COURT NOTES

By Ilene Sherwyn Cooper


Ilene S. Cooper

Appellate Division- Second Department

Attorney Resignations

The following attorneys, who are in good standing, with no complaints or charges pending against them, have voluntarily resigned from the practice of law in the State of New York:

Donald S. Goldrich
Donald Graham
Peter J. Gurfein
Stuart M. Hatcher
William D. Johnson admitted as William David Johnson
Helen Jorda
Russell Philip Leino
Timothy P. Lenes admitted as Timothy Lenes
Andrew John McLaughlin
Aylana Meisel
Keith Ronald Miles
Michael Anthony Morrison
Lisa Taylor Muhlstock now known as Lisa Taylor Brophy, admitted as Lisa Dawn Taylor
Michael Murphy
Helen O'Leary
Daniel Paul Rause
James Thomas Richardson
Stella J. Rozanski, admitted as Stella Jacqueline Rozanski
Woodward L. Rubin
Frederick Neil Saal
Kenneth A. Sack admitted as Kenneth Andrew Sack
Richard P. Schaefer
Ryan Sipkovsky admitted as Ryan Matthew Sipkovsky
Katherine Toan admitted as Katherine Lynn Toan
Joseph Francis Valente
Jon G. Waggoner admitted a Jon Garrett Waggoner
Rose Annmarie Walker-Williams admitted as Rose Annmarie Walker
Beth Ellen Wortman

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

CIVIL RIGHTS

Focus on FOIL

By Cory Morris


Cory Morris

The New York Legislature (Public Officers Law, Section 6) finds that "a free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions. The more open a government is with its citizenry, the greater the understanding and participation of the public in government."

Indeed, Public Officers Law, Section 84 states that "[t]he people's right to know the process of governmental decision-making and to review the documents and statistics leading to determinations is basic to our society. Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality." The New York Freedom of Information Law just surpassed its 40th year of existence. But do not start celebrating just yet. There is still much that can be done.

New York's Freedom of Information Law

"Freedom of Information Law… proceeds under the premise that the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government."[1] Indeed, the New York Freedom of Information Law (FOIL) is based on the principle that "[o]pen and accessible government is a hall-mark of a free society, engendering public understanding and participation."[2] New York courts have consistently recognized that " 'the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government,' "[3] and that the Legislature enacted FOIL to: "achieve[ ] a more informed electorate and a more responsible and responsive [government]."[4]

> The Freedom of Information Law unequivocally makes all agency records open to the public unless they fall within one of its enumerated exemptions ... All records are presumptively available and exemptions must be narrowly construed to ensure maximum access to public records ... The burden of proof rests on the agency that claims an exemption from disclosure ... Mere conclusory allegations, without factual support, that the requested materials fall within an exemption are insufficient to sustain an agency's burden of proof.[5]

"[T]he Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in

(Continued on page 25)

APPELLATE LAND USE

Tug of War — Understanding NY's "Monroe Doctrine"

By Robert J. Flynn

The State of New York comprises a multitude of municipalities and overlapping layers of government. In Nassau and Suffolk Counties alone there are 13 towns, 2 cities, 2 counties, 132 fire districts, 125 school districts and 95 villages (not to mention water districts, sewer districts, refuse districts and library districts, etc.).[i] Thus, it should come as no surprise that, where two governmental entities overlap, the interests of the two entities may differ, causing them to collide on issues.

These differences can be particularly acute in the area of land use-that is, when one governmental entity (the encroaching entity) seeks to build in an area where another governmental entity (the host entity) exists. The host entity may contend that, before the building project can move forward, there must first be compliance by the encroaching entity with the building, zoning, and planning regulations of the host entity.

As an attorney representing the encroaching municipality with a proposed building project to be located within *another* municipality, it is your duty to advise the governing board that you represent to exercise caution; you need to properly analyze whether or not compliance with a town zoning code or planning regulations of the host entity are required prior to moving forward with the project. Failure to do so could result in a costly mistake for your client and the project being stalled for years. Similarly, if you represent the host community, you need to understand the law in order to advise your client of the appropriate steps necessary to protect the interests of the host community, and to insure the local laws of the municipality you represent are observed.


Robert J. Flynn

How do you decide whether an encroaching municipality is required to observe the local zoning and planning codes of the host municipality? In 1988, the New York Court of Appeals answered this question when they decided the case *Matter of the County of Monroe v. City Rochester*.[ii]

In *Monroe*, the County of Monroe decided to make certain improvements to the Greater Rochester International Airport. These improvements included expansion of the main terminal, improvement to the runway apron, addition to the parking garage, and the building of an air freight facility, a hotel, and a temporary parking facility. All improvements to the airport were located entirely within the City of Rochester. The County of Monroe initially submitted a site plan for most of the improvements to the City of Rochester, but balked at going further with the site plan review when the city requested further improvements and compliance with the State Environmental Quality Review Act. The county took the position that, with the exception of the planned hotel, the planned uses were of a governmental nature and therefore immune from city planning oversight. The city claimed jurisdiction to review the county's plan to build based upon the proprietary nature of the project.

The case was submitted to the Appellate Division, Fourth Department upon an agreed statement of facts. That court decided that, based upon the traditional governmental v. proprietary test, that the county was not required to meet Rochester City Code and permit requirements. Leave to appeal the case was granted by the Court of Appeals.

The Court of Appeals affirmed the Appellate Division, but, in so doing, rejected the governmental v. proprietary test, which they deemed to be on "shaky ground for a long time".[iii] In its place, the court created a new balancing test to ascertain whether or not the encroaching government was subject to the zoning requirements of the host governmental unit where the extraterritorial land use would be employed.

The Court of Appeals, with guidance from the American Law Institute and decisions from other states, outlined the factors to be employed in the balancing test approach:

> "…..among the sundry factors to be weighed in making that determination are "the nature and scope of the instrumentality seeking immunity, the kind of function or land use involved, the extent of the public interest to be served thereby, the effect local land use regulation would have upon the enterprise concerned and the impact upon legitimate local interests…."[iv]

The court also set forth a series of other helpful factors to be considered by a reviewing court conducting the

(Continued on page 26)

WHO'S YOUR EXPERT

Expert Preclusion as a Discovery or Spoliation Sanction

By Hillary A. Frommer

When a party fails to comply with the expert disclosure rules and requirements under the CPLR and Federal Rules of Civil Procedure, that party runs the risk that his or her expert witness may be precluded from testifying at trial.[1] A party takes a similar risk when he or she fails to disclose other materials in discovery.

Trial courts have broad discretion to impose discovery sanctions, which can range from giving an adverse inference instruction, to prohibiting the admission of evidence at trial, to dismissing a party's pleading.[2] The latter is the most "drastic" sanction, which while not favored, nonetheless can occur when a party engages in conduct that is "willful, contumacious, or in bad faith."[3] A party can also be barred from presenting expert testimony or introducing an experts' report. Depending on the particular circumstances, such preclusion could be a drastic sanction. At least three courts have precluded expert testimony as a discovery sanction.

For example, in *Arpino v F.J.F. & Sons Electric Co., Inc.*,[4] a personal injury action arising out of an automobile accident, the plaintiff's discovery demands sought information concerning witnesses to and photographs of the accident. In response, the defendants represented that they were unaware of any witnesses and had no photographs. When the name of one potential witness surfaced during a deposition, the plaintiff made a second demand for witness information and photographs. Again, the defendants responded that they had no responsive information. Thereafter, the parties stipulated that disclosure was complete, and the note of issue was filed. Seven months later, the defendants served supplemental discovery responses in which they identified, for the first time, four witnesses. The witnesses' addressees were not provided.. Shortly thereafter, the defendants served their expert witness disclosure attached to which was the expert's report. According to that report, prepared three months earlier, the defendants' expert relied on information provided by those four witnesses and 18 photographs taken of the defendant driver's vehicle following the accident. Two months later, the defendants provided the addresses of those four witnesses and the 18 photographs identified by their expert. So, judging by this timeline, the defendants had the names and contact information of witnesses and photographs of the scene for five months before producing it all to the plaintiff.


