features noted attorney, author and speaker, Henry Miller, discussing tips and tactics for effective summations.

Faculty: Henry Miller, Esq., Clark, Gagliardi &

Miller, P.C.

6:30 - 8:30p.m. (Registration from 6:00

p.m.)

Time:

Time:

Location: Suffolk County Bar Association,

560 Wheeler Road, Hauppauge, NY 2 Hours (Skills) [Transitional or Non-MCLE:

Transitional]; \$75

Transitional]; \$90

Evening Program CIVIL PRACTICE-CPLR **UPDATE WITH PROFESSOR PATRICK CONNORS**

October 13, 2015, 6:00 -9:00 p.m.

Professor Patrick Connors returns with his annual update which will include everything from pleading requirements to depositions to obtaining discovery outside of the State and more. Learn all the latest!

Faculty: Professor Patrick Connors, Albany Law

School, visiting Professor, Touro Law

Time: 6:00 p.m. - 9:00 p.m. (Registration from 5:30 p.m.)

Location: Suffolk County Bar Association, 560

Wheeler Road, Hauppauge, NY

MCLE: 3 Hours (Professional Practice) [Transitional or Non-Transitional]; \$150

Evening Program

RESIDENTIAL REAL ESTATE PART 2

October 19, 2015, 6:00 -9:00 p.m.

This seminar is part of our two session Residential Real Estate series, covering all aspects of residential real estate from inception of a file in the office to post closing issues. The program will be a "how to" for beginners and include tips for the advanced practitioner. Attend just one session or both. Session two features a discussion of the new TRID rules.

Faculty: Peter Tamsen, Esq., Mitchell Borkowsky, Esq., Joel Agruso, Esq., Vincent Danzi,

Esq., Audrey Bloom, Esq.

6:00 p.m. - 9:00 p.m. (Registration

from 5:30 p.m.)

Suffolk County Bar Association, 560 Location:

Wheeler Road, Hauppauge, NY 3 Hours (1 Skills; 1 Professional Practice; 1 Ethics) [Transitional or Non-

Transitional]; \$90

Time:

MCLE:

Evening Program and Reception

AN EVENING WITH **COURT OF** APPEALS JUDGE **JENNY RIVERA**

October 26, 2015, 6:00 -9:00 p.m.

Judge Jenny Rivera of the Court of Appeals visits the Suffolk County Bar. Join us for a reception and dinner followed by a CLE presentation in which J. Rivera will discuss the transition from legal advocate and educator to the bench. The evening is FREE for SCBA members, however, there is a fee if you wish to receive CLE credits.

Faculty: Hon. Jenny Rivera, NYS Court of Appeals

Time: 5:30 p.m. (reception); 7:15 p.m. CLE presentation Pre-registration

is required. Location: Suffolk County Bar Association,

560 Wheeler Road, Hauppauge, NY MCLE: 1 Hour (Professional Practice) [Transitional or Non-Transitional]; \$35

Evening Program RESIDENTIAL REAL **ESTATE PART 1**

October 5, 2015, 6:00 -9:00 p.m.

This seminar is part of our two session Residential Real Estate series, covering all aspects of residential real estate from inception of a file in the office to post closing issues. The program will be a "how to" for beginners and include tips for the advanced practitioner. Attend just one session or both.

Faculty: Joseph O'Connor, Esq., Peter C. Walsh,

Esq., Lita Smith Mines, Esq., Gerard McCreight, Esq., Peter Tamsen, Esq. 6:00 p.m. – 9:00 p.m. (Registration

from 5:30 p.m.)

Location: Suffolk County Bar Association, 560 Wheeler Road, Hauppauge, NY

MCLE: 3 Hours (2 Skills; 1 Professional



SUFFOLK ACADEMY OF LAW

OF THE SUFFOLK COUNTY BAR ASSOCIATION

Evening Program- East End TL UPDATE – EAST END

November 4, 2015, 6:00 -9:00 p.m.

David Mansfield provides his yearly update on Vehicle and Traffic Law specifically for an East End audience.

