CONSTITUTIONAL

Respondent's Invocation of Fifth Amendment Results in Stayed Eviction

By Cory Morris

A civil legal service provider invoked their client's Fifth Amendment rights in eviction proceedings, resulting in a stay and allowing the client to remain in her residence. The client, Deborah Moorer ("Moorer"), was simultaneously being evicted by the Hempstead Housing Authority and prosecuted by the Nassau County District Attorney's office for hitting someone with her cane, which she denied doing. This case should serve as a reminder to civil practitioners whose clients are facing criminal charges that civil courts have the discretion to stay the proceedings pending the resolution of a criminal matter.

The case, *Hempstead Housing Authority v. Moorer*,[1] started out as a simple eviction. On April 21, 2015, Petitioner, Hempstead Housing Authority ("Housing Authority") filed a holdover proceeding in District Court, Nassau County, Landlord and Tenant Part. The Housing Authority alleged that the tenant defaulted on the lease because "[o]n or about January 22, 2015 [she] assaulted another tenant with a cane." The respondent, Deborah Moorer, averred in her answer that, even if proven, these allegations would not be a material breach of the lease. The matter was set down for a trial due to occur on Nov. 21, 2015. Ms. Moorer, by order to show cause, made a motion to stay the proceedings on or about Oct. 23, 2015.

Cory Morris

In her affidavit in support of the motion to stay the action, Ms. Moorer invoked her Fifth Amendment rights, stating, *inter alia*, that:

> I wish to preserve my constitutional rights while for fighting for my acquittal and defeat of this summary eviction proceeding, and I ask the Court to stay this matter pending the outcome of my criminal trial… My criminal defense attorney advised me that testifying in this matter effectively sacrifices my right to exercise the Fifth Amendment in my criminal trial, as my testimony in the civil matter becomes public record.

The Housing Authority responded that Ms. Moorer had "waited too long to make the application for a stay because this matter was scheduled for trial." Judge Scott Fairgrieve found that Ms. Moorer's "right against self incrimination is more important than any prejudice and delay suffered by Petitioner." After the resolve of the criminal matter (which was set for trial due to occur on Feb. 5, 2016) the landlord tenant matter will be tried.

Ms. Moorer was represented by the Nassau/Suffolk Law Services, Committee Inc. ("NSLS"), a legal service provider "dedicated to providing equal access to basic human rights and services through provision of high quality legal representation, public information and community advocacy training to ensure that low income, disabled and disadvantaged individuals have equal access to the civil justice system on Long Island."[2] The quality of the representation is in the result. Aside from the importance to the bar, we should be reminded that the impact of this case is profound for Ms. Moorer, a woman who resided in low-income housing in Hempstead, New York, for over a decade before she was charged with a crime and subsequently notified that she was being evicted.

Civil Practitioners should note that the Fifth Amendment is multifaceted and, in this case, was not only a fundamental protection in the criminal matter but sufficiently prolonged the civil matter throughout the winter. "In the wake of Netflix's Making a Murderer documentary … interest in the recognized right to remain silent has been reignited amongst the populace."[3] This documentary is the latest in a string of media that sends the same message: innocent or guilty, demand an attorney and exercise your right to remain silent. You need not be a movie buff to know that on the screen and in reality you *do* have the right to remain silent and everything you say can be used against you.[4] Making a Murderer simply buttresses the importance of exercising one's Fifth Amendment rights in the face of police questioning even if that person is factually innocent.

The Fifth Amendment to the United States Constitution is as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

(Continued on page 24)

PRACTICE MANAGEMENT

Dealing with Interruptions

By Allison C. Shields

Interruptions are enormous time wasters that represent huge productivity losses. Studies have shown that it can take more than 25 minutes, on average, to resume a task after being interrupted. After resuming complex tasks, such as those performed by most lawyers daily, it can take an additional 15 minutes to return to the level of focus or concentration as before the interruption. A September 10, 2013 article in the *Wall Street Journal*[i] linked frequent interruptions to higher rates of exhaustion, stress-induced ailments and a doubling of error rates. Constant interruptions can even mimic the symptoms of sleep deprivation.

Given the number of interruptions most lawyers experience daily, this is an issue that cannot be ignored.

Sometimes interruptions are unavoidable; emergencies do arise, and some interruptions need to be addressed immediately. In my May 2015 column, I talked about blocking time for priority work and leaving room for the "chaos factor." By doing so, you plan time to handle emergencies that may arise. If you *must* be interrupted, make a note about what you were doing and, ideally, what the next step is. Then put the original task away so that you can focus completely on the new priority.

Allison M. Shields

Allowing interruptions permits the priorities of others to override your own. But most interruptions don't represent real emergencies or significant priorities that trump your original task. In those instances it's better to avoid the interruption entirely. You can circumvent many of these interruptions if you set some ground rules for how others interact with you.

Staff and colleague interruptions

Not all lawyers have staff, but those who do frequently find that staff interruptions can represent a major loss of productivity. Staff interruptions can be the result of the lawyer's limited availability or an inability of staff to predict when the lawyer will be able to answer their questions. When you *are* present in the office — usually when you're alone in your office trying to get work done — you can be bombarded with interruptions simply because your staff doesn't know when you will be available next. And once they have your attention, they may be afraid to let it go because it's so difficult to get it in the first place.

But you can limit or eliminate these problems with these basic actions.

First, train staff to hold all questions for a specific time, so you can tackle several issues at once rather than dealing with multiple interruptions for individual questions. Next, implement "available" and "unavailable" (or "do not disturb") time in your office. Give staff a clear time when you'll be accessible to them, and follow through consistently. Establish regular daily or weekly office hours, or provide a changing block of time daily when you will be on hand for questions. Either way, staff must know when they can reach you. This will eliminate (or at least reduce) their urge to grab you every time they see you.

Schedule recurring meetings with those who are accountable to you or have regular questions for you. For example, schedule a meeting with your assistant every day at 4:00 p.m. to resolve any remaining issues from the day and plan for the following day. Or have a weekly meeting with your associate to report on progress of ongoing projects or cases.

Block out do not disturb time to concentrate on complex tasks. Instruct others not to interrupt unless an emergency arises — and define what constitutes an emergency. If possible, put your office phone in do not disturb mode to alert others that you are not available and close your office door. If all else fails, leave your office in favor of a conference room or remote location to ensure that important work gets done.

Colleagues present another oft-cited source of interruptions. Even solos can experience these interruptions, particularly if they work in an office suite or shared office arrangement. Colleagues may stop by for feedback or questions, or they may simply want to take a break and shoot the breeze. Let them know your office hours and do not disturb policy. If they interrupt anyway, give them a time to come back with their questions. Don't be

(Continued on page 25)

CYBERLAW

'Technological Competence,' a New Ethical Obligation

By Victor John Yannacone Jr.

Rule 1.1 Competence: a lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. [i]

In August 2012 Comment 8 was added to the rule, "To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology …"

Although this was a nonbinding comment to the rules, over the three years since that amendment, at least 15 states — Arizona, Arkansas, California, Connecticut, Delaware, Idaho, Kansas, Massachusetts, Minnesota, New Hampshire, New Mexico, North Carolina, Ohio, Pennsylvania and West Virginia — have amended their ethics rules or issued ethics opinions with provisions on attorneys' competence with technology.

Earlier this year, the State Bar of California in its Formal Opinion No. 2015–193,[ii] determined that attorney competence in litigation requires, "at a minimum, a basic understanding of, and facility with, issues related to e-discovery, including[iii] the discovery of electronically stored information (ESI)," adding this ominous warning to the unprepared attorney — "Lack of competence in e-discovery issues also may lead to an ethical violation of an attorney's duty of confidentiality."

Victor Yannacone Jr.

The California State Bar established three options for attorneys "lacking the required competence for e-discovery issues: "acquire sufficient learning and skill before performance is required; associate with or consult technical consultants or competent counsel; and decline the client representation.

Particularly in the area of e-discovery, failure to understand the technology creates a genuine risk of legal malpractice and professional liability.

Business considerations

There is also a significant business component to cyberlaw and technological competence. Attorneys who represent clients engaged in modern commerce, particularly international trade and finance, must attain a level of technological competence commensurate with that of their clients. This is critical when the client becomes involved in litigation and e-discovery involves identification and collection of documents and data from structured data sources and analysis of global information architecture, among other tasks involving a combination of legal, technical and business skills.

E-discovery

Any lawsuit in any court, which requires production and examination of "documents," involves electronically stored information (ESI) and calls for e-discovery. From relatively uncomplicated contested matrimonial actions through mass toxic torts and product liability class actions, counsel managing the litigation for plaintiffs or defendants must understand the technology associated with electronic media in all its forms and the storage and management of business and personal records as computer records; or, as they used to say in the early days of IBM mainframes, "machine-readable format," whether the material is stored in personal computers, laptops, tablets, servers, and now, more frequently than ever, mobile devices such as smart phones.

To be considered a "competent" litigator in the context of professional liability considerations, at the very minimum, an attorney must understand the technology of ESI and should be able to handle the basic elements common to all e-discovery:

- Assessing the e-discovery needs and issues of the litigation.
- Implementing ESI preservation procedures.
- Analyzing and understanding the ESI systems and storage of both your client and the opposing party.
- Determining options for collection and preservation of ESI.
- Identifying the custodians of potentially relevant ESI.
- Conferring with opposing counsel concerning e-discovery plans.
- Conducting data searches with your client.
- Designing data searches of the opposing party.