Hillary A. Frommer

As one can imagine, the plaintiff rejected those supplemental responses and expert disclosure, and then sought discovery sanctions against the defendants. The defendants argued that sanctions were not warranted because they did not intentionally and willfully withhold that discovery, but the court disagreed. According to the court, the defendants were not simply "careless" in discovery, as they contended, but rather, were intentionally misleading in order to avoid their "obligation to provide timely and meaningful discovery responses."[5] The court determined that the defendants' affirmative representations that they did not have any photographs nor were aware of any witnesses, were intentionally false and warranted sanctions. The court then sanctioned the defendants by precluding them from offering any expert testimony or portion of their expert's report, which relied on the witness statements and the accident photographs.

Federal Magistrate Judge Ronald Ellis of the United States District Court for the Southern District of New York imposed a similar sanction upon the defendants in *Fleming v City of New York*, a discrimination action.[6] In that case, the defendant's expert formed his opinion based on certain computer data that had not been produced to the plaintiff in discovery. The court held that the withheld data was discoverable under Rule 26 of the Federal Rules of Civil Procedure, and that it was appropriate to preclude the defendant's expert from offering any testimony or evidence that included the undisclosed data, as a sanction under Rule 37(c)(1).

Preclusion as a spoliation sanction was imposed upon the plaintiffs in *Oppenheim v Mojo-Stumer Assocs. Architects, P.C.*[7] In that breach of contract case, the plaintiffs hired the defendants to renovate their apartment. Midway into the project, the plaintiffs learned that they had paid the defendants for work not performed, and that

(Continued on page 25)

REAL ESTATE

Does The Fair Housing Act Cover Disparate Impact Discrimination?

By Andrew Lieb

In the coming months we will learn whether The Fair Housing Act, Title VIII of the Civil Rights Act of 1968, protects against disparate impact discrimination in housing when the US Supreme Court issues its decision within the seminal case of *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.*

The *Texas* case is not just important for discrimination attorneys, but this case will impact the practice of all attorneys representing parties within residential real estate transactions (both sales and leases), lenders and brokers as well as land use counsel and municipal attorneys. Specifically, if disparate impact discrimination is actionable, attorneys will need to determine if an act that is facially neutral (i.e., no discriminatory purpose) nonetheless has a statistically significant adverse impact on a protected class (i.e., discriminatory effect), but if disparate impact is not actionable attorneys will nonetheless have to determine whether a relevant local law provides such protection (i.e., The Fair Housing Act is merely the floor of protection for housing discrimination) before abstaining from such an analysis.

Andrew Lieb

The Fair Housing Act protects against acts of discrimination directed at a member of one of seven protected classes, to wit: race, color, religion, sex, handicap, familial status and national origin (notating that state and local laws add more protected classes). While The Fair Housing Act expressly makes it illegal to intentionally treat someone differently based on such individual's existence within one of its seven protected classes, the Act does not expressly address secondary effects of discrimination occurring by way of seemingly neutral conduct. This later type of discrimination is known as disparate impact discrimination and it is a protected form of discrimination within many local housing discrimination statues, such as New York City's Human Rights Law, but not in others, such as Suffolk County's Human Rights Law.

The US Supreme Court is set to determine if disparate impact discrimination is protected as the law of the land having heard oral arguments in the *Texas* case on January 21, 2015. The factual question before the court is whether a Texas state agency distributed housing credits for rentals to lower-income African-American families in a racially segregated manner and thereby kept these African-American families from living within white communities.

Both the district court and the U.S. Court of Appeals for the Fifth Circuit found a violation of The Fair Housing Act due to the existence of disparate impact discrimination. Before the court is an issue of statutory interpretation. Should the court rule that disparate impact discrimination is not part of The Fair Housing Act, it will be taking a strict constructionist view of the statute and likely focusing on the words "because of" that are set forth in the statute when talking about the basis for prohibited conduct. Should the court rule that disparate impact is a form of discrimination, the court will be taking a more activist role in that it will be looking to the statutory purpose of The Fair Housing Act, which was first drafted to effectuate "the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States" and that of The Fair Housing Act's sister-titles, Title VII and Title IX, addressing equal employment opportunities and equal educational opportunities respectively, where disparate impact discrimination is actionable.

Stay tuned.

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

EDUCATION

Behind the Headlines: Immunizations, Religion and Schools

By Candace J. Gomez

Immunizations are currently headline news because of the recent rise in the number of measles cases. By early February, the New York State Department of Health (DOH) had confirmed three cases of measles in the state, which prompted the New York State Education Department (SED) and DOH to issue a joint memo dated February 9, 2015 reminding schools to adhere to state public health laws requiring student vaccinations.

What are the laws, regulations and policies?

New York Public Health Law (PHL) §2164 requires parents to vaccinate their children against serious diseases including, but not limited to, measles, polio, chicken pox and whooping cough. New York Education Law § 914 requires schools to comply with PHL §2164. In addition, Department of Health Regulation 10 NYCRR, Section 66-1.3(d) sets forth the immunization documents that each principal must receive from parents before admitting a child into school. Most school districts have also adopted policies that reinforce the above-mentioned laws and regulations.

Candace J. Gomez

Must every student be vaccinated or do exemptions exist?

The state's vaccination requirements prohibit schools from admitting students who have not been immunized or allowing them to attend for more than 14 days unless[1]: (1) the child has medical reasons that would cause the immunization to be detrimental to the student's health and a physician licensed to practice medicine in this state has certified that the immunization may be detrimental to the child's health; or (2) the child's parents hold genuine and sincere religious beliefs which are contrary to vaccination practices. There is a third exemption which is seldom mentioned because it is rare, but a student may also qualify for an exemption if, in the case of varicella, either a health care provider documents that the child has already had varicella or there is evidence that the child has immunity to varicella. For the remainder of this article, we will focus on the second exemption, which is also the most common and hotly contested exemption – the religious exemption.

Deciding if a parent's religious beliefs are "genuine and sincere"

The building principal is responsible for reviewing each request for a religious exemption. SED has recommended the following procedure for principals evaluating parental requests for religious exemptions: (1) issue a Request for Religious Exemption to Immunization Form (the "Form") to parents (SED has created a sample form that may be used by districts); (2) parent returns the signed and notarized Form to the school; (3) the building principal reviews the Form and if the principal still has questions, the principal may ask for additional information and/or supporting documents such as: a letter from an authorized representative of the church, temple, or religious institution attended by the parent; literature from the church, temple or religious institution explaining doctrine/beliefs that prohibit immunizations; other writings or sources which the parent relied upon when formulating religious beliefs against immunizations; a copy of any previous statements that the parent gave to healthcare providers or school district officials explaining the religious basis

(Continued on page 30)

COMMERCIAL LITIGATION

Guidelines for E-Mail Keyword Searches

By: Leo K. Barnes Jr.

The Chief Judge's Task Force on Commercial Litigation was charged with creating processes to reduce delay and eliminate unnecessary costs in Commercial Division litigation. Recent amendments to the Commercial Division Rules have implemented measures designed to do just that — streamline discovery and curtail abuses.

Although each discovery device is capable of abuse, e-mail keyword search term demands are ripe for abuse due to the boundless nature of search terms created by crafty counsel.

In *Levine v. City Medical Associates, P.C.*, 108 A.D.3d 746 (2d Dept. 2013), the Second Department reiterated that: "unlimited disclosure is not required []. The essential test is "usefulness and reason." Of course, this well-settled rule applies equally in the electronically stored information ("ESI") arena. For example, in response to a motion to compel additional email production in a residential mortgage backed security case, Justice Kornreich[1] recently observed that:

> Nonetheless, [] any plaintiff in a complex litigation[] cannot reasonably expect to uncover every single instance in which an [] employee said something that makes its [] conduct, at a minimum, a public relations disaster. … This case is more likely to (and should) turn on the law (e.g., due diligence issues) and expert evidence (e.g., the non-conformance rate) rather than how many inflammatory emails [plaintiff] can read to a jury.

Leo K. Barnes Jr.

Keyword and Boolean searches are a rudimentary form of technology-assisted review, but the same are subject to the same "usefulness and reason" criteria. In that regard, leading commentators have observed that search terms must be drafted with the goal of highlighting a nexus between the search terms and the issues asserted in the parties' pleadings to meet the "usefulness and reason" criteria highlighted in *Levine*.