David Mansfield, Esq. Time:

5:30 p.m. - 8:30 p.m. (Registration from

5:30 p.m.)

Location: TBD

MCLE:

2.5 Hours (Professional Practice)

[Transitional or Non-Transitional]; \$75

Full Day Program

HOT BUTTON ISSUES IN MATRIMONIAL LAW

November 6, 2015, 9:00a.m. - 4:00 p.m.

This full day program will discuss the hottest issues and newest cases in matrimonial law.

Faculty: **TBD**

MCLE:

MCLE:

Time: 9:00 a.m. - 4:00 p.m. (Registration from

8:30 a.m.)

Location: Suffolk County Bar Association, 560

Wheeler Road, Hauppauge, NY 6 Hours (TBD) [Transitional or Non-

Transitional]; \$159

Evening Program VTL UPDATE

November 12, 2015, 6:00 -8:00 p.m.

David Mansfield provides his yearly update on the Vehicle and Traffic Law.

David Mansfield, Esq. Faculty:

6:00 p.m. - 8:00 p.m. (Registration from Time:

5:30 p.m.)

Location: Suffolk County Bar Association, 560 Wheeler Road, Hauppauge, NY

2.5 Hours (Professional Practice) [Transitional or Non-Transitional]; \$75

Evening Program

PATENTS, TRADEMARKS AND COPYRIGHTS FOR THE NON-IP LAWYER

November 17, 2015, 6 p.m.-9 p.m.

This program is for all non-intellectual property lawyers who might encounter intellectual property issues in their everyday practice. The program will cover contractual issues, intellectual property issues that arise in sale of a business, copyright issues that arise in non-IP cases, patentability of computer programs and business methods, as well as trademark issues.

Faculty: Frederick J. Dorchak, Esq., John F. Vodopia, Esq., Robert G. Gingher, Esq., William F. Gormley, esq., Irwin S. Izen, Esq., Martin I. Saperstein, Esq., Thomas A. O'Rourke, Esq.

 $6:00\ p.m.-9:00\ p.m.$ (Registration from Time:

5:30 p.m.)

Suffolk County Bar Association, 560 Location:

Wheeler Road, Hauppauge, NY MCLE: 3 Hours (3.0 Professional Practice)

[Transitional or Non-Transitional]: \$90

Evening Program

AUTO LIABILITY UPDATE

November 19, 2015, 6:00 -9:00 p.m.

Our annual Auto Liability Update provides insights into new cases.

Faculty: Professor Michael Hutter, Albany Law

School, Jonathan Dachs, Esq.

Time: 6:00 p.m. - 9:00 p.m. (Registration from

5:30 p.m.)

Location: Suffolk County Bar Association, 560

Wheeler Road, Hauppauge, NY

MCLE: 3 Hours (Professional Practice) [Transitional or Non-Transitional]: \$125

FALL 2015 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)

COURSE	SCBA Member	SCBA Student Member	Non-Member Attorney	12 Sess. Pass	CLE Bundle	DVD	Audio CD	Printed Course Materials
Henry Miller – The Trial: Summations	\$75	\$0	\$95	N/A	Yes	\$100	\$100	\$25
Residential Real Estate Part I	\$90	\$0	\$120	Yes	Yes	\$115	\$115	\$25
CPLR Update with Prof. Pat Connors	\$155	\$0	\$180	Yes	Yes	\$180	\$180	\$25
Residential Real Estate Part II	\$90	\$0	\$120	Yes	Yes	\$115	\$115	\$25
An Evening with Judge Jenny Rivera of the Court of Appeals	\$35 (CLE only)	\$0	\$45 (if space permits)	No	No	N/A	N/A	N/A
VTL Update (East End)	\$75	\$0	\$100	Yes	Yes	\$100	\$100	\$25
VTL Update	\$75	\$0	\$100	Yes	Yes	\$100	\$100	\$25
Hot Button Issues in Matrimonial and Family Law (Full Day)	\$ 159	\$0	\$184	2 uses	Yes	\$184	\$184	\$25
Patents, Trademarks and Copyrights for the Non-IP Lawyer	\$90	\$0	\$120	Yes	Yes	\$115	\$115	\$25
Auto Liability Update	\$125	\$0	\$150	Yes	Yes	\$150	\$150	\$25

*If more than one individual from a firm or organization attends the Law in the Workplace conference, the second individual's fee will be \$150.