(Continued on page 22)

ETHICS

The Self-Defense Exception to the Attorney-Client Privilege

By Janice J. DiGennaro

Responding to Client Critical Commentary on a Website

NYSBA Ethics Opinion 1032 (Oct. 30, 2014)

Under R.P.C. 1.6 a lawyer is permitted to disclose privileged communications in certain circumstances when needed for his or her defense.

R.P.C. 1.6(b)(5)(i) states that a lawyer "may reveal or use confidential information to the extent he believes is reasonably necessary … to defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct."

The cases and commentators have held either an actual civil, criminal, disciplinary or other proceeding in which sanctions can be imposed must be commenced or a material threat that a proceeding will be commenced. Late last year, the New York Bar Association Committee on Professional Ethics issued Opinion 1032. In that opinion, the committee examined whether a lawyer may disclose confidential information under the self-defense exception solely to respond to criticism of the lawyer posted on a lawyer-rating website.

Janice J. DiGennaro

The short answer is no. The lawyer may not rely upon the self-defense exception to the attorney-client privilege to reveal privileged or confidential information about the client to respond to critical comments about the lawyer on a website where there were no pending or imminently threatened proceedings initiated by the client.

The committee concluded that rules permitting disclosure of client confidences should be read restrictively. Unflattering but less formal criticism of the lawyer's skills, whether in the hallway, newspaper or on a website, are an inevitable incident of the practice of law and provide no license to divulge confidential or privileged communications.

Note: Janice J. DiGennaro is a partner in Rivkin Radler's Professional Liability, Directors & Officers Liability and Compliance, Investigations & White Collar, Practice Groups, where she represents attorneys for claimed malpractice, fiduciary breaches, and fraud. She can be reached at: (516) 357-3548 or janince.digennaro@rivkin.com.

SAVE THE DATE

Cyber-Insurance and Cyber-Security:

When Hackers Strike Your Practice, Will You Be Prepared?

April 20, 2016, 12:30 – 2:15 p.m. – New Date and Time!

It is no longer a matter of whether your practice will be hacked – it's just a matter of *when*. This program will tell you what you need to do to be prepared, how to protect your data and your clients' data, and what you need to do when you get hacked. Don't get caught unprepared – come to this timely and important program featuring attorneys and professionals from the insurance and IT fields.

Faculty: Regina Vetere, CBS Coverage; Ken Hale, Glasser Tech; Elizabeth Simoni, Travelers Insurance; Tom Rizzuto, Esq., Travelers Insurance; Shari Claire Lewis, Esq., Rivkin Radler LLP

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

MCLE: 2 Hours Professional Practice [Transitional or Non-Transitional]; $60

CRIMINAL

"Best Practices" at a Wade Hearing

By Vesselin Mitev

Eyewitness identification of a suspect, once heralded as the gold standard of proof for the prosecution in criminal cases, has been time and time again demonstrated to be faulty, erroneous, easily influenced, and altogether unreliable. Yet few things are more powerful than an in-court identification of the defendant as the person who committed the crime, with the witness pointing to the defendant as they are asked if they see the suspect in court today, even if that witness is sorely mistaken.

The pre-trial *Wade* hearing (after the 1967 U.S. Supreme Court case *U.S. v. Wade*), codified under CPL 710.30, puts the burden on the People to prove that the pre-trial identification of the suspect was the product of reasonable police conduct and the lack of any undue suggestiveness in a pre-trial identification procedure (photo array, line-up, show-up); if the People meet this initial burden, the burden then shifts to the defendant to prove that the process was unduly suggestive.

Importantly, prevailing at the *Wade* hearing means that at trial, in-court identification(s) will be admissible (at the court's discretion) only if the People establish by clear and convincing evidence that said identification(s) were "neither the product of, nor affected by, the improper pretrial" procedure, see *People v. Rahming*, 26 NY2d 411, 416 [1970]).

Vesselin Mitev

The standard photo array *Wade* hearing involves the People calling the police officer or detective who will attempt to establish that he or she presented several (usually six) pictures of possible suspects to the identifying witness and then the identifying witness, without any hint or suggestion by the officer/detective, simply picked out the defendant charged with the crime.

The witness is a disinterested public servant and enjoys the patina of credibility of a sworn law enforcement agent while your client is a suspect charged with a crime. The scales are not balanced at the outset, one might say, yet there is fertile ground for cross-examination to determine the "lack of *any* undue suggestiveness," which is a horse of a different color than whether taken as a whole the entire procedure was not unduly suggestive.

For example, the typical photo array sheet comes with a set of pre-printed instructions that are supposed to be read to the identifying witness. Often, these are never read at all. Nine times out of 10 the officer/detective does not first ask the witness whether or not they can read or write English.

The photo array sheet asks of the witness a series of questions, such as: "Do you recognize any of the photographs above?" and has pre-printed blank spaces for the witness to fill out. Of course, if the good officer/detective did not inquire whether the witness could understand what was being asked of him/her (since he failed to inquire whether the witness spoke or wrote English), then necessarily the photo array display was not conducted correctly on its face.

Subtle suggestiveness lurks everywhere. Inquiry should be made where the officer stood as related to the witness, i.e., was he hovering over her shoulder while she reviewed the array, or was he removed and out of the witness' line of eyesight so as not to give even inadvertent cues. Were any statements made to the witness such as, "Are you sure you got a good look at number 5?" or did the witness ask any questions and were said questions answered in any fashion. Did the officer/detective clear his throat while the witness paused her finger over a particular photograph or was the room stone silent?

The state District Attorneys' Association has a best practices guideline as to identification procedures. This is a helpful checklist for any defense counsel looking to poke substantial holes in the testifying officer/detective's narrative, especially if it does not conform with the state prosecutors' own guidelines (which the court should be asked to take judicial notice of).

For example, the photo array should be handed to the witness covered up (in an envelope or a folder) so that neither the witness nor the officer can see the pictures. The witness should be told by the officer/detective before viewing the array that 1) the person who committed the crime may or may

(Continued on page 26)

TRUSTS AND ESTATES UPDATE

By Ilene Sherwyn Cooper

Standing

Before the Surrogate's Court, New York County, in *In re Bruno,* was an application by the petitioner to dismiss the objections filed by one of the decedent's distributees on the grounds that she lacked standing to pursue her claims.

The decedent died, survived by 11 first cousins once removed, who were her sole distributees. The approximate value of her estate at death was $482,000. Pursuant to the pertinent terms of her will, she bequeathed her cooperative apartment, valued at approximately $400,000, to Rose, who was one of her said distributees, and left the residue of her estate to the petitioner. Under a penultimate instrument, Rose received one-half of the cooperative apartment, and a one-fifth share of the residuary estate.

Objections to probate were filed by five of the decedent's distributees, including Rose, alleging, *inter alia,* lack of due execution, lack of testamentary capacity, fraud and undue influence. The petitioner moved to dismiss the objections filed by Rose, claiming that she was not adversely affected by the probate of the propounded will and therefore lacked standing.

The court opined that the provisions of SCPA 1410 authorize any person whose interest in property or in the estate of the testator is adversely affected by the admission of the propounded will to probate to file objections to the probate of the instrument. The court noted that the "interest" contemplated by the statute, need not be absolute, and can include a contingent stake in the estate.

Within this context, and based upon the estimated value of the estate, the petitioner argued that the objectant received more under the propounded instrument than under the penultimate will or in intestacy. The objectant, on the other hand, maintained that the petitioner was withholding assets from the estate that he wrongfully converted from the decedent, and that the recovery of those assets would result in the estate exceeding $2.5 million. She thus maintained that she would have more to gain under the prior instrument, once the petitioner was made to turn over the property in issue.

The court held that where a party's standing to object in a probate proceeding is in question, it is generally recognized that the probate estate assets should be deemed to include "any property transferred before death, which for one reason or another can or should be recovered or brought into the estate…" (*citations omitted*). Thus, where it cannot be readily determined whether a would-be objectant's interest will prove to be greater under the propounded instrument than it would be under a prior will or in intestacy, the court will rule in favor of standing.

Accordingly, the petitioner's motion to dismiss was denied.

In re Bruno, NYLJ, Oct. 23, 2015, at 42 (Sur. Ct. New York County)(Anderson, S.)

Ilene S. Cooper

Estoppel

Before the Surrogate's Court, Suffolk County, in *In re Lowe*, was an accounting by JP Morgan Chase Bank as executor and trustee of the trusts created under the decedent's will. Although objections to the account were initially filed by the decedent's spouse, his daughter, and his two grandchildren, after many years of litigation all the objectants, but for the decedent's daughter, settled with the fiduciary.

The decedent died on February 23, 1986, and his will was admitted to probate on April 4, 1986. Ancillary probate was granted in California on the same date the will was admitted to probate in New York, and ancillary letters testamentary were issued to the corporate fiduciary on June 6, 1986. The assets of the decedent's estate included a valuable parcel of real property located in California that was the subject of a long-term lease agreement, which expired on July 23, 2014.

Pursuant to the pertinent provisions

(Continued on page 23)

Black History Month Celebrated at the Courts

By Sarah Jane LaCova

Since 1976, every U.S. president has officially designated the month of February as Black History Month. It is a month to recognize the many achievements of African Americans since our country's beginning and is a moment in time when we recommit to the belief that people are only judged by the content of their character.

When we in Suffolk County celebrate Black History Month at the courts, we not only mark the month-long event, but also celebrate our legal community's diversity. The celebration emphasizes our common goals of working together for the common good.