Incident to his work with the International Institute for Conflict Prevention and Resolution, New York County Supreme Court Justice Charles E. Ramos was tasked with creating an addendum to the New York County Preliminary Conference Order to address, *inter alia*, guidelines governing keyword searches in Commercial Division cases. The pertinent portions of the same provides:

Key Words. Keywords shall consist of words or Boolean phrases with proximity believed to be reasonably likely to return a reasonable volume of relevant documents. A key word shall not include a word that is not substantively related to the dispute (such as "and"). Key words shall not include the names of a product, a party, or a current or former employee or executive of a party, but may include these words in combination with other key words. A Boolean combination of key words shall count as a single key word. Key words may include a reasonable use of wild cards and root extenders.

Key Word Search Limits. The parties agree that each party's Request for Key Word Searches shall be limited as specified below.

Disputes up to $400,000: No Requests for Key Word Searches allowed.

Disputes up to $1,000,000: Requests for Key Word Searches may be sent in the form of an e-document request as follows: identifying no more than four custodians of information; for a period of time no more than six months, which may include multiple periods of time aggregating to no more than six months; and involving not more than six key words likely to lead to the discovery of information both relevant and material to the underlying dispute.

Disputes up to $10,000,000: Requests for Key Word Searches may be sent in the form of an e-document request as follows: identifying no more than eight custodians of information; for a period of time no more than one year, which may include multiple periods of time aggregating to no more than one year; and involving not more than 18 key words likely to lead to the discovery of information both relevant and material to the underlying dispute.

In providing that a key word search protocol "must be reasonably likely to return a reasonable volume of relevant documents," the onus will fall upon counsel to ascertain, in advance of a Preliminary Conference, the scope of a client's computer system. Ideally, some rudimentary test searches should be performed to ascertain the number of hits generated on a few anticipated search terms. This information will be invaluable in guiding counsel concerning the relevant custodians, the period of time covered by the searches and the number of searches to be performed.

Although the New York County Commercial Division Addendum is not a mandatory directive for cases pending the Commercial Division, it is an objective, court-sanctioned standard for keyword search parameters; it provides an outstanding starting point for counsel and the court to address the limitations on the number of keyword searches to be performed.

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

[1] *MBIA Ins. Corp. v. Credit Suisse Securities (USA) LLC*, 2014 NY Slip Op 31871(U), Index no. 603751/2009, July 17, 2014 (Sup. Ct. NY County 2014).

New York State Bar Association Annual Meeting Features Election of Officers, Action on Criminal Discovery and Snow

By Scott M. Karson

The 138th annual meeting of the New York State Bar Association (the Association) was held on January 26, 2015 through February 1, 2015 at the New York Hilton Hotel in New York City. Despite the cancellation of Tuesday's programs and activities due to a snowstorm, the event featured meetings of NYSBA sections and committees, as well as continuing legal education programs, award programs and opportunities for social interaction

The highlight of the annual meeting was the meeting of the Association's policy-making body, the 250-member House of Delegates. NYSBA President Elect David P. Miranda of Albany presided in his capacity as Chair of the House.

The first matter taken up by the House was the election of the officers of the Association. The slate of nominees selected by the Nominating Committee and elected by the House included Claire B. Gutekunst of Yonkers as President Elect. Ms. Gutekunst will succeed Mr. Miranda as President Elect when Mr. Miranda succeeds current NYSBA President Glenn Lau-Kee as President of the Association on June 1, 2015. During her term as President Elect, Ms. Gutekunst will preside as Chair of the House.

The other Association officers elected by the House were Sharon Stern Gerstman of Buffalo as Treasurer and Ellen G. Makofsky of Garden City as Secretary, as well as Vice Presidents for each judicial district (including myself as Tenth District Vice President for a third and final one-year term). Elected delegates to the House from the Tenth District were Marc Gann of Mineola, John Gross of Hauppauge and Peter Mancuso of North Bellmore.

Scott M. Karson

The House approved the Report and Recommendations of the Task Force on Criminal Discovery. Among those Task Force recommendations adopted by the House were: disclosure to the defense, according to a multi-stage time frame, of witness information, with special procedures to ensure the safety of witnesses; police reports; evidence favorable to the defense; intended exhibits; disclosure concerning expert witnesses; witnesses' criminal history information; notice of potentially suppressible property; and search warrant information. The report recommends that a defendant's obligation to provide reciprocal disclosure be expanded as well.

Another controversial issue presented to the House was Chief Judge Jonathan Lippman's proposal for a uniform bar examination ("UBE") in New York State. The NYSBA Committee on Legal Education and Admission to the Bar presented a report to the House which identifies three areas of concern with the Chief Judge's proposal: whether the UBE would adequately test knowledge of New York law requisite for practice in the state; whether the UBE would adequately test the professional skills required for practice; and whether the UBE would worsen the disparate impact of the bar examination. These concerns will be pointed out by NYSBA leadership in testimony to be given at public hearings being conducted by the Task Force appointed by the Chief Judge to study the UBE.

On the issue of mandatory pro bono reporting, President Lau-Kee reported that the Office of Court Administration is drafting the rules to be implemented in accordance with the agreement reached between the NYSBA and the Chief Judge. These rules will provide for anonymous and aggregate reporting of pro bono hours and contributions.

The annual meeting also featured recognition of distinguished members of the Association. Among them: Professor Michael Hutter of Albany Law School delivered a moving tribute to the late Professor David D. Siegel; the Commercial and Federal Litigation Section presented its Stanley H. Fuld Award to Chief Administrative Judge A. Gail Prudenti; the Judicial Section presented its Distinguished Jurist Award to former Justice Betty Weinberg Ellerin; and President Lau-Kee presented the Gold Medal, the Association's highest award, to Judge Juanita Bing Newton, the Dean of the New York State Judicial Institute.

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

TAX

Working with the Medicare Surtax on Net Investment Income – What Have We Seen?

By Alan E. Weiner

Note: A version of this article appeared in the December 2014 issue of The Nassau Lawyer.

Whether you have incurred (or will incur) this tax on your personal income tax return, or are advising a client on a financial, tax, business sale, or estate/trust transaction, be forewarned that the 3.8 percent federal tax on net investment income is lurking in the background and is a work in progress.

For a primer on this still relatively new tax, see *The Nassau Lawyer*, December 2013.[1]

The Internal Revenue Service (IRS) published proposed regulations in November 2012 and finalized some of those regulations in November 2013 and it also issued additional proposed regulations in November 2013 on undecided issues.[2]

The 2012 and 2013 proposed regulations are "reliance" regulations. Normally, proposed regulations have no standing in the tax world; however, because the IRS stated that the aforementioned proposed regulations can be relied on, you have the comfort of knowing that any action that you take in accordance with the proposed regulations, or final regulations (even if contradictory to the proposed regulations), will be accepted by the IRS.

Also of assistance to the non-tax specialist are published IRS frequently asked (and answered) questions available on the IRS website.[3]

Alan E. Weiner

Individuals (Including Flow-through Entities, i.e., Partnerships, LLCs, and S Corporations)

Net Operating Losses ("NOL")

A major change between the regulations proposed in November 2012 and the final regulations issued in November 2013 has to do with net operating losses. This won't affect many taxpayers but it is important to those with NOLs.

The proposed regulations held that net operating losses, no matter when incurred, could not reduce net investment income (NII) because it would be "too difficult" to handle the calculation. After receiving many comments, the IRS thought better of its original view and the final regulations allow the use of an allocated portion of the NOLs, that arose in and after 2013, to reduce investment income. The calculation won't be easy, but a good starting point can be found in the instructions[4] (pages 10-11) for Form 8960, Net Investment Income Tax-Individuals, Estates, and Trusts[5].

State and local income taxes

Here's an annoying issue having to do with state and local income taxes attributable to net investment income. Major tax preparation services and major accounting firms hold different opinions. It has to do with the payment of state/local taxes attributable to 2012 paid in 2013 (e.g., the fourth quarter 2012 installment and/or the 2012 balance due paid by April 15, 2013).

The final regulations state that the starting point for the deduction attributable to the net investment income (NIIT) is the amount described in Internal Revenue Code (IRC) § 164 (a) (3). That includes state and local income taxes. Some practitioners and CCH's ProFx have taken the position that since the NIIT did not exist in 2012, state/local taxes attributable to that year cannot be considered in the NIIT calculation. Thomson Reuters' GoSystem has not made that distinction. GoSystem relies on the deduction entered on Schedule A (Itemized Deductions) of Form 1040, i.e., the cash basis deduction, and does not distinguish as to what year the tax is being paid for.

The following is from the 2013 Instructions for Form 8960 at page 14.