** MATERIALS: All materials will be provided electronically via an internet link to a PDF. Bring your laptop or other mobile device if you wish to access the materials during the program. Printed materials can be provided for an additional charge (see above) and must be ordered in advance

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ACADEMY OF I

Changes to CLE Rules for Newly Admitted Attorneys

By Allison Shields

New rules will go into effect with regard to the continuing legal education requirements for newly admitted attorneys in the State of New York in January, 2016.

Previously, attorneys admitted to the Bar of the State of New York for two years or less were required to complete their continuing legal education credits in traditional live classroom settings or through attendance at fully interactive videoconferences. But beginning on January 1, 2016, those rules have been changed to

allow newly admitted attorneys to obtain some of their continuing legal education credits through non-traditional formats, including on-demand audio or video, live broadcast, or webconference.

The new rules state in part as fol-

- Law **Practice** Management and Areas of Professional Practice credit may be completed in any approved format, including nonparticipatory formats such as on-demand audio or video, or live broadcast.
- Ethics and Professionalism credit may be completed in the traditional live classroom setting; by fully interactive videoconference; or by simultaneous transmission with synchronous interactivity, such as webconference, or teleconference, where questions are allowed during the program.
- · There is no change in the requirement for Skills credit, which must be completed in the traditional live classroom setting or by fully interactive videoconference.

Newly admitted attorneys eligible for a prorated CLE requirement must complete the credit in a format permissible for the category of credit, except that no more than 14 credits may be earned through nonparticipatory formats, such as on-demand audio or video, or live broadcast.

These new rules do not affect the number or categories of credit required, and all credits must continue to be fulfilled by attending accredited transitional courses. Thus, newly admitted attorneys are still required to complete a minimum of 32 credit hours of accredited transitional education within the first two years of the date of admission to the Bar, sixteen credit hours in each of those years.

The required categories of credit are as follows:

- Three hours of ethics and professionalism
- Six hours of skills
- Seven hours of law practice management and areas of professional practice

The Suffolk Academy of Law is already hard at work in preparing its annual "Bridge the Gap" training program — a two day workshop specifically geared toward ensuring that newly admitted attorneys obtain the

	Credits per year	Live Classroom Setting	Webcast	On Demand/ Online	Recorded DVD/CD
Law Practice Management/ Areas of Professional Practice	7	Yes	Yes	Yes	Yes
Ethics	3	Yes	Yes	No	No
Skills	6	Yes	No	No	No
Total	16				

number and categories of credits required to meet their New York State continuing legal education obligations.

As in past years, the Academy is developing its two-day programming to accommodate newly admitted attorneys, and this year will incorporate webconference and recorded elements for those categories of credit permitted by the New York State CLE Board to be taken in these non-traditional formats so that attorneys who do not wish to attend the entire conference live may do so by taking advantage of these options. Please watch the Academy pages for more information about the Bridge the Gap program, scheduled to be held this year on March 18 and 19, 2016.

Newly admitted lawyers should also be aware that the Academy of Law offers many pre-recorded programs available on DVD, audio CD, or on-demand online (suitable for law practice management or professional practice credits), and conducts live webcasts (suitable for ethics credits) of many of its regular programs, which will now be available for newly admitted attorneys, beginning in 2016.

No changes have been made to the requirements for veteran attorneys, but all attorneys should be aware of the courses available in alternative formats from the Suffolk Academy of Law. If you have any questions about these or other course options available from the Suffolk Academy of Law, please do not hesitate to contact the Academy at (631) 234-5588.

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.