Last year the court established an award in the name of a well known and beloved jurist, the Honorable Marquette L. Floyd, who served for 19 years as a District Court judge before being elected to the Supreme Court Bench in 1989, where he served with distinction, including a term as the Presiding Justice of the Appellate Term for the 10th Judicial District. Justice Floyd's accomplishments are many, including service as a director of our bar association. His is a story of a legend that persevered.

This year, the second annual Hon. Marquette L. Floyd Award was given to an equally deserving recipient, the Honorable William G. Ford. Justice Ford was elected to the Supreme Court Bench this past year. Prior to his elevation to the Supreme Court, he served as an Acting County Court judge from 2014-2015, having first been elected to the District Court bench in November 2008. He is an active member of the SCBA, who served on the Bench Bar Committee, the Neuroscience, County Court and Appellate Practice committees; he also served as co-chair of our District Court Committee for several terms. Justice Ford has also served our Academy of Law as a lecturer and as program coordinator.

This year's theme, "Hallowed Grounds," gave pause to Justice Ford, who waxed nostalgia about growing up in Suffolk County, citing that the Central Islip courthouse is the spot where his family worked at the former Central Islip Psychiatric Hospital, certainly a hallowed ground where many black families were able to enter middle class life through employment at the hospital. Our own beloved Justice Floyd used to say, "Middle class is not based on your possessions. It's based on your values. If you have standards, you are middle class."

Justice Ford also said that the churches where the black community gathered found much of its true expression and were definitely hallowed grounds since they are spiritual centers of the community. He said he thought about Justice Marquette Floyd, the first person of color to be elected to the Supreme Court Bench in Suffolk County, and closed by saying, "Every judge of color in this county stands on Justice Floyd's shoulders."

District Administrative Judge C. Randall Hinrichs, who did the welcome, thanked our wonderful Mistress of Ceremony the Honorable Toni A. Bean, who has chaired the committee for many years and who deserves our recognition and appreciation. Thank you to the Amityville High School Select Choir who gave us a rousing rendition of "Lift Every Voice and Sing" as well as other choral selections. The Amityville HS Jazz Ensemble played several jazz numbers and they were sensational and so professional.

Justice Hinrichs thanked Presiding Officer of the Suffolk County Legislature DuWayne Gregory for his inspiring remarks. He also recognized Captain David Santiago and the Honor Guard for the Presentation of Colors. The Amistad Long Island Black Bar Association and the Suffolk County Bar Association hosted the program. Presidents Maxine Broderick and Donna England both gave poignant remarks

Note: Sarah Jane LaCova, is the Executive Director of the Suffolk County Bar Association.

CORPORATE

Letters of Intent

By Stella Lellos and Sean N. Simensky

Modern business transactions can be costly, both financially and temporally, particularly if after long periods of negotiation and due diligence a final agreement is never reached. In an attempt to reduce the likelihood that an agreement will fall through, it is often advantageous for the parties to sign a letter of intent.

This letter, usually sent from the buyer to the seller, is designed to set out the main deal points of the contemplated transaction at an early stage, prior to major expenditures by the parties. The letter of intent is typically non-binding, except for specific provisions. As such, the letter of intent serves as a guideline, subject to the drafting and execution of a future definitive agreement.

The letter of intent allows the parties to understand the major business points and develop an overall framework of the transaction, as well as to identify any major deal-breakers. As an added benefit, the letter of intent can also help streamline negotiations and create at least a soft timeline for the transaction.

Stella Lellos

Sean N. Simensky

Though a letter of intent can and should be tailored to the specifics of the deal, there are certain provisions that appear in most letters of intent. Set forth below are some of such key provisions, each of which should be expressly designated as either binding or non-binding.

Business terms and description of transaction

The letter of intent should begin with the most important aspects of the transaction. That is, it should identify the parties and describe the type of transaction contemplated, whether an acquisition of assets or stock, merger, acquisition or otherwise. The letter of intent should also include payment or other consideration amounts and terms.

No-shop and exclusivity

Generally, one of the few binding provisions of a letter of intent, which should be expressly indicated as such, is the so-called "no-shop" provision. The purpose of the "no-shop" provision is to protect a buyer who is expending time and resources performing due diligence from the threat that the seller will engage in discussions with or solicitations of potential third-party buyers. The length of the "no-shop" exclusivity period will depend greatly on the size of the deal and the extent of due diligence required, and should provide a timeframe long enough to allow the buyer to conduct thorough due diligence and to negotiate and sign a definitive agreement. During, the exclusivity period, it is important that the business of the target company continue to be conducted in substantially the same manner consistent with past practices, and the "no shop" provision should so provide.

Confidentiality and non-solicitation

Much in the way the "no-shop" provision protects a buyer's interests, the confidentiality and non-solicitation provisions of a letter of intent are designed to protect a seller's interests. An inherent aspect of a business transaction is the need for the buyer to have access to the seller's information, much of which will be confidential. Whether it is client lists, employee information, or trade secrets, the seller needs a certain level of protection during the due diligence period when its business is most exposed and vulnerable. Such protection is provided for in the letter of intent through binding confidentiality and non-solicitation provisions, thereby preventing the buyer from using information learned during due diligence to its own advantage. That said, to the extent that parties to a transaction have signed a separate non-disclosure agreement, the non-disclosure agreement would suffice to protect the buyer's interests, and additional confidentiality provisions would not be necessary in the letter of intent.

Additional provisions

Additional provisions in the letter of intent may include provisions regarding employee retention, restrictive covenants, whether employment or consulting agreements will be offered

(Continued on page 21)

WHO'S YOUR EXPERT

Confronting the Expert Under the Sixth Amendment

By Hillary Frommer

In *People v M.F.*,[1] the Bronx County Supreme Court addressed for the first time since the U.S. Supreme Court's controversial 5-4 decision in *Williams v Illinois*[2] in 2012, whether the Sixth Amendment rights of a defendant standing trial for rape are violated if the results of a DNA report are introduced into evidence at a jury trial without presenting the testimony of each laboratory analyst or technician who contributed to the report. The court struggled to strictly apply *Williams*, as it noted key factual differences between the cases, and the fact that "no five justices agreed on the rationale for the result [which] has been the subject of much debate in the courts since it was issued."[3] To understand how the court reached its result, which "split the baby" if you will, we must examine *Williams* and what it has left in its wake.

Williams was one of several cases before the Supreme Court involving the expert testimony and the Confrontation Clause. In its 2004 decision in *Crawford v Washington*,[4] the court changed its long-held position that out-of-court statements that fall into a hearsay exception are not barred by the Sixth Amendment, to hold that "testimonial statements of witnesses absent from trial [can be] admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine."[5] The ultimate import of *Crawford*, was that a defendant had a right to confront all of the analysts who authored the lab analysis/reports offered into evidence against him. However, the court reaffirmed the proposition that the Confrontation Clause does not bar out-of-court statements that are not offered for the truth of the matter asserted – *i.e.* non-hearsay.


Hillary A. Frommer

The issue in *Williams* was whether the defendant's confrontation rights were violated when a forensic expert testified at a bench trial that the DNA profile provided by an outside laboratory was produced from semen found on the victim's vaginal swabs, because the expert did not have personal knowledge of that fact, and there was no other expert or fact witness with such personal knowledge that testified. Justice Alito[6] wrote the plurality decision, in which the court found that there was no violation because that testimony was an "out-of-court statement … related by the expert solely for the purpose of explaining the assumptions on which [the expert] opinion rests" not offered for the truth and, therefore, outside of the Confrontation Clause. In reaching this opinion, the court made the following determinations: the expert's remaining testimony was based on personal knowledge and, therefore, did not implicate the Confrontation Clause; the questionable factual statement was "a mere premise of the prosecutor's question," which the expert assumed when testifying that there was a match between two DNA profiles; and the judge presiding over the bench trial presumably "understood that the portion of [the expert's] testimony … was not admissible to prove the truth of the matter asserted."[7] The court noted, however, that there may have been a Confrontation Clause issue if the trial had been before a jury, rather than bench.

The court also concluded that the questionable testimony did not through the backdoor introduce the substance of the report into evidence. Importantly, however, the court further held that the introduction of the report into evidence would not have violated the Confrontation Clause because it was prepared before any suspect was identified and therefore, was not generated specifically for the purpose of obtaining evidence against the defendant (who the victim had subsequently identified in a line-up).

Not surprisingly, the dissent took a sharply different view. It considered *Williams* an "open-and-shut case" of a violation of the Confrontation Clause, because the state prosecuted the defendant based on a DNA profile created in a lab, but did not afford the defendant the right to cross-examine the analyst who created the very profile, which linked the defendant to the victim. The dissent rejected the plurality's opinion that the questionable statement that the profile came from the swab of the victim was merely an assumption which was not offered for its truth, as it saw no meaningful distinction between a hearsay statement, which forms the basis of the expert's opinion and the hearsay statement offered for its truth.[8]

Faced with *Williams*, the Bronx Supreme Court was asked to deter-

(Continued on page 26)

CONSUMER BANKRUPTCY

Mrs. Robinson Exempts the Book of Mormon in Bankruptcy

US Circuit Court addresses whether valuable bible is exempt

By Craig D. Robins

The opening stanza to Simon & Garfunkel's 1968 chart-topping song, *Mrs. Robinson*, is very appropriate here:

And here's to you, Mrs. Robinson,
Jesus loves you more than you will know, woe woe woe
God bless you, please, Mrs. Robinson
Heaven holds a place for those who pray,
Hey, hey, hey
Hey, hey, hey

Two years ago, Mrs. Anna Robinson in Illinois sought Chapter 7 relief to discharge the relatively modest sum of $23,000 of typical consumer debt. She just happened to own a very rare, first edition Book of Mormon from 1830.