"The … items that may be allocated between net investment income and excluded income are: State, local, and foreign income taxes deducted on Schedule A (Form 1040), line 5 (or Form 1041, line 11),…"

The language in the 2014 Instructions for Form 8960 (FN5) reads as follows:

"To the extent that you have a properly allocable deduction that is allocable to both net investment income and excluded income, you may use any reasonable method to determine that portion of the deduction that is properly allocable to net investment income." This includes "State, local, and foreign income taxes if properly deducted on your return when calculating your US regular income tax." (page 12)

Some writers, and practitioners, have dismissed the issue as a one-off applying only to the 2013 tax year but that may not be correct. Consider the possible effect in future years where, e.g., there are tax litigation costs; fiduciary accounting costs; and other allowable deductions applicable to (spanning) years before 2013 and after 2012.

Since there is nothing contrary in the regulations, and since the IRS had the opportunity to alter its definition before finalizing the regulations, the author believes that GoSystem is correct.

(Continued on page 22)

TRUSTS AND ESTATES UPDATE

By Ilene Sherwyn Cooper

Removal of a Fiduciary

Before the Appellate Division, Second Department in *In re Mercer,* was an appeal from an Order of the Surrogate's Court, Suffolk County (Czygier, J.), which denied that branch of an application by the objectants in a contested probate and accounting proceeding to immediately suspend the petitioners' letters testamentary and letters of trusteeship. Specifically, the Surrogate denied the motion pending the conclusion of the trial in the accounting proceeding, but continued a temporary restraining order against one of the fiduciaries which barred her from making any disbursements from the estate or testamentary trusts.

In affirming the Surrogate's decision, the Appellate Division found, contrary to the appellants' contentions, that the allegations of the parties were sharply in dispute, and gave rise to conflicting inferences regarding the fiduciaries' alleged misconduct. Furthermore, the court noted that the claims asserted against the fiduciaries largely addressed issues raised by the objections in the contested accounting proceeding, and that the Surrogate's continuance of the temporary restraining order was sufficient to protect the rights of the parties. ***In re Mercer,* 119 A.D.3d 990 (2d Dep't 2014).**

Construction of Will — Intestate Distribution

In *In re Ruee, Cantin,* the Surrogate's Court, New York County (Mella, S.), the parties, in an otherwise uncontested probate proceeding, requested a determination as to the disposition of the decedent's residuary estate.

Ilene S. Cooper

The record revealed that on January 1, 1947, the decedent gave birth to a son who was adopted by strangers several weeks later in a private adoption proceeding. She had no other children. Prior to the decedent's death, her adopted son sought out and found the decedent, and he and his two children developed a close relationship with her until her demise on March 5, 2013.

The decedent died with an estate of approximately $600,000, and in her will acknowledged that she had one son. A niece and nephew also survived the decedent. Pursuant to the terms of her will, the decedent directed that her entire residuary estate be held in trust for the benefit of her mother. The decedent further directed that upon her mother's death her grandchildren (children of her adopted-out son), and her niece each be given $20,000, and the balance of the trust estate be paid over to her aunt. The decedent's mother and her aunt predeceased her.

As a consequence of the foregoing, the decedent's niece argued that the residuary estate lapsed, and passed to her pursuant to the laws of intestacy. The decedent's son and grandchildren agreed that the residuary estate lapsed but maintained instead that it passed either to her son or her grandchildren, or alternatively, that it should be divided between her niece and grandchildren.

The court first addressed the issue of whether there was a complete or partial lapse of the residuary estate. Upon reviewing the terms of the instrument, the court observed that the fact that the decedent's mother predeceased her, did not cause the residuary estate to fail entirely. Rather, the court found that when the beneficiary of a life estate does not survive the decedent, the remainder interest is not destroyed but accelerates. Therefore, the court held, under the circumstances, that the pecuniary interests of the decedent's niece and grandchildren did not lapse and were effective dispositions of a part of the decedent's residuary estate following the death of her mother.

On the other hand, the court concluded that since the decedent did not make an alternative disposition of the balance of her estate in the event her aunt predeceased her, that portion of the residue lapsed. Noting that there is a presumption against intestacy, particularly where a decedent took the requisite steps to execute a will, the court stated that it would be inclined to hold that the ineffective residuary be saved by directing a distribution, ratably, to the remaining residuary beneficiaries. However, the court found this result inoperative since the only beneficiaries of the residue, the decedent's niece and grandchildren, were pecuniary legatees, and not residuary heirs.

Accordingly, the court held that the remainder of the decedent's estate lapsed and passed to her intestate distributees. In assessing whether the decedent's son and grandchildren were included within that class, the court referred to the provisions of Domestic Relations Law (DRL) §117(2)(a) and noted that adopted children are to be considered strangers to their biological relatives unless the instrument evinces a contrary intention by naming the child specifically or defining the class so as to include adopted -out children. Further, the court observed that DRL §117 (1)(b) clearly states that where a decedent's estate or a portion thereof passes by intestacy, an adopted out child has no right to inherit as a distributee of his or her biological parent. Therefore, the court held that neither the decedent's adopted-out son, nor his

(Continued on page 30)

Black History Month Celebrated at the Courts

By Sarah Jane LaCova

Suffolk County's Administrative Judge, the Honorable C. Randall Hinrichs, the Amistad Long Island Black Bar Association and the Suffolk County Bar Association celebrated "A Century of Black Life, History and Culture," this year's theme, which is commemorated throughout the US with great pride.

This year the court established an award in the name of a well known and beloved jurist, the Honorable Marquette L. Floyd, who served many years with distinction on the District and Supreme Court Bench. Congratulations to J. Stewart Moore, the first recipient of this special award which highlights his accomplishments as an attorney and one of the founders of the Amistad Black Bar Association. A special presentation in memory of a beloved court employee Antoinette "Toni" Foster was particularly poignant. The Venettes Cultural Workshop dance troupe performed two group numbers; these students ranging in age from 11-18 years were exceptionally talented and have received numerous awards and recognition for their performances. We also would like to recognize Andrea Amoa who recited a beautiful poem by Maya Angelou.

It was a wonderful program in celebration of the recognition of not only black history month, but how we, Suffolk County, come together as individuals in the legal community, to share common goals, to strive for justice and to recognize and celebrate the many achievements of African Americans.

PRO BONO

Attorney of the Month Louis L. Sternberg

By Ellen Krakow

The Suffolk Pro Bono Project (the Project) is pleased to honor Louis L. Sternberg as Pro Bono Attorney of the Month for March. His selection as the latest Attorney of the Month is particularly noteworthy because Mr. Sternberg has been in private practice for less than four years. In this relatively short amount of time, and while busy establishing his matrimonial and family law practice, Mr. Sternberg devoted over 130 pro bono hours to successfully representing the Project's clients in contested divorce matters. For this reason, we are extremely pleased to recognize Mr. Sternberg for his outstanding pro bono service.

Louis Sternberg is a graduate of Touro Law Center, which he attended from 2006 to 2009 after obtaining his undergraduate degree from the University of Buffalo. While a student at Touro, he participated in the Family Law Clinic as an intern and then a student attorney. It was through the clinic that Mr. Sternberg had his first experience representing clients in Suffolk County Family Court. Upon graduating in 2010, he was hired by Touro as a staff attorney in the Family Law Clinic. A year later, Mr. Sternberg left Touro to start a solo practice in Huntington. His practice centers primarily on divorce and family court issues. In addition, he represents clients in routine criminal matters.

Mr. Sternberg's experience with the Project exemplifies how mutually beneficial pro bono service can be for both the attorney (especially those in the early stages of their careers), and the clients they represent. When Mr. Sternberg first started his solo practice, his work was primarily limited to Family Court matters. Wishing to expand his practice, he contacted the Pro Bono Project, hoping to work with clients in uncontested divorces. As he lacked prior experience with contested divorces, a mentor was made available to him through the Project.

Mr. Sternberg describes his pro bono work as providing "great learning tools *and* great networking tools." He explained, "The pro bono cases gave me the opportunity to experience many different phases of a contested divorce case." He equally values the contacts that his pro bono cases helped him to develop within the matrimonial bar. "In each case, I was introduced to judges and divorce attorneys I'd hadn't yet met. These were great opportunities for me as an attorney just starting out on my own."