OCTOBER

Residential Real Estate, Part 1, 6:00-9:00 p.m., 3 cred-5 Monday its, \$90. Part 1 of a two part series covering all aspects of residential real estate. A light supper will be served.

CPLR Update with Prof. Pat Connors, 6:00-9:00 13 Tuesday p.m., 3 credits, \$155. All the latest on civil practice - a

light supper will be served

19 Monday Residential Real Estate, Part 2, 6:00-9:00 p.m., 3 credits, \$90. Part 2 of a two part series covering all aspects of residential real estate, with special emphasis

on the new TRID rules. A light supper will be served. An Evening with Court of Appeals Judge Jenny Rivera, 5:30 p.m. (reception); 7:15 p.m. (CLE presen-

tation); 1 credit, \$35. Evening includes Free wine reception and seated dinner for SCBA members.

NOVEMBER

26 Monday

VTL Update on the East End, 5:30-8:30 p.m., 4 Wednesday 2.5 credits, \$75. A light supper will be served

Hot Button Issues in Matrimonial Law - Full Day 6 Friday **Program**, 9:00 a.m.-4:00 p.m., 6 credits, \$159. Continental breakfast and a light lunch will be served

VTL Update (Hauppauge), 6:00-8:00 p.m., 2.5 cred-12 Thursday its, \$75. A light supper will be served

Patents, Trademarks and Copyrights for the Non-17 Tuesday IP Lawyer, 6:00-9:00 p.m., 3 credits, \$90. A light sup-

per will be served

19 Thursday Auto Liability Update, 6:00-9:00 p.m., 3 credits, \$125. A light supper will be served

Please note: Materials for all Academy programs are provided online and are available for download in PDF format prior to or at the time of the program. Printed materials are available for an additional charge.

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> Please call 631-747-7165.

Confrontation Clause Concerns after Clark (Continued from page 12)

of-court statement is testimonial in nature, it may not be introduced against the accused at trial unless the witness who made the statement is unavailable and the accused has had a prior opportunity to confront that witness."² In Bullcoming, a driving while intoxicated ("DWI") prosecution, the court evaluated whether a blood analysis was testimonial even though it was made in the regular course of DWI prosecutions. Although this occurs quite regularly in criminal trials, the Supreme Court held that "[b]usiness and public records are generally admissible absent confrontation, not because they qualify under an exception to the hearsay rules, but because - having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial — they are not testimonial."

Even a forensic laboratory report stating that a suspect substance was cocaine ranked as testimonial for purposes of the Amendment's Confrontation Clause.⁴ In *Melendez-Diaz*, the prosecutor attempted to put a surrogate witness to testify to the validity of a drug analysis finding the substance tested as positive for cocaine. The analyst who tested the substance was unavailable at trial and the defense attorney objected to the report's introduction. Specifically, the defense attorney alleged that a surrogate witness to testify as to the procedure of the analysis would violate the defendant's right to confront the witnesses against him. The Supreme Court agreed, holding that because the report had been created specifically to serve as evidence in a criminal preceding the prosecution may not introduce such a report without offering a live witness competent to testify to the truth of the statements made in the report.

In the *Crawford v. Washington* era, 'witnesses' under the Confrontation Clause are those "who bear testimony," and "testimony" is defined as "a solemn declaration or affirmation made for the purpose of establishing or proving some fact." Now the Sixth Amendment, there-

fore, prohibits the introduction of testimonial statements by a non-testifying witness, unless the witness is "unavailable to testify, and the defendant had had a prior opportunity for cross-examina-tion." If the primary purpose of those statements were to address an ongoing emergency, however, the statements would not be testimonial and thus could be introduced. The inquiry in this case becomes: were these statements made to address an ongoing emergency?
Statements are "testimonial when the

circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interroga-tion is to establish or prove past events potentially relevant to later criminal prosecution." Therefore, the Supreme Court deemed statements created to be used by law enforcement or for the purpose of creating a record, such as ongoing domestic violence, testimonial. In Ohio v. Clark, the declarant was a child, incompetent to testify under Ohio law, and the questioner was not a law enforcement officer.