When consumers file for bankruptcy they can keep a number of possessions. The legislatures have determined what is fair and reasonable for debtors to keep while seeking to discharge their debts in bankruptcy.

Many states, including New York, have exemption statutes that, in addition to permitting consumers to protect a certain dollar amount of essentials like cars, houses and home furnishings, also enable them to protect items like the family bible. But what happens if that bible is an exceptionally rare collector's item worth a tidy sum? The trustee objected to Mrs. Robinson's exemption.


Craig Robins

Just a few weeks ago, the United States Court of Appeals for the Seventh Circuit ruled against the trustee and held that it was fully exempt. *Hagan v. Robinson (In re Robinson)*, 14-3585 (7th Cir. Feb. 4, 2016).

In the *Robinson* case, the debtor, while working at the local public library in 2003, was permitted to keep any books she found while cleaning out a storage area. While cleaning, she found the Book of Mormon, which she later authenticated as a first edition, one of only 5,000 copies printed. At the time, it was valued at $10,000. It was worth substantially more than that when she filed her bankruptcy case.

Mrs. Robinson kept the bible in a Ziploc bag to preserve it. She did not use it regularly, and only took it out to show her children and fellow church members. The debtor owned other bibles, which she used to pray, including several copies of the Book of Mormon that did not have collector value.

Years later, when she filed her Chapter 7 bankruptcy case, she exempted the bible but the trustee objected. The debtor relied on the typical state exemption statute that permits debtors to protect a bible.

However, the court sustained the trustee's objection, stating that "allowing the debtor's exemption would violate the intent and purpose of the statute," namely "to protect a bible of ordinary value so as not to deprive a debtor of a worship aid."

Mrs. Robinson moved the court to reconsider on the ground that the bankruptcy court's opinion was unconstitutional because it permitted the exemption statute to interfere with the free exercise of her religion as she chose to exercise it, which interfered with her right to choose which items to exempt.

The bankruptcy court denied the motion. Undeterred, Mrs. Robinson then appealed to the U.S. District Court, arguing that the bankruptcy court's decision ignored the plain meaning and structure of the statute, as well as the judicial rule that bankruptcy exemption statutes should be construed liberally in favor of the debtor.

The district court agreed with the debtor and reversed the bankruptcy court, stating that the legislature did not place monetary limitations on certain items such as bibles.

This time the trustee appealed, now to the circuit court, which started its analysis by looking at the statute,

(Continued on page 25)

AMERICAN PERSPECTIVE

The Case of Natural Born Vs. Native Born

The eligibility for President 2016 question

By Justin Giordano

The 2016 contest for the Republican nomination for president of the United States has seen its shares of surprises, unexpected twists and turns and contentious debates typically associated with the nomination process that takes place every four years.

In this 2016 nomination contest an issue that is not generally a main concern is the "legal" eligibility of a candidate running for the nomination of his party. That is not to say that this has not been raised on prior occasions. In fact, in the 2008 during the Democratic Party nomination race and later during the presidential election itself then candidate and now President Obama had similar questions raised about him. The charge in his case dealt with the charge that he was born in Kenya and not Hawaii. In the same year Senator McCain, the Republican Party presidential nominee also faced equivalent, if not exactly the same challenges. In Senator McCain's case he was born in the Panama Canal zone, which was at the time an American territory, but not on the American mainland. Obama had several suits filed against him challenging his eligibility to run and mostly, once he secured his party's nomination, to prevent him from assuming office. The better known of these lawsuits being the *Berg v Obama* case, filed by Philip J. Berg, a Democrat and former deputy state attorney general, and the *Essek v Obama* case filed by Daniel John Essek. The former lawsuit failed for lack of standing while the latter for lack of subject matter jurisdiction.

Senator John McCain also had to contend with lawsuits, or threat of same, along these lines. In his circumstance the U.S. Senate drew and voted on a resolution that affirmed his natural born status and ascertained his eligibility to run for the highest office in the land, basically putting the matter to rest in his race for the White House.

Moving forward to the 2016, Senator Ted Cruz, a leading candidate for the Republication nomination, was born in the province of Alberta in Canada, thus clearly on foreign soil. His mother was and is an American citizen, having been born in the state of Maryland while his father was a resident of the United States born in Cuba. Senator Cruz's parents were working in the oil industry in Canada at the time of his birth. Consequently the issue of his eligibility to run for president of the United States comes to this — what does a "natural born citizen" mean in its fullest scope. The U.S. Constitution under Article II, section 1, Clause 5, spells out what the requirements necessary for eligibility as follows: "No person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty-five Years, and been fourteen Years a Resident within the United States."

Justin Giordano

Putting the question even more simply does "natural born citizen" mean that an individual has to be a "native" born in order to qualify as natural born citizen and thus eligible to run for the presidency of the United States? Obviously this issue is uniquely pertinent to the presidential office and no other elected office. It has been established law that for an individual to run for any other federal or state office, be it as mayor, congress, or governor, there is no natural born citizen requirement, only the requirement to be a naturalized citizen and certain residency mandates depending on the elected office sought.

Prior to addressing directly the "natural born citizen" it's worth noting that a situation very much mirroring the current one occurred in the 1968 presidential election cycle. That year running for the nomination of the Republican Party was George Romney, the father of the 2012 Republican presidential nominee Governor Mitt Romney. George Romey was born in Mexico from American parents. However there was no issue raised as to Romey senior's eligibility to run or serve had he won the presidency.

First it must be pointed out that for those who state that the matter of "natural born citizen" is not a settled issue given that the United States Supreme Court has never taken a case that dealt directly with said issue are indeed correct. Unquestionably the high court has never provided any definitive interpretation regarding the full breath and limits of "natural born citizen." However it would also seem quite evident, if only by extrapolation of the court's historical actions or lack thereof, that it did not wish to intervene on this question. If it had wanted to do otherwise there is little doubt that there was plenty of opportunity to give voice to the question over the two centuries plus since the creation of the court and the nation for which it interprets its constitution.

As it stands we are left with federal law, in 8 U.S. Code, Section 1401. Under said law all that is required is that the mother be an American citizen who has lived in the U.S. for five years or more, at least two of those years after the age of 14. If the mother fits those criteria, the child is a U.S. citizen at birth, regardless of the father's nationality. Senator Ted Cruz fits the requirements of this law to the letter.

In the broader context in addition to the above, individuals who are born outside the United States are also considered natural born citizens if both parents who are citizens, provided either parent has lived in the United States for any period of time. Also considered natural born citizens are individuals born outside the United States to one parent who is an American citizen and the other who is an American national, the latter meaning that that parent is from an outlying possession of the U.S. The proviso is that the citizen parent has lived in the United States or its possessions for at least one year prior to the birth of the child.

One way to sum all of this up is that anyone that does not need to go through any naturalization proceedings is considered a natural born citizen. A non-natural born citizen has to go through the process of becoming a naturalized American citizen by legally migrating to the United States and becoming a permanent resident, i.e. a "green card" holder. The permanent resident status will enable that individual to apply for U.S. citizenship after a five-year period if he/she so wishes. Next that individual will have to meet all other legal requirements set by law (such as not being a felon or having lied on the application to be granted permanent resident status), passing a test administered by the INS (Immigration and Naturalization department), and taking an oath of allegiance to the United States in a formal swearing in ceremony.

As a side issue, which has been brought up in the Senator Cruz situation, pertains to the dual citizenship case. In fact that has no bearing simply because any nation can opt to bestow its citizenship on an individual. The key point is whether an individual has taken an active step to seek or even accept that citizenship by taking an oath such as in a naturalization proceeding. And incidentally Canada does have such a proceeding; a legal immigrant can apply for citizenship after a period of time (I believe three years). All information available indicates that Senator Cruz has never taken any oath or steps to become a Canadian citizen. That status was gratuitously conferred on him by Canadian law premised on his being born on Canadian soil.

It's worth underscoring that the Supreme Court, although not directly ruling on a case focusing strictly on the definition of "natural born citizen," has nonetheless long recognized that there are two sources that are considered highly valuable in understanding constitutional terms and they are the British common law (*Smith v. Alabama*, 124 U.S. 465, 478 (1888), and the enactments of the First Congress) (Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 297 (1888). Both of these sources confirm that the original meaning of the phrase "natural born citizen" includes persons born abroad who are citizens from birth based on the citizenship of a parent as has been discussed in detail above.

More specifically, the British practice, which were the laws in force in the 1700s in the original thirteen colonies prior to the Revolutionary War and the founding of the United States, recognized that children born outside of the British Empire to subjects of the Crown were considered subjects (i.e. put in modern terms citizens of Great Britain) themselves and in fact the term "natural born" was explicitly used to describe the status of these children. This language is found in the British Nationality Act of 1730 as well as in the case *United States v. Wong Kim Ark*, 169 U.S. 649, 655–72 (1898). Furthermore, language echoing the aforementioned is found in the Blackstone's Commentaries (pg. 354-63). The Blackstone Commentaries were very familiar to and widely read by the framers of the constitution (many of whom were part of the First Congress) as well as the justices of the original Supreme Court who were quite versed in this subject matter.