Mr. Sternberg continues to accept client referrals from the Project as well as pro bono work from other sources. He also serves on the Suffolk County Bar Association's Modest Means Panel, where he provides reduced-fee legal services in divorce and Family Court matters, and on the 18-B panels in Supreme Court and Family Court. On June 12, 2015, Mr. Sternberg will be sharing his knowledge and experience as one of several lecturers at the "Matrimonial Boot Camp," a full day CLE program offered by the SCBA's Suffolk Academy of Law for attorneys new to matrimonial practice.

On a more personal note, Mr. Sternberg is engaged and will marry his fiancé, Janna, in October. (Congratulations, Lou and Janna!)

The Pro Bono Project is grateful for the services Louis Sternberg has generously extended to our clients. It is, therefore, with great pleasure that we honor him as Pro Bono Attorney of the Month.

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

Louis L. Sternberg

The Suffolk Pro Bono Project is a joint effort of Nassau Suffolk Law Services, the Suffolk County Bar Association and the Suffolk County Pro Bono Foundation, who, for many years, have joined resources toward the goal of providing free legal assistance to Suffolk County residents who are dealing with economic hardship. Nassau Suffolk Law Services is a non profit civil legal services agency providing free legal assistance to Long Islanders, primarily in the areas of benefits advocacy, homelessness prevention (foreclosure and eviction defense), access to health care, and services to special populations such as domestic violence victims, disabled, and adult home 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.

TOURO

Industrial Design: the Inadequacy of Legal Protection

By Rena C. Seplowitz

Note: This is part one of a two-part series.

Industrial design continues to receive little support under intellectual property law in the United States, unlike in Europe. Conferring protection on industrial design would incentivize manufacturers to invest in the creation of useful objects, which incorporate artistic features and appear aesthetically pleasing. As a perusal of magazines and weekly newspaper supplements demonstrates, consumer interest in attractive, yet utilitarian articles – the interface of the iPhone is one of the best known examples – has burgeoned. Protection for industrial design would also decrease the risk of diminution of the market share of innovative manufacturers to competitors' copying and underselling their products. Justifications for retaining the status quo have generally focused on concerns that protection would bar competitors from entry into the market for goods, which do not merit patent, trademark or copyright protection and ultimately harm consumers in their choice of products and the prices they pay. Opponents of protection have voiced this objection, particularly in the fashion industry in which legitimate knock-offs enable consumers to acquire clothing resembling high-end designs at affordable prices. To date, their position has prevailed despite the introduction of bills in Congress to protect fashion designs for a limited period of time. However, the lack of protection for industrial design is not unique to the fashion industry but has impacted such other areas as lighting fixtures, furniture, bicycle racks, mannequins and even hookah water containers. Although some designs have received intellectual property protection, they represent a minority and, due to the strictures of current law, arguably are not consistently those designs, which enhance the aesthetic appeal of the utilitarian articles.

Rena C. Seplowitz

Part I of this article discusses the values of industrial design and the deficiencies in current law with respect to its protection. In a subsequent issue, Part II will propose the enactment of *sui generis* design legislation to protect both the aesthetic and utilitarian features of industrial design for a limited period of time.

Trademark, patent and copyright laws do not focus on the values or features inherent in useful but aesthetically appealing objects. Focusing on distinctive marks, logos and trade dress to prevent the likelihood of consumer confusion as to source, trademark law is ill equipped to provide meaningful protection to industrial design. First, functional features, essential parts of industrial design, are not eligible for trademark protection. Second, any nonfunctional aesthetic elements generally constitute trade dress and require secondary meaning (*Wal-Mart Stores, Inc. v. Samara Brothers, Inc.*, 529 U.S. 205 (2000)).

Because secondary meaning or acquired distinctiveness is derived from use, this requirement disadvantages creators of industrial design who must inject their products into the market and risk copying while they build brand recognition. Design patents protect "any new, original and ornamental design for an article of manufacture" as opposed to functional features protected by utility patents (35 U.S.C. § 171). The rigorous requirements, expense and time associated with the acquisition of a design patent and its exclusion of utilitarian elements renders patent law an unsatisfactory vehicle for protection of industrial design.

The artistic aspects of industrial design would appear to make copyright law a more appropriate choice for protection. Indeed, the subject matter of copyright encompasses "pictorial, graphic, and sculptural works" (17 U.S.C. § 102 (a) (5)), which include "works of applied art …" (§ 101). However, the definition of such works in section 101 clearly indicates that "the design of a useful article," which is otherwise ineligible for copyright protection, "shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article." This definition, inspired by the Supreme Court's decision in *Mazer v. Stein*, which upheld the copyright in a statuette of dancers used as lamp base, has given rise to the physical and conceptual separability tests (347 U.S. 201 (1954). Generating a myriad of tests, some of questionable predictive value, the conceptual separability doctrine is often viewed as an unworkable mechanism for the protection of industrial design (*See, e.g., Masquerade Novelty, Inc. v. Unique Indus., Inc*., 912 F.2d 663, 670 (3d Cir. 1990) ("Courts have twisted themselves into knots to create a test to effectively ascertain whether the artistic aspects of a useful article can be identified separately from and exist independently of the article's utilitarian function.").

Although the different tests for conceptual separability do not require the artistic elements to exist physically apart from the functional aspects of the work, an examination of the cases indicates that courts are more likely to protect representational rather than abstract art. Two cases dealing with furniture illustrate this dichotomy. In *Universal*

(Continued on page 24)

ADR

Avoiding and Resolving Conflict within Non-Profit Organizations

By Lisa Renee Pomerantz

People volunteer for non-profit boards and organizations for a variety of personal, political, philanthropic and professional reasons. In turn, non-profit organizations often rely on volunteers to carry out their activities. Although it is well understood that employees owe a duty of loyalty to their employers, there is a common but fallacious assumption that volunteers cannot or should not be held accountable. As a result, these organizations often suffer or experience conflict when volunteers fail to carry out their responsibilities or pursue their own interests rather than established goals or policies of the organization.

As explained in "Right From the Start," a guide for non-profit directors published by the Charities Bureau of the New York Attorney General's office:

Employees and volunteers should be aware of the organization's internal controls that impact their area of responsibility. At the time of adoption or revisions of internal controls, all directors, officers, employees and volunteers should be made aware of the organization's internal controls, given a copy of the policy and procedures manual, and trained to understand what is expected of them in carrying out their duties and in advising the organization's management and\or the board of directors of violations of the policy. New employees and volunteers should be trained before they assume their responsibilities.

Lisa Pomerantz

To carry out this directive, I recommend that non-profit organizations actually require volunteers to sign a participation agreement acknowledging their responsibilities and confirming their terms of service. The key elements of such an agreement include:

- Acknowledgment that the volunteer's participation is at-will and may be terminated at any time by either party.
- The expectation is that the volunteer will behave in a professional manner and consistently with organization policies and procedures.
- It should clarify that the volunteer must act in the best interests of the organization and not for personal benefit or the benefit of any third party.
- There should be protection of the confidential information of the organization against unwarranted disclosure.
- And requirements that conflicts of interest or violations of organizational policy be reported.
- Also assignment to the organization of any work product created by the volunteer on the organization's behalf as well as permission to use the person's name or likeness in organizational publicity materials.

When conflicts do arise, especially within the board, or between the board and staff, it can be very helpful to have a retreat, managed by a neutral facilitator. That person can review applicable corporate governance considerations, and facilitate a discussion about what course of action is in the best interest of the organization. Such a discussion can help ensure that board members, staff and volunteers are all focusing on the organization's concerns rather than their own.

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

FORECLOSURE

Plaintiff's Evidentiary Pitfalls on Motions for Summary Judgment in Securitized Foreclosures

By Charles Wallshein

In the last year, the Second Department decided a string of cases clarifying the evidentiary standard on summary judgment motions when the defendant affirmatively raised the issue of standing in a mortgage foreclosure action.[1] When the answer raises standing as an affirmative defense, the plaintiff must establish its standing by proof of the assignment of the debt by written assignment or by physical delivery of the note. This is accomplished by a supporting affidavit that annexes the plaintiff's business records and contains a proper foundation for those records to be in admissible form; otherwise the supporting affidavit is inadmissible hearsay.