In the concurrence in Ohio v. Clark, Justice Scalia, joined by Justice Ginsburg, stated "[a]t common law, young children were generally considered incompetent to take oaths, and were therefore unavailable as witnesses unless the court determined the individual child to be competent." Although true at common law, there is a general consensus among the social sciences that infant children, three years old, may not be able to recollect memory or appreciate the circumstances of what happened the way that adults do. Children may need to be questioned in a certain manner or by a forensic expert. The child's statements here were instrumental in the arrest and prosecution of Clark what sort of constitutional protection did Clark have and was Clark able to test the veracity of these statements elicited by the child's teachers?

Defense attorneys should bear in mind that a due process challenge might be brought as a result of the inability of the defendant to confront the child's testimony

against him or her. The mental state of the child may be an issue so should practitioners question whether there is any test of reliability available in this scenario? A question as to whether the defendant is afforded expert testify as to the circumstances of the unchallenged testimony may be available. Although such testimony did not violate the Confrontation Clause, the inherent fairness of the criminal trial may be challenged. Defense counsel should note this exception and prepare to challenge the inherent fairness of the admission of such untested and, as the Ohio Supreme Court stated, incompetent testimony,

Note: Cory Morris is a civil rights attorney and adjunct professor at Adelphi University. He can be reached at http://www.coryhmorris.com

¹ Michigan v. Bryant, 562 U.S. 344, 369 (2011). ² Bullcoming v New Mexico, 131 S.Ct. 2705, 2713 (2011).

⁴ Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009). __ (June 18, 2015),

⁵ Ohio v. Clark, 135 S.CT. _ Pp. 5 (citing *Davis v. Washington*, 547 U.S. 813 (2006)).

SAPA and Timely and Sufficient DEC Permit Renewal Applications (Continued from page 21)

and certain Clean Air Permits),6 and within 15 days for all other permits.7 If DEC fails to meet these deadlines, the application is deemed to be complete.8 While DEC may still require additional information from the applicant,9 SAPA §401(2) will preclude the permit for which renewal is sought from expiring prior to DEC's determination.10

The moral is, call your clients, find out if they have DEC permits, and make sure they file timely and sufficient applications for renewal.

NOTE: Frederick Eisenbud is Of Counsel to Campolo, Middleton & McCormick, LLP in Ronkonkoma, and heads the Firm's Environmental Practice

¹ SAPA §102(4): "License' includes the whole or part of any agency permit, certificate, approval, registration charter, or similar form of permission required by law."

² See, e.g., Riverkeeper Inc. v. Crotty, 28 A.D.3d 957 (3rd Dep't 2006) (Timely application by power plant for SPDES permit renewal; DEC did not make a determination. Permit good for

five years. Riverkeeper challenged the DEC's failure to make a determination ten years after the original application expired. Court ruled SAPA §401(2) authorized the power plant to continue operating lawfully, and Riverkeeper's claim that the DEC's failure to make a determination five years after the original renewal would have expired provided a basis to compel DEC to act was dismissed on statute of limitations grounds).

3 One exception to this is SAPA§401(3), which authorizes the agency to immediately suspend a permit if it finds that "public health, safety, or welfare imperatively requires emergency action" and the agency provides a prompt hearing to determine the propriety of the suspension.

4 Although beyond the scope of this article, treating a Notice of Violation as commencement of an enforcement action for purposes of suspending permit review should be considered an unconstitutional deprivation of the permittee's right to Due Proces

6 NYCRR §622.11(a)(1).

66 NYCRR §621.2(g).

6 NYCRR §621.6(c)(1 and 2).

⁸6 NYCRR §621.6(h).
⁹ 6 NYCRR §621.6(h) goes on to state: "Nothing in this Section ...precludes the department from requesting additional information in accordance with section 621.14(b) of this Part."

10 See, e.g., Jamaica Recycling Inc. v. New York State Department of Environments 308 A.D.2d 538 (2d Dep't 2003). ntal Conservation,