Will the current Supreme Court ever agree to hear a case directly pertaining to the meaning of "natural born citizen" or does it consider this a settled matter? Based on historical precedent it would seem that the high court is not inclined in the least to take up the issue. But then again the U.S. Supreme Court, while steeped in American legal tradition, has not always been averse to taking up contentious matters that many experts never predicted they would. As usual only time will tell.

Note: Justin A. Giordano, Esq. is a professor of Business & Law at SUNY and also teaches Constitutional Law at John Jay College of Criminal Justice.

Did You Say Taxable Partnership?

(Continued from page 1)

— in the year that the audit or any judicial review is completed (the "adjustment year"), and the tax resulting from such adjustments will be computed at the highest marginal rate for individuals or corporations without regard to the character of the income or gain.

A "taxable partnership"

This marks an important change in the audit of closely held partnerships. The IRS will collect the tax from the partnership, even if the persons who were partners in the reviewed year are no longer partners in the adjustment year. Stated differently, the current-year partners will bear the economic burden even though the adjustments relate to a prior year in which the composition of the partnership may have been different.

Partnerships will have the option, however, of demonstrating that the adjustment would be lower if it were based on certain partner-level information from the reviewed year rather than imputed amounts determined solely on the partnership's information in such year. This information could include amended returns of partners opting to file, the tax rates applicable to specific types of partners (e.g., individuals, corporations), and the type of income subject to the adjustment (e.g., ordinary income, dividends, capital gains).

Important exceptions

Under the BBA, a partnership with 100 or fewer partners is permitted to elect out of the new rules, in which case the partnership and partners will be audited under the general rules applicable to individual taxpayers.

In order to qualify for this "small partnership" election, each partner of the partnership must be an individual, a C corporation, an S corporation, or the estate of a deceased partner. Another partnership and a trust cannot be partners of an electing small partnership.

Among other things, it should be noted that the election is to be made on an annual basis, it must be made on a timely filed partnership return, and the partnership must notify the partners of the election.

A partnership that does not qualify for the small partnership election, or which does not elect to be treated as such, will be permitted (in accordance with rules to be issued by the IRS), as an alternative to taking the adjustments into account at the partnership level, to pass the adjustments along to its partners by issuing adjusted Form K-1s to the reviewed-year partners, in which case those partners (and not the partnership) will take the adjustments into account on their individual returns in the adjustment year through a simplified amended-return process.

A partnership must elect this alternative not later than 45 days after the date of the notice of partnership adjustment (a "6226 election"). Where the election is made, the reviewed year partners will be subject to an increased interest charge as to any tax deficiency.

Looking ahead

Because the BBA marks a significant change in the audit of partnerships, and because it applies to both existing and new partnerships, its effective date is delayed: the new rules will first become effective for returns filed for partnership tax years beginning after 2017.

Until then, the IRS should have sufficient time to promulgate any regulations to implement the changes. It should also afford partnerships the time to adjust to the new audit regime, and especially to the new default rule that applies to every partnership unless the partnerships elects out.

Most partnerships that qualify will likely make the annual election to be treated as a small partnership. However, many small partnerships will not qualify for this election because they include trusts or other partnerships as partners.

In any case, partners and partnerships will have to ensure that their partnership agreements address the new rules. This may include whether to elect out of the new regime or to elect to pass-through the adjustments to the review-year partners.

Partnerships may also want to include indemnity provisions in their agreements, pursuant to which current partners and former partners of a partnership will agree to indemnify the partnership or each other for their pro rata share of any deficiencies resulting from an IRS audit of the partnership. This may be especially important to transferees of partnership interests, including potential new investors, who are also likely to insist upon increased levels of due diligence before acquiring such an interest.

I don't know about you, but the years seem to be going by faster and faster. Before you know it, these rules will go into effect. Don't wait. Start your preparations now.

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@farrell-fritzcom.

American Mock Trial Association Regional Competition

(Continued from page 1)

ise: Justice John Leo, the chair of the Academy of Law's Strategic Planning Committee, Justice Jeffrey Arlen Spinner, Justice James Quinn, Judge James Matthews, Judge James McDonaugh, and Support Magistrate Aletha Fields.

The top eight teams from the CI regional continue in the national championship series by competing in March in an Opening Round Championship tournament in Wilmington, Delaware, and the top teams from that and other similar tournaments being held around the United States will travel to Greenville, South Carolina in April for the National Championship Tournament. Those moving on were: two teams from Fordham Lincoln Center (one of which went undefeated through the four rounds), two teams from Columbia University, Tufts University, St. John's University, New York University and College of the Holy Cross. William Floyd High School graduate Vincent Kappel whose family attended the tournament is a member of the Fordham Lincoln Center team. Mr. Kappel's high school coach, William Hennessey, attended round three.

The local Family and Matrimonial Bar were well represented in our judging pool. Evie Zarkadis and Francine Moss were two stellar presiding judges, and Jennifer A. Mendelsohn, the treasurer for the Suffolk Academy of Law, served as a scoring juror in one round and the presiding judge in another. Similarly, the criminal bar had a significant turnout with each of Scott Lockwood and John Powers presiding over two trials. Lawyers from both the Legal Aid Society and the District Attorney's office also volunteered. The Abbates, Mary Beth and John, worked all weekend long, and each of them presided over four trials.

"This was a terrific event," said Nancy LeJava, former assistant district attorney. "Not only did we get to see incredibly talented undergrads, but also I had the chance to reconnect with so many old friends before and after the trials."

Numerous law student members from the Touro College Jacob D. Fuchsberg Law Center contributed to make the tournament successful. Dana Mangiacapra not only served as a scoring juror in all four rounds, but also she, Alida Marcos and Michael Giammarusco were instrumental in assisting Academy of Law Dean Harry Tilis in organizing the tournament. In addition, the Touro student leaders spoke to the undergraduates about the unique opportunities Touro makes available under the dynamic leadership of Dean Patricia Salkin who kindly opened the auditorium at the law school for the closing ceremonies.

Individual award winners included Andrew Nassar from Tufts University, who received a perfect score in his role as a witness, as did Molly Stewart from Fordham Rose Hill, in her role as a criminal defense attorney. Chosen by their competitors, Queensborough Community College won the Spirit of AMTA Award, as the team that best exemplified good sporting conduct and positive energy, which these events generate.

In what is believed to be a first, a team of all freshman students without an attorney coach participated, the SUNY Albany team, who picked up two ballots during the weekend. Monroe College also picked up two ballots in its first year participating in the AMTA events. Siena College, Fairleigh Dickenson University, The King's College and CCNY won an aggregate of 11 ballots.

The Suffolk Academy of Law is giving all volunteers 50 percent off of a future live Academy program. Local businesses also supported the tournament — Love Sushi, 26 North Research Place, Central Islip (near the Home Depot) and Foo Chow Kitchen, 142 Wheeler Road, Central Islip (on the southwest corner with Motor Parkway) are offering a 20 percent discount to volunteer judges.

This tournament joins the American Collegiate Moot Court competition (held in November) and the NYSBA sponsored high school mock trial tournament as outstanding opportunities for SCBA members to enjoy socializing and networking with colleagues in conjunction with valuable public legal education programs and the development of our profession.

Note: Harry Tilis is the Dean of the Suffolk Academy of Law, a member of the SCBA Board of Directors and of the Executive Committee of the Suffolk County Criminal Bar Association and a trial and appellate practitioner in criminal cases.

Bench Briefs (Continued from page 4)

Nasser Mansour, and Ali Mohammed, as the application failed to submit evidentiary proof of compliance with the personal service provisions of CPLR §308 regarding "due diligence" for those defendants served by the "nail and mail" method pursuant to CPLR §308(4). This was sufficient to establish jurisdiction over said defendants, not merely a showing of several attempts to serve the defendants at their residences without a showing that there was first a genuine inquiry about the defendants' whereabouts and place of employment; and failure to submit an affidavit: stating whether or not the defendant is in military service and showing necessary facts to support the affidavit; or if the plaintiff is unable to determine whether or not the defendant is in military service, stating that the plaintiff is unable to determine that, as requires by 50 USCS §521[b].

Motion to dismiss granted; since all five causes of action may be characterized as those for economic loss due to alleged product failure, all claims were dismissed.

In *Sears Ready Mix, Ltd. V. Continental Tire the Americas, LLC a/k/a Continental Tire AG and Dave Kunzler Tire Service, Inc., d/b/a Dave Kunzler Tire Service,* Index No.: 9271/2014 decided on June 17, 2015, the court granted the motion by defendant for dismissal of the first, second, third, fourth, and fifth causes of action asserted by plaintiff against defendant Continental.

In the complaint, plaintiff alleged that on July 30, 2012, while plaintiff's truck was en route to a job site, two tires on the truck blew out causing plaintiff to sustain damage to the truck, as well as monetary damages related to delayed production of plaintiff's concrete work. Defendant Dave Kunzler Tire Service, Inc. d/b/a Kunzler Tire Service is alleged to have sold the subject tires to the plaintiff. Continental now moved pursuant to CPLR §3211(a)(7) for dismissal of all causes of action. In deciding the application, the court noted that the economic loss rule provides that tort recovery in strict products liability and negligence against a manufacturer is not available to a downstream purchaser where the claimed losses flow from damage to the property that is the subject of the contract, and personal injury is not alleged or at issue. The rule is applicable even where the allegedly defective product is or may be unduly hazardous. Here in rendering its decision, the court pointed out that each of plaintiff's five causes of action was premised upon property damage and consequential damages from the allegedly defective tires. Accordingly, since all five causes of action may be characterized as those for economic loss due to alleged product failure, all claims were dismissed.