Proof of the written assignment of debt may be found in the language of the mortgage assignment that states "this mortgage together with the indebtedness thereon" or "together with the note." In *Citibank NA v. Herman* the Appellate Division held that the Hermans established, prima facie, that MERS was never the holder of the note and was without authority to assign the note to the plaintiff. In opposition, the plaintiff failed to raise a triable issue of fact. While the plaintiff submitted, among other things, a copy of the note in opposition to the Hermans' motion, the plaintiff failed to establish delivery of the note to MERS prior to the execution of the assignment (cf. *Midland Mtge. Co.* v Imtiaz, 110 AD3d 773, 776). Moreover, the plaintiff failed to raise a triable issue fact as to whether it was the holder of the note at the time the action was commenced (cf. *US Bank N.A. v Faruque*, 120 AD3d 575, 577; *Homecomings Fin., LLC v Guldi,* 108 AD3d 506). In reversing the trial court, the Appellate Division determined that Citimortgage did not have standing and dismissed the complaint. The court determined that the plaintiff allegedly obtained its right to foreclose by way of an assignment of the mortgage and note from Mortgage Electronic Registration Systems, Inc., acting as nominee for the original lender. The court determined, prima facie, that MERS was never the holder of the note and was without authority to assign the note to the plaintiff.

The fact that MERS had never had physical possession of a mortgage note is established in numerous depositions of MERS officers and as plain language in the *MERS Procedures Manual*. Page 63 of the *MERS Procedures Manual* clearly states, "MERS cannot transfer beneficial rights to the debt." One should not rely on a MERS assignment of mortgage instrument to assign any interest in the debt.[2]

In the absence of a written assignment of the debt plaintiff must prove physical delivery of the note to satisfy the plaintiff's prima facie burden. Pursuant to CPLR §3212(b), on a motion for summary judgment, the moving party must present evidence in admissible form by a person with personal knowledge to establish the basis for its relief. In foreclosure cases, this requires authentication of the debt, existence of the lien, proof of default and demand, the note, the mortgage, and the notices respectively.

In cases where standing is in issue, the plaintiff must prove that it could rightfully enforce the debt when it filed the action. This requires the plaintiff to submit an affidavit by a person with personal knowledge of delivery of the note. More than likely, plaintiff will not or cannot produce an eyewitness to the physical delivery but instead will submit an affidavit from a person who relies on business records to establish the note's delivery prior to the commencement of the action and possession at the time of the commencement of the action.

Plaintiff may introduce business records to prove the matter asserted, pursuant to the business record exception to the hearsay rule under CPLR §4518. The affiant must (1) lay a foundation to introduce the business records that indicate proof of physical delivery, (2) testify that the particular business record was systematically kept in the ordinary course of business, and (3) testify that the affiant has personal knowledge of the record keeping procedures by which the documents were created and maintained by the particular entity. The third prong is most difficult since the majority of foreclosure actions have been assigned multiple times and the physical "collateral" files are transferred among various servicing agents and their respective document custodians.

Prior to the advent of securitization and the routine pooling of debt into securitized debt obligations, a note was "held" by the obligee-payee or by its agent-depository. The depository acted as a trustee or as a custodian. The custodian did not own the debt but the custodian had the debt instrument in its physical possession. With the advent of mortgage-backed securities, the definitions of the entity that is the "custodian," or the "loan servicer" or the "investor-owner" have blurred. It is typical that one entity has physical possession of a note, while another entity receives payments and yet another receives the "beneficial" income

(Continued on page 21

CONSUMER BANKRUPTCY

What Has the U.S. Trustee Been Up To?

By Craig D. Robins

Last summer, Clifford J. White, who is the Director of the Executive Office for United States Trustees (EOUST), addressed the National Association of Chapter 13 Trustees during their annual convention in Chicago. He provided some interesting bits of information that I would like to share.

First some background: The Office of the United States Trustee is a component of the Department of Justice and it is responsible for overseeing the administration of all bankruptcy cases in this country.

By seeking to promote the efficiency and protect the integrity of our bankruptcy system, the U.S. Trustee Program is essentially a watchdog over the bankruptcy process. It does this by monitoring the conduct of all parties to bankruptcy proceedings to ensure compliance with bankruptcy laws and procedures. It also investigates bankruptcy fraud and abuse.

We consumer bankruptcy practitioners typically interact with the local Assistant U.S. Trustee from time to time, usually when they contact counsel to investigate whether a case is an abusive filing, or through Chapter 11 proceedings where they maintain a prominent role in reviewing all activities in a reorganization case.

Craig D. Robins

Mr. White stated that in 2013, the U.S. Trustee Program brought 44,000 formal and informal civil enforcement actions. More than half of them were related to combating debtor fraud and abuse in Chapter 7 and 13 cases. Mr. White noted that case trustees are sometimes frustrated by the task of sorting through schedules and statements of financial affairs that are inaccurate or incomplete.

He suggested that debtors' counsel prior to filing could have fixed many of these problems. The EOUST conducts random and targeted audits and he observed that the audits showed that one-quarter of all consumer cases contain material misstatements. That's a pretty high number.

The U.S. Trustee Program seeks to review the means test filed in every single case, to ascertain if the case is abusive pursuant to Bankruptcy Code section 707(b)(2). He expressed his frustration for the program as the review is often impeded by a lack of information from the debtor.

In any event, he said that of all of the Chapter 7 cases that the U.S. Trustee deemed to be abusive, his office declined to bring motions to dismiss in about two-thirds of them because they found special circumstances, such as a recent job loss or medical catastrophe, which justified an adjustment to the currently monthly income calculation.

The impact to us is that just because a debtor lost a job, it does not necessarily mean that we must wait up to six months to file so as to let the debtor's prior income drop out of the means test. However, as Mr. White pointed out, counsel must be prepared to expeditiously provide the necessary information to the office of the local U.S. Trustee.

Mr. White also commented on the flip side of the coin, being consumer bankruptcy practitioners, who have been complaining that Chapter 7 trustees routinely ask for too much information. He noted that his office does assess trustee performance and efficiency in seeking and reviewing documents from debtors as part of that evaluation.

He then referred to a Best Practices Guide that the EOUST issued in 2012, which was a joint collaboration of his office, the NACTT, the Chapter 7 National Association of Bankruptcy Trustees, and the National Association of Consumer Bankruptcy Attorneys. He said it might be useful to convene these groups again. The guide was designed to help reduce unnecessary paperwork and to sensitize debtors' counsel to the need for prompt responses to trustees, but he felt that practitioners may not be following it as closely as his office had hoped.

The EOUST reviews more than just debtors, their attorneys and trustees. Mr. White also discussed the increasing problem of mortgage servicer violations that harm homeowners in bankruptcy. He said that the U.S. Trustee Program has been at the forefront of the government's efforts.

The U.S. Trustee Program brought thousands of actions over the past five years to address servicer abuse, Mr. White noted. He felt that there are fewer horror stories about distressed homeowners being mistreated by their

(Continued on page 20)

Death and Dying – Film at Eleven (Continued from page 1)

Mark Chanko, then 83, was rushed to New York Presbyterian after being hit by a truck while crossing a Manhattan street late one night in April 2011. Dr. Sebastian Schubl (known on "NY Med" as "Dr. McDreamy") was the supervising treating physician. When Mr. Chanko's adult children, his daughter-in-law, and his wife, Anita, arrived at the hospital, they were ushered into a separate room to wait for news about Mr. Chanko. Unable to save Mr. Chanko, Dr. Schubl delivered the sad news to the family. The grief-stricken family left the hospital unaware that Mr. Chanko's demise in the operating room and the family's reaction to the news of his death had been captured on film.

Over a year later, in August 2012, Anita Chanko viewed "NY Med" and saw the episode in which her husband dies. Although his face is blurred and he is not otherwise identified, Mrs. Chanko recognized his voice and body image and heard her husband asking Dr. Schubl, "Did you speak to my wife?" These same words are flashed on the screen in big letters.

Mrs. Chanko describing the episode said, "… my husband is heard moaning. Bloody sheets are waived in front of the camera. My husband's blood is being displayed to me. Dr. Schubl then discusses with an unseen cast member cutting off a leg, narrates my husband's deterioration and asks, "Anybody have a problem with calling it?" " She concludes with, "My husband has died before my eyes." *Chanko v American Broadcasting Companies, Inc., et al., 122 A.D.3d 487, 997 N.Y.S.2d 44 (Anita Chanko aff.)*

The Chanko family sued the network (American Broadcasting Companies, Inc. "ABC"), the hospital, and the treating doctors, with Mrs. Chanko as plaintiff individually and on behalf of Mr. Chanko's estate. Among the claims were violations of sections 50 and 51 of the New York Civil Rights Law, the right to privacy statute.