Honorable William B. Rebolini

Motion to compel disclosure of housing program records in personal injury matter denied; records not shown to be material and necessary to the defense of the action.

In *Sonja Hawkins v. Brook Alyssa Simeone and Chris D. Simeone,* Index No.: 3180/2012 decided on November 4, 2015, the court denied the motion to compel to the extent that it sought disclosure of records from the housing program that provides services to the plaintiff. The court stated the pertinent facts as follows: plaintiff commenced the action to recover damages for personal injuries allegedly sustained as the result of a motor vehicle accident. The defendants sought an unrestricted authorization to obtain records from the Concern for Independent Living, which operates a group home in which plaintiff resides.

In rendering its decision, the court noted that while there shall be full disclosure of information that is material and necessary in the defense of an action, a party is not entitled to unlimited and uncontrolled unfettered disclosure. Here, since the defendants failed to demonstrate how records from a housing program that provided services to the plaintiff were either material or necessary to the defense of the action, the application to compel their disclosure was denied.

Complaint to be dismissed unless the plaintiff appeared for a deposition and appeared for an independent medical examination within Suffolk County; plaintiff failed to establish that traveling from his home in Florida to New York to be deposed and to submit to a medical examination would cause undue hardship.

In *Thomas Shelton v. Maurocio O. Larrea,* Index No.: 31012/2012 decided on February 3, 2015, the court granted the defendant's motion to dismiss the complaint to the extent that the complaint was to be dismissed unless the plaintiff appeared for a deposition and appeared for an independent medical examination within Suffolk County.

The court noted that the determination whether to strike a pleading for failure to comply with court-ordered disclosure lies within the sound distribution of the trial court. The court pointed out that the plaintiff did not dispute that he adjourned the deposition scheduled for September 26, 2013 and that he continued to adjourn depositions for December 16, 2013, April 16, 2014, June 20, 2014, and October 1, 2014. Plaintiff's contention was that he adjourned the depositions for "personal reasons" and he submitted that he is readily available to submit to an electronic/digital/live deposition in the state of Florida but cannot return to the state of New York for the EBT and IME.

In rendering its decision, the court stated that depositions of parties to an action are generally held in the county where the action is pending. And the defendant who will retain a doctor in whom the defense has confidence and who is in a position to testify at the time of trial will generally specify the location and time of the examination. Since plaintiff failed to establish that traveling from his home in Florida to New York to be deposed and to submit to a medical examination would cause undue hardship, the deposition and independent medical examination of plaintiff will be conducted within the county in which the action is pending.

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 basis.

Note: Elaine Colavito graduated from Touro Law Center in 2007 in the top 6 percent of her class. She is an associate at Sahn Ward Coschignano, PLLC in Uniondale, concentrating her practice in matrimonial and family law, civil litigation and immigration

Letters of Intent (Continued from page 17)

to seller's principals and "conditions to closing" provisions, which set forth the conditions that must be satisfied before the agreement may be fully executed. A letter of intent can of course have as many additional provisions as the parties require; however, the purpose of the letter of intent is to streamline negotiations, not burden them. Thus, provisions should not be mindlessly added in a letter of intent when they are better suited to be part of the negotiations of the definitive agreement.

The utility of a letter of intent is in its ability to address major deal-breakers and to streamline negotiations early on in the transaction process. There can be, however, a fine line between developing a thorough plan for reaching an ultimate agreement and entering into a binding contract. Drafters should be cautious, with the addition of too many provisions as some courts have found provisions within a letter of intent to be binding, despite the objectives of the parties, where the parties have agreed upon all of the salient terms and have left little, if anything, left to negotiate.[1] Most importantly, each provision should be clearly designated as either binding or non-binding so that the parties may reap the greatest benefits of their letter of intent without risking entering into an undesirable binding contract.[2]

Note: Stella Lellos is a partner in Rivkin Radler's Corporate Practice Group, where she advises companies from startup to maturity and has significant experience in all aspects of complex corporate transactions. She can be reached at: stella.lellos@rivkin.com or (516) 357-3373.

Note: Sean Simensky is an associate in Rivkin Radler's Corporate & Commercial Practice Group where he concentrates his practice on general corporate representation of private national and international companies. He can be reached at (516) 357-3227 or sean.simensky@rivkin.com.

[1] *See, e.g., Brown v. Cara*, 450 F.3d 148 (2d Cir. 2005) (explaining that New York courts apply a four factor test to determine whether a preliminary agreement is enforceable as a contract: "(1) whether there is an express reservation of the right not to be bound in the absence of a writing; (2) whether there has been partial performance of the contract; (3) whether all of the terms of the alleged contract have been agreed upon; and (4) whether the agreement at issue is the type of contract that is usually committed to writing" (citing to *Adjustrite Sys., Inc. v. GAB Bus. Servs., Inc.*, 145 F.3d 543 (2d Cir. 1998)).

[2] *See Cohen v. Singer*, 2001 U.S. App. LEXIS 2435 (2d Cir.) (holding that where a document explicitly "characterizes the agreement as an 'agreement in principle' and a 'letter of intent,' and explicitly makes binding agreement 'subject to and contingent upon' formal agreement between the parties'" it is not a binding contract).

"Technological Competence," a New Ethical Obligation (Continued from page 13)

- Collecting ESI from your client while preserving the integrity of that ESI.
- Producing non-privileged ESI in a recognized and appropriate manner.
- Selecting a qualified expert in e-discovery technology.

If you, as an attorney, do not feel comfortable in your ability to meet these basic needs of e-discovery, then ethically, and as a matter of concern over professional liability, you should consider associating a technologically competent litigator of counsel.

Cybersecurity, an ethical and professional liability issue

Attorneys have always considered themselves guardians of their clients' privacy and custodial trustees of the property and documents of their clients. Now, many of the documents important to clients are maintained in electronic form on a variety of computing devices in electronically insecure and vulnerable law offices. Storing this material in the cloud makes it even more vulnerable and insecure.

Recently, the computers of a number of law firms have been infected with ransomware and the attorneys have been forced to buy back access to data on their computers after hackers had locked them out. Small firms have been forced to pay up to $10,000 to regain access to their own computers and there is no guarantee that after paying the ransom that their data is free from infection with the virus which originally compromised their systems. Unfortunately, such attacks also compromise client data as well as critical firm data that may have been stored on the infected machines end any of the networks with which they are associated.

Few, if any, law firms have conducted a cybersecurity audit, and most law firms do not have well-established cybersecurity policies with respect to client and firm critical data access by laptops and mobile devices operating from locations remote to the law office and often over insecure public networks at places such as bars and coffee shops.

In addition to the economic loss lawyers and law firms can suffer as a result of a cybersecurity breach, certain violations of the *Health Insurance Portability & Protection Act* (HIPPA) can lead to criminal prosecution, as well as civil liability.

Cyber liability insurance

The most important single act any attorney can do is check their professional liability insurance policy and determine whether they are covered for losses associated with cybersecurity breaches, particularly the cost of defending litigation brought by those clients affected by the breach. Do not forget that professional liability insurance is not really meant to shield attorneys from sanctions for their lack of technological competence. Because this type of insurance policy protects the insured attorney from liability to third parties, it is no substitute for property and casualty insurance. Therefore, it would be wise to immediately determine whether your property and casualty insurance policies cover the cost of data recovery when the cause is a cyber security breach or cyber theft.

One of the more unpleasant reality checks for attorneys, even in large law firms, is how difficult it is to obtain cyber insurance and how large the deductibles or retained self-insured risk are for the policies that are available.

Technologically competent counsel

To satisfy the ethical mandate, which requires an attorney to associate with or seek advice from technical consultants and competent counsel when cyber issues may be involved, is not as simple as retaining an expert, the way personal-injury lawyers retain the services of expert medical witnesses.

In the area of cybersecurity, database management, and social networking, working effectively with experts requires a level of understanding, sadly lacking among attorneys.

Large firms can afford IT departments or at least a full-time IT manager, but solo practitioners, small and medium-sized law firms generally cannot. As every lawyer who has followed the constant upgrades of their smart phone and tablet, and the regular security and operational patches to the Microsoft operating systems and application software such as *Office* and *Outlook* is now aware, it is becoming extremely difficult for lawyers to stay on top of every new trend.

Before undertaking to represent a client in any kind of litigation, it is wise to contemplate the observation of the late Chief Justice Warren Burger, "There are too many Piper Cub lawyers at the controls of 747 litigation."

In many cases, the duty of technological competence may require a higher level of technical knowledge and ability and an attorney may require the services of an expert.

Retaining the services of experts

Evaluating the credentials of experts in technology is no different than cross-examining such an expert during a trial or deposition.

Unless an attorney has sufficient understanding of the technology the expert may use to complete the task for which they have been retained, that attorney is *prima facie*, not competent to make the decision about retaining the expert. Unfortunately, this lack of competence on the part of the attorney may only be discovered in the context of an action for legal malpractice or a hearing on sanctions by the court

There is an additional ethical obligation upon attorneys who engage experts in litigation. The litigation attorney has a nondelegable duty to supervise the expert by remaining regularly engaged in the work of the expert and educating the expert about the legal and factual issues in the case. Ethical Considerations and Disciplinary Rules mandate that attorneys ensure that their experts comply with the same ethical obligations that govern attorneys.