Regarding the right to privacy claims, defendant ABC moved to dismiss the complaint for failure to state a cause of action, arguing that (i) New York's right to privacy statute does not apply to news programs, and (ii) any claim that Mr. Chanko may have had died with him. In its decision dated November 18, 2014, the Appellate Division, First Dept., agreed. *Chanko, supra.*

"NY Med" is an ABC News documentary program and is described as real-life show that "… sheds light on the inner workings of hospital life by educating viewers about how different medical conditions are treated, how doctors make decisions about medical options, and other features of a workplace that routinely confronts life-and-death situations. … there are successes and there are failures." *Chanko, supra (ABC Brief, pp. 1, 2)* It should be noted that upon the Chanko family's complaint to ABC after the initial broadcast, ABC responded with deference to the family by releasing a second version of the episode without the offending segment. The initial broadcast version is no longer available to the public. *Chanko, supra (ABC Brief, p. 4)*

In New York, meaningful discussion of the "right to privacy" begins in the early 1900s with *Roberson v. Rochester Folding Box Co., 171 NY 538, 64 NE 442*. Abigail Roberson, then a teenager in Rochester, NY, complained that the Franklin Mills Company printed about 25,000 posters using her photographic portrait (head and shoulders in profile) along with the words, "Flour of the Family" above "Franklin Mills Flour" below, framing her image. The posters were circulated among warehouses, stores, saloons, and other public places for display, including some in Rochester where Abigail's friends and acquaintances recognized her image. With her good name tarnished by these advertisements, Abigail suffered great humiliation, distress, and nervous shock requiring treatment by a physician. She sought $15,000 in damages and an order enjoining the Franklin Mills Company from further use of her image.

The lower courts finding for Ms. Roberson noted that if her beauty is of such value as a "trademark or an advertising medium, … it is a *property right* which belongs to her." *Roberson v. Rochester Folding Box Co., et al., 32 Misc. 344 (Sup. Ct., Monroe County, 1900); 64 A.D. 30 (4th Dept., 1901).*

This newfound *property right* was promptly extinguished on appeal. The New York Court of Appeals, by a 4-3 vote, determined that such a property right had no foundation in the law and would not only result in widespread litigation, but "litigation bordering on the absurd." It posited that once established as legal doctrine, the "right to privacy" would not be confined to restrain the publication of likeness, but would include the "publication of a word picture, a comment upon one's looks, conduct, domestic relations or habits." The right to free speech and public discourse would surely be threatened. While the Court of Appeals in *Roberson* would find no remedy for Abigail, it suggested that the legislature might provide distinctions for nonconsensual use of one's image for advertising purposes.

The New York Legislature responded by enacting a privacy statute making it the first state to establish a right to control the use of one's name and image, albeit a very limited right and one reserved only for the living. Civil Rights Law Sec. 50 makes it a misdemeanor to use a *living* person's "name, portrait, or picture" for advertising or trade purposes without having first obtained written consent of the person. CRL Sec. 51. provides the teeth for a civil action allowing the aggrieved victim to maintain an equitable action to prevent and restrain unlawful use of her image and sue and recover damages for any injuries sustained. The language of CLR Sec. 50 remains unchanged from its 1909 version. CRL Sec. 51 was amended in 1995 to include the use of a person's "voice" in certain circumstances.

Soon after *Roberson* and the enactment of the statue, the doctrine of the newsworthy exception evolved: if the use of a person's name, portrait or picture has a *real relationship* with the context of the newsworthy item — and is not *used for trade purposes* or *an advertisement in disguise*, then there is no violation of the statute. The *real relationship* requirement is notoriously broad, and even though the medium (e.g., magazine, television program, documentary) contains advertising or has the attendant purpose of increasing audience or revenue, such use will not be deemed to be *for trade purposes*, and therefore not actionable. (*Messenger v. Gruner + Jahr Printing & Pub*., *94 NY2d 436, 727 NE2d 549 [2000]*) The "newsworthy" exception has been expanded over time to include matters of public interest, all types of factual, educational and historical data, or even entertainment and amusement, concerning interesting phases of human activity in general. (See *Lemerond v Twentieth Century Fox Film Corp*., *No. 07 Civ. 4635, 2008 WL 918579, (SDNY Mar. 31, 2008*) While all this may leave us with the uneasy feeling that the notion of privacy and the right to be left alone is just about non-existent, when we consider the role of social media in our lives and how we, as publishers of a sort, consistently expose ourselves and others (without their consent) to the world at large, the *Roberson* court's concern for free and unhampered public discourse has merit. Yet, there is something about death and dying that feels sacred, and we are disturbed that Mr. Chanko's last moments were filmed without his or his family's knowledge and then broadcast on national television.

While there is no relief for the family members under New York Civil Rights Law, and there would likely have been none for Mr. Chanko, had he survived, Mrs. Chanko remains undeterred and an appeal is planned. "If there's no applicable law, there most certainly should be," she told the *New York Times*. " I'm willing to just pursue it all the way. Why shouldn't there be a law against this kind of thing?"

As it happens, the New York Assembly is taking a look at modifying CLR Sec. 51 to include a private right of action in the instance of unlawful surveillance and has introduced a bill to "allow victims of unlawful surveillance … a civil cause of action to seek injunctive relief and damages when their privacy is violated." (*2015 New York Assembly Bill No. 3576*) While the purpose of the bill seems to be geared toward surveillance of a sexual nature, the publicity of the Chanko case may help shape its ultimate form.

In the meantime, you might want to consider adding a "do not film" clause to your healthcare directives, as dying in the ER in New York is not the private matter many of us may have assumed. It will not likely change the result vis a vis your right to privacy in New York, but at least you will have gone on record with your wishes.

Note: Rosemarie Tully and Diane Krausz both practice entertainment law. Rosemarie Tully may be reached at (631) 234-2376. Diane Krausz may be reached at (212) 244-5292.

[1]Orenstein, Charles, "Dying In The E. R., And On TV Without His Family's Consent," New York Times, 01/02/15, Metropolitan Section, P.1.

Consumer Bankruptcy (Continued from page 19)

lenders, but he expressed disappointment at the inability or the unwillingness of the mortgage servicing industry to comply with the law.

He cited an ongoing problem involving lenders who fail to inform borrowers and trustees of payment increases, something which I have personally experienced many times in my practice during the past few years. He expressed alarm over one particular bank that admitted that it engaged in robo-signing a mortgage payment change notice filed in bankruptcy court.

Mr. White also provided details about current Chapter 13 trustee compensation. Trustees are paid a commission based on a percentage of their receipts in a case. The average percentage fee was 5.7 percent, which is down from 7.7 percent just four years ago.

In our jurisdiction, even though debtors' attorneys typically propose a commission of 10 percent in a plan, I believe the actual commission our Chapter 13 trustees receive is about eight percent.

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

Evidentiary Pitfalls on Motions for Summary Judgment *(Continued from page 19)*

stream and has the duty to declare the income and pay taxes to the particular taxing authority.

The identity of the custodian, the loan servicing agent and the document custodian is rarely, if ever, disclosed in the complaint. Similarly, the type of securitization the loan is placed into is also rarely revealed. This is especially true in the loans securitized by Government Sponsored Entities (GSEs) FannieMae, FreddieMac, and FHA/GinnieMae. Most private label REMIC RMBS foreclosures are easy to identify. The caption in REMIC foreclosures usually reads as XXX as Trustee for the XXX Trust 2006-4.

The type of RMBS is material to the supporting affidavit in summary judgment. Each type of securitization has its own servicing and document custodial model. Each particular type of GSE servicing and custodial agreement is similar to the next while REMIC agreements vary from one trust to another. The complexity of the securitization model demands a higher scrutiny of the plaintiff's supporting evidence for proper foundation or risk having the supporting testimony excluded as hearsay.

In this respect, plaintiffs' affidavits look something like the following: *"I am Joe Smith, Vice President of Document Control at XYZ Bank. I have reviewed the books and records concerning defendant's loan. The documents I reviewed are systematically kept in the ordinary course of business and I am fully familiar with XYZ Bank's record keeping practices and procedures. As of the date of the commencement of this action, XYZ Bank has been the holder of the note and has had physical possession of the note. I make this statement based upon my own personal knowledge and based upon the review of the documents in our possession."*

In the example, the affidavit only describes possession of the note. Possession alone is not dispositive of the plaintiff's standing. When the entity enforcing the note is not the original payee, there must be written assignment or physical delivery. Uniform Commercial Code Article 3's "bearer paper" argument is inapposite to real estate mortgage foreclosures.[3] Bearer paper only applies to negotiable instruments. Mortgage notes are not negotiable instruments. Even if they were negotiable instruments, a "holder/bearer" takes subject to the standing defense.