Note: Victor John Yannacone Jr. is an advocate, trial lawyer, and litigator practicing today in the manner of a British barrister by serving of counsel to attorneys and law firms locally and throughout the United States in complex matters. Mr. Yannacone has been continuously involved in computer science since the days of the first transistors in 1955 and actively involved in design, development, and management of relational databases. He pioneered in the development of environmental systems science and was a cofounder of the Environmental Defense Fund. Mr. Yannacone can be reached at (631) 475–0231, or vyannacone@yannalaw.com, and through his website https://yannalaw.com.

[i] *American Bar Association Model Rules of Professional Conduct.*

[ii] http://ethics.calbar.ca.gov/Portals/9/documents/Opinions/CAL%202015-193%20%5B11-0004%5D%20%2806-30-15%29%20-%20FINAL.pdf.

Working Elder-Caregivers (Continued from page 9)

assigned to another employee. It is crucial for the employer to check in with the employee during the crisis and refocus the employee after the crisis has passed. Most important, however, is to refer the employee to the appropriate resources.

It is helpful to realize that in many instances, the elder-caregiver becomes the healthcare decision maker, the bookkeeper, the accountant, the chauffeur, the housekeeper/cook and the secretary to the aging or disabled loved one. It is impossible to wear all of these hats and wear them well, especially when someone is juggling their job and their own family matters. The confusion between Medicare, Medicaid and Medigap insurance can be extremely overwhelming, as can the difference between Community Medicaid and Institutional Medicaid. Many elder-caregivers struggle with decisions regarding taking care of their loved one at home, in an assisted living facility or in a nursing home. Asset protection and the appropriate way to handle financial matters leaves many people in a dire state of confusion. When individuals are made aware of the healthcare choices, government benefits programs, and the legal and financial options available, they can more easily navigate the elder-care landscape, get their loved one the care and assistance they need, and keep their focus on their job.

Bringing in outside professionals to educate employees can be a great benefit to both the staff and to the employer. Empowering working elder-caregivers with knowledge and information to handle an elder care crisis, or to plan ahead to avoid the crisis altogether, promotes job security for the employee and protects the employer's bottom line.

Studies show that giving employees the tools they need to navigate the elder-care landscape greatly reduces absenteeism, downtime and turnover and promotes productivity and job security.

Note: Jennifer B. Cona, Esq. and Melissa Negrin-Wiener, Esq. are partners in the Elder Law firm Genser Dubow Genser & Cona, LLP, located in Melville. They practices exclusively in the field of Elder Law, including asset protection planning, Medicaid planning, representation in Fair Hearings and Article 78 proceedings, estate planning, trust and estate administration, guardianships and estate litigation.

[1] National Alliance for Caregiving Study, AARP Research on Caregiving in the US, www.aarp.org.

[2] MetLife Mature Market Institute Study: "Metlife Study of Working Caregivers and Employer Health Care Costs," www.metlife.com.

[3] Gallup poll: "Caregiving Costs U.S. Economy $25.2 Billion in Lost Productivity," www.gallup.com/poll/148670.

[4] National Alliance for Caregiving and AARP, Caregiving in the U.S. 2009.

[5] M. Pitt-Catsouphes, C. Matz-Costa and E. Besen, "Age and Generations: Understanding Experiences in the Workplace".

Health and Hospital Law (Continued from page 9)

patient; no other action is needed. Second, providers comply with this duty "merely by advising one to whom such medication is administered of the dangers of that medication." Lastly, "our decision herein should not be considered as an erosion of the prevailing principle that courts should proceed cautiously and carefully in recognizing a duty of care." (While the court expressly says that this case is not about *preventing* the patient from leaving, I wonder how long it will be before another court at another time will say that knowledge that the patient wanted to drive home should be imputed to the provider, requiring some "reasonable" response in addition to a mere warning.)

One almost can hear the howls of the dissenting minority. Citing to weighty authority and precedent from its own court the dissent argues that the foreseeability of Walsh's side effects does not resolve the question of the defendants' liability because, absent a duty running directly to the injured party, there can be no liability in damages, however careless or foreseeable the harm may be. "This restriction is necessary to avoid exposing defendants to unlimited liability to an indeterminate class of persons conceivably injured by any negligence in a defendant's act."

A physician does not take on a duty of care to an entire community when he treats one patient. A provider's duty of care is limited to the patient and "to persons he knew or reasonably should have known were relying on him for this service to his patient," a very small class at best. The dissent distinguishes the cases relied upon by the majority on just this ground — that the actions of the providers in those cases implicated "a determinate and identified class" whose relationships with the patient "have traditionally been recognized as a means of extending and yet limiting the scope of liability..." In case after case, so the dissent finds, liability only was possible based on a plaintiff's reasonable reliance on the provider's services to the patient *combined with* the fact that the provider created the risk of harm:

> *The rule of law that emerges from this line of cases is easily discerned. In New York, a physician's duty to a patient and the corresponding liability, may be extended beyond the patient only to someone who is both a readily identifiable third party of a definable class, usually a family member, and who the physician knew or should have known could be injured by the physician's affirmative creation of a risk of harm through his or her treatment of the patient. I am not aware of anything — and the majority makes no attempt to identify anything — indicating that this clear rule has become so unworkable that the significant redefinition of the scope of a physician's duty adopted by the majority is warranted. Under a reasoned application of our precedent to the facts of this case, it is evident that defendants owed no legal duty to [plaintiffs] — or any other member of the public who may have come into contact with, and been harmed by, Walsh after her discharge — to warn Walsh against, or prevent her from, driving (citations omitted).*
>
> *Under the Court's decision in this case, the class of potential plaintiffs cannot be logically restricted or identified. ... [E]ven where the defendant is best positioned to prevent harm, a duty should be imposed only where "the specter of limitless liability is not present because the class of potential plaintiffs to whom the duty is owed is circumscribed by the relationship." … [O]ur jurisprudence, both in general and in the specific context of physician-owed duties, has repeatedly rejected the imposition of a duty that will have such far-reaching and unmanageable consequences. … [I]t is the responsibility of the courts when fixing duty to "to protect against crushing exposure to liability." (citations omitted).*

The dissent also engages in an interesting and relevant analysis of the possible social and financial consequences of the potential outcome of the majority's decision, which I will leave to the interested reader to explore at his or her leisure.

Lastly, the dissent argues that a line must be drawn between competing public policy considerations of providing a remedy to everyone who is injured, and extending liability exposure almost without limit. Emphasizing the depth of feeling obviously generated by this issue, it concludes with something that this writer has never before seen; an invitation to the Legislature to redress the erroneous majority decision in the very case in which the dissent is issued:

> *It is, therefore, my hope that the Legislature — a which has long expressed its concern regarding the impact of the costs of medical malpractice insurance and litigation on the affordability and availability of medical care — will carefully consider whether the majority's holding is consistent with New York's statutory medical malpractice schemes and the aims of tort recovery in New York.*

As an aside, I wonder whether this decision broadens the scope of "medical malpractice" liability or whether it could — or should — be considered to be an expansion of common law negligence? If the latter, could the new rule promulgated by the high court be expanded to other areas of professional malpractice and to other areas of activity generally?

Note: James Fouassier, Esq. is the Associate Administrator of the Department of Managed Care at Stony Brook University Hospital, Stony Brook, New York and Co-Chair of the Association's Health and Hospital Law Committee. His opinions are his own. He may be reached at: james.fouassier@stonybrookmedicine.edu.

Trusts and Estates (Continued from page 15)

of his will, the decedent created several trusts for the benefit of his wife, daughter and grandchildren. Significantly, the trust created for the benefit of the decedent's daughter provided for principal distributions to her in five equal installments at stated ages, commencing on December 27, 1989, and concluding on December 27, 2009.

The thrust of the objections asserted by the daughter were addressed to the fiduciary's failure to sell the real property located in California, which constituted a portion of the principal of the testamentary trust created for her benefit, as well as legal fees and commissions. More particularly, the objectant claimed that the fiduciary's retention of the realty constituted a breach of fiduciary duty that the payments to the fiduciary's counsel were unreasonable, and that commissions or payments to the fiduciary relating to the rents or management of the subject property were excessive.

The fiduciary moved for summary judgment dismissing the objections, and any related claims for damages or surcharges, and the objectant opposed and cross-moved for summary relief in her favor.

With regard to the principal issue involving the California realty, the record revealed that offers had been made by a corporate purchaser to purchase the property as early as 2005, for a gross selling price of $41,330,000.00. Additional offers by the same purchaser were thereafter made, with the highest offer being $43,750,000.00. After the national decrease in value in the real estate market, a final offer by the purchaser, in January 2009, was to purchase the property for $34,000,000. 00.

Despite the foregoing, none of the foregoing offers resulted in a sale of the property. Indeed, the court noted that although the fiduciary recommended to the beneficiaries that the property be sold, and although the decedent's spouse agreed to the sale, the decedent's daughter vigorously opposed any sale, and even threatened to bring a suit to enjoin any effort to bring a sale to fruition. The daughter's deposition testimony confirmed that she objected to any sale of the property and wanted to keep it in the family in order to preserve her father's legacy. The court found that since the daughter's individual interest in the property vested upon her attaining each of the ages set forth in the testamentary trust for a distribution of principal, she had the power, as a co-owner, to prevent its sale, and the fiduciary, under California law, lacked the authority to bind any of its cotenants to a contract of sale.

Accordingly, based upon the foregoing, the court held, as a matter of equity, that the decedent's daughter could not hold the fiduciary responsible for its inability to sell the California property, when it was her obstructionist behavior that precluded its sale. The court therefore held she was estopped from contending that the property should have been sold and granted the fiduciary summary judgment dismissing the objections by the decedent's daughter on this issue.

On the other hand, the court denied the fiduciary's request for summary relief on the issue of legal fees, finding that the record was insufficient to determine their reasonableness.

Finally, the court granted summary judgment on the issue of commissions, concluding that the objectant had failed to demonstrate any basis for denying commissions in their entirety, or for not awarding same in the amount sought.

In re Lowe, NYLJ, June 16, 2015, at p.27 (Sur. Ct. Suffolk 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.

Invocation of Fifth Amendment Results in Stayed Eviction (Continued from page 12)

In New York State, the Fifth Amendment attaches the indelible right to counsel once invoked. Indeed, "[o]nce a suspect in police custody unequivocally requests the assistance of counsel, the suspect may not be asked any more questions in the absence of counsel."[5] "A defendant's unequivocal invocation of counsel while in custody results in the attachment of the right to counsel, indelibly so, meaning that, as a matter of state constitutional law, a defendant cannot subsequently waive the right to counsel unless the defendant is in the presence of an attorney representing that defendant."[6] Sworn testimony made in a civil context can impact a criminal proceeding. Ms. Moorer could have waived her Fifth Amendment right in the civil context had she testified in the landlord tenant matter. Civil practitioners should not only advise their clients of this right, but recognize that the court may grant a stay to protect a civil litigant's Fifth Amendment right against self-incrimination.

In *Hempstead Housing Authority v. Moorer*, Judge Scott Fairgrieve found that Ms. Moorer's Fifth Amendment rights were more important than any delay suffered by the Housing Authority. Ms. Moorer was being evicted based on the same events that resulted in criminal charges. "It is well settled that a court has the authority to stay an action pending the outcome of criminal proceedings."[7] However, "a stay is not constitutionally required whenever a litigant finds himself facing the dilemmas inherent in pursuing civil litigation while being the subject of a related criminal investigation."[8] The interest at hand was not merely Ms. Moorer's ability to stay in her residence but her ability to effectively defend herself against Criminal Possession of a Weapon and Criminal Assault charges stemming out of the same alleged facts that resulted in the termination of Ms. Moorer's lease.

Ms. Moorer's case shows that time and delay will not defeat a litigant's Fifth Amendment rights. In some instances, the Constitutional implications, that being the right against self-incrimination, will trump the interests of the plaintiff or, here, the petitioner.[9] Additionally, the criminal matter may very well resolve the pending civil matter.[10]

Although the pendency of a criminal proceeding does not give rise to an absolute right under the United States or New York State Constitutions to a stay of a related civil proceeding *(United States v Kordel*, 397 U.S. 1; *Langemyr v Campbell*, 21 NY2d 796, *remittitur amended* 21 NY2d 969, *rearg denied* 21 NY2d 1040, *cert denied* 393 U.S. 934), it has also been held that "[there] is no question but that the court may exercise its discretion to stay proceedings in a civil action until a related criminal dispute is resolved. *See, e.g., United States v. Kordel [supra]; DeVita v. Sills*, 422 F.2d 1172" (*Klitzman, Klitzman & Gallagher v. Krut*, 591 F Supp 258, 269-270, n 7, *affd* 744 F2d 955).[11]

Further, "[w]hile this will undoubtedly cause inconvenience and delay to plaintiffs, protection of defendants' constitutional rights against self-incrimination is the more important consideration."[12] Indeed, for Ms. Moorer, the right against self-incrimination is more than just a line rattled off some movie screen, through the advocacy of the NSLS, its invocation allowed her to remain in her home for nearly a year since the holdover proceeding was filed.

Note: Cory Morris is a civil rights attorney, holding a Masters Degree in General Psychology and is currently the Principal Attorney at the Law Offices of Cory H. Morris. He can be reached at www.corymorris.com

[1] *Hempstead Housing Authority v. Moorer*, LT-001957-15, NYLJ 1202745486079, at *1 (Dist., NA, Decided December 16, 2015).
[2] Nassau/Suffolk Law Services Committee, Inc., *About NSLS* (last accessed Jan. 22, 2016), http://nslawservices.org/wp/?page_id=2.
[3] Asa J., Law Professor Warns "Don't Talk To Police" In Viral Making a Murderer Video, Copblock (Jan. 21, 2016), available at http://www.copblock.org/152166/law-professor-warns-never-talk-to-police-in-viral-video/.
[4] See *Miranda v. Arizona*, 384 U.S. 436 (1966).
[5] *People v. Carrino*, 114/12, NYLJ 1202745595679, at *4 (App. Div., 2nd, Decided December 16, 2015)(citations omitted).
[6] *People v Harris*, 93 AD3d 58, 66 (2d Dep't. 2012), affd 20 NY3d 912.
[7] *Parker v Dawson*, 2007 US Dist LEXIS 63068, at *9 (E.D.N.Y. Aug. 27, 2007, Nos. 06-CV-6191 (JFB) (WDW), 06-CV-6627 (JFB) (WDW), 07-CV-1268 (JFB) (WDW)) (citations omitted).
[8] *Sterling Nat'l Bank v A-1 Hotels Int'l, Inc.*, 175 F Supp 2d 573, 576 (S.D.N.Y. 2001); see *Parker*, 2007 US Dist Lexis 63068 at * 9.
[9] See *De Siervi v Liverzani*, 136 AD2d 527, 528 (2d Dep't. 1988).
[10] *Merchants Mut. Ins. Co. v Arzillo*, 98 AD2d 495, 495 (2d Dep't. 1984).
[11] *De Siervi v Liverzani*, 136 AD2d at 528 (external quotation marks omitted and internal citations and quotations preserved).
[12] *Dienstag v Bronsen*, 49 FRD 327, 329 (S.D.N.Y. 1970) (citations omitted).

Pro Bono and Experiential Learning (Continued from page 8)

placements such as at Nassau Suffolk Law Services. Ms. Dosso says that, historically, students and Nassau Suffolk Law Services staff has a more meaningful placement experience when students participate voluntarily for at least 100 hours per semester. Although this would be more hours than is required for the pro bono requirement for admission to the New York Bar, it is the more successful internship scenario. Part of the issue is the staff attorney's investment of time for on-the-job training when a student placement is relatively short term.

Time is limited and funding is short. Ms. Greenberger of Nassau/Suffolk Law Services (and a Touro Law graduate) mentioned the former existence of a Public Interest Externship at Touro which included a classroom component and was an innovative program to not only help their clients, but to assist in creating practice ready attorneys out of law school. (The Pro Bono Scholar Program has some similarities)

The concept of experiential learning instituted by the judiciary, and the pro bono task force to improve access to justice are noble, respectable, achievable and understandable goals. The only problem is that there is a real need for access to justice that is being ignored and the solutions that are being implemented are creating roadblocks in their accomplishment. If only the right hand knew what the left hand was doing.

Note: George Pammer is a 3rd year law student at Touro Law School. George is a part-time evening student and the President of the Student Bar Association. He has also held the position of Vice-President in the SBA as well as in the Suffolk County Bar Association – Student Committee, where he was one of the founding members.

[1] New York State Bar Association State Bar News January/February 2016, Vol. 58, No. 1

Pro Bono (Continued from page 6)

legal assistance to Suffolk County residents who are dealing with economic hardship. Nassau Suffolk Law Services is a non-profit civil legal services agency, providing free legal assistance to Long Islanders, primarily in the areas of benefits advocacy, homelessness prevention (foreclosure and eviction defense), access to health care, and services to special populations such as domestic violence victims, disabled, and adult home resident. The provision of free services is prioritized based on financial need and funding is often inadequate in these areas. Furthermore, there is no funding for the general provision of matrimonial or bankruptcy representation, therefore the demand for pro bono assistance is the greatest in these areas. If you would like to volunteer, please contact Ellen Krakow, Esq. 631 232-2400 x 3323.

Note: Ellen Krakow Suffolk Pro Bono Project Coordinator Nassau Suffolk Law Services.

Expanding Definition of "Value" (Continued from page 10)

change their hiring standards. Although certainly not dispositive, it will be much easier to allege improper motive if the hire in question is not even remotely qualified for the position. Jobs at the world's leading investment banks, for instance, are highly coveted and competitive even among the best credentialed graduates. Of course, "princelings" by definition tend to have greater access to prestigious educational opportunities and may nevertheless be qualified. Second, ensure that you follow the same hiring process for all applicants, regardless of their familial connections. Third, ensure your business units and human resources department are well trained and resourced to identify potentially problematic candidates and ensure that any hiring is done in accordance with your company's anti-corruption policy. Of course, when in doubt, consult with an FCPA expert.

The princeling investigations have not been limited to financial services firms operating in Asia. In August 2015, BNY Mellon agreed to pay the SEC $14.8 million to settle FCPA charges in connection with providing student internships to family members of foreign officials affiliated with a Middle Eastern sovereign wealth fund. You can bet that the government has its eye on hiring practices at U.S. companies and issuers operating in different industries and in other corners of the world. Stay tuned.

Note: Jonathan ("Jack") Harrington is counsel to Campolo, Middleton & McCormick, LLP. He counsels multinational corporations and individuals in securities, white-collar, anti-money laundering, and Foreign Corrupt Practices Act (FCPA) matters. He also represents clients in litigation and appeals before state and federal courts and in commercial arbitrations, often with an international component. Jack's combination of legal, policy, and international business experience enables him to advise clients on transactions and strategy.