In most cases, plaintiff's affiant lays a foundation for documents that are never submitted to the court. Plaintiff's affiant must state that (s)he examined business records systematically kept in the ordinary course of XYZ's business. However, the affiant's examination of records does not prove the matter asserted without annexing the documents. The statement is probative to authenticate the business record and to lay a foundation for the admissibility of the business record, so the document should be annexed as an exhibit to support the statement. The above example is pure hearsay if the witness does not have firsthand knowledge of the physical delivery of the note. The business record is evidence of physical delivery and standing, not the statement. The statement by itself and without the business record is conclusory.

Documentary proof of the note and mortgage without more does not prove its physical delivery to the plaintiff. The note and mortgage are evidence of the debt and the lien but they are not evidence of the physical delivery to the plaintiff. Loan servicing records are not evidence of delivery. Loan servicing records are proof of payments and disbursements on the account. The servicing records are irrelevant to standing. Custodial records are evidence of delivery. Every document custodian maintains detailed records of the time and date of transfer and receipt of documents in the collateral file, especially the note.

Plaintiff must use the affidavit of a person who is qualified to lay the foundation for the admissibility of the documents. Very often loan servicing agents change and as a result, the document custodians change as well. It is also common for the affiant to be characterized as a "document specialist" for the entity that never possessed the physical file, which disqualifies the affiant from having personal knowledge of the document's maintenance and record retention procedures.

The supporting affidavit is subject to attack from facts discovered in the custodial history of the loan file, including that of the note from the date of origination. I strongly suggest serving discovery demands, interrogatories and a notice to admit with the answer. The demands must be specific to the type of RMBS the loan was sold to. It is highly beneficial to know the answers to the questions you ask before you ask. It is also helpful to know exactly what documents you are looking for.

Plaintiff counsel has been and continues to use the defense bar's ignorance of structured finance and residential mortgage backed securities transactions to its benefit for years. Fannie, Freddie, Ginnie and REMIC each require specific demands, interrogatories and notices to admit. Once the defense practitioner understands what plaintiff's burden of proof of delivery should look like, objecting to inadequate responses and compelling complete, accurate and truthful responses becomes relatively easy.

Fannie and Freddie can be researched on their respective websites. Ginnie loans contain an "FHA Case Number" on the face of the mortgage. Fannie, Freddie and Ginnie RMBS guidelines are public information. REMICs can be researched on the Securities and Exchange Commission "EDGAR" website and by a person who has access to Bloomberg or ABSNet databases.

According to the Second Department Articles 31 and 32 of the CPLR and §4518 still apply to foreclosures.

[1] *US Bank v. Weinman,* 2014 NY Slip Op 09119 (2nd Dept, 2014); *U.S. Bank National Association v. Faruque*, 120 A.D.3d 575 (2nd Dept. 2014); *U.S. Bank National Association v. Madero*, (2015 NY Slip Op 1265, 2nd Dept); *Citibank N.A. v. Herman,* (NY Slip Op. 00838, 2nd Dept., 2015).

[2] Reliance on *MERS v. Coakley* (41 A.D.3d 674) to establish that MERS could have transferred the note via the assignment of mortgage would be misplaced. *Coakley* was decided in June 2007. The decision predates the heightened awareness courts now have regarding MERS ability to foreclose in its own name. MERS' role in RMBS transactions was highlighted in *Bank of New York v. Silverberg* in 2011. In *Coakley* the record below indicated that MERS submitted an affidavit stating that it had possession of the note. Defendant did not challenge the assertion. Since 2008 MERS has repeatedly admitted in depositions and in affirmations that it never had or has any beneficial interest in the note, has no authority to transfer the debt and never takes physical possession of the note. If MERS made the assertion that it was the holder of the note today, the MERS affiant would be making a perjurious statement.

[3] UCC §3-306; UCC §3-307; UCC §3-104(b); *P & K Marble v. La Paglia* 147 A.D.2d 804 (3rd Dept, 1989); *Pintard v. Tackington*, 10 Johns 104 (Supreme Court of New York, 1813); *Wright v. Wright,* 9 Sickels 437 (NY Ct.App, 1873).

VEHICLE AND TRAFFIC

Representing Commercial Drivers

By David A. Mansfield

Recent changes in the Vehicle & Traffic Law and the regulations of the Federal Carrier Motor Safety Administration 49 U.S.C §392.80, §392.82 have made it important to for defense counsel to review their representation of commercial drivers for improper cellphone use and use of a portable electronic device offenses committed while operating a commercial motor vehicle.

During an initial interview defense counsel must be able to learn whether the vehicle weighed in excess of 10,000 pounds, which is the Transportation Law §2 (4) definition of a commercial motor vehicle, or if the summons was marked CDL vehicle. And it is also important to start the conversation as to what the client does for a living? What class license does the client hold?

David A. Mansfield

The question of collateral consequences will come up most frequently with improper cell phone use, VTL §1225(c) (2) (a) and use of a portable electronic device, §1225-d.

Changes in the Vehicle & Traffic Law to §1225-c (2a) and §1225-d mandated by federal regulations eliminated an exception for commercial vehicles being stopped in traffic. It is no longer a defense to these offenses while operating a commercial motor vehicle that the operator was stopped at a traffic signal or was momentarily stopped in traffic. The only defense that can be used is that the commercial vehicle was legally parked or the telephone call or communication involved an emergency situation with an emergency response operator, a hospital, physician's office or health clinic, ambulance corps, fire department, district or company or police department.

Please note that police officers, fire department members or the operators of an authorized emergency vehicle are exempt from these provisions of state law.

The convictions for these violations carry five points 15 NYCRR Part§131.3(b) (4) (iii) and fines, which recently increased. These collateral consequences of points and fines while serious, can also result in a suspension of the client's regular driver's license if they have accumulated too many points under §510(3) for persistent violation of Vehicle & Traffic Law and 15 NYCRR Part §131.4 (c) (1), generally defined as having been assessed 11 or more points. The client's commercial driver license can be at risk. A conviction could also impact their ability to obtain and to maintain employment.

More importantly, under Vehicle & Traffic Law §510-a (4) (a), these improper cellphone use and portable electronic device use offenses are classified as a serious traffic violation. Other serious traffic violations commit-

(Continued on page 26)

Working with the Medicare Surtax on Net Investment Income *(Continued from page 16)*

Bernie Madoff (and other pre-2013 Ponzi schemes)

Payments have been made to Madoff investors in 2013 and 2014 and will continue to be made in subsequent years. Post 2012 recoveries for pre-2013 Ponzi schemes should not be subject to the 3.8 percent tax on NIIT because the loss was attributable to a deduction taken before the effective date of IRC § 1411. See the final regulation, Federal Register page 72409 (FN 3), for an example of a post 2012 state income tax refund attributable to a pre-2013 taxable year when IRC § 1411 was not in effect.

This position may seem contradictory to the state/local income tax deduction position above but it's not. With deductible state and local income taxes, you always will have disparities between the year that income was earned and the year in which the state/local taxes are paid. The regulations resolved that by mandating the use of the cash basis as the starting point. In the Madoff position, the logic is that the recovery is for a deduction taken before 2013.

Other issues not mentioned in this article can be found in the American Institute of Certified Public Accountants ("AICPA") June 16, 2014 commentary letter to the IRS.[6]

Passive/nonpassive activities and material participation

Next is where some real confusion lies, especially for estates and trusts that own business interests.

If an estate/trust is a "material participant" in the business, the income derived therefrom is not subject to the 3.8 percent surtax. For a refresher course on passive activities and material participation, see IRS Publication 925, *Passive Activity and At-Risk Rules*.[7] Since the estate/trust is inanimate, whose participation do you look at in determining whether the 500 hour test for material participation has been met?

When the regulations for passive activities were issued in 1988, the IRS did not spend any time on estates and trusts because it wasn't a big issue; however, the Medicare surtax rules under IRC § 1411 are heavily dependent upon the passive activity rules and now it is a big issue. The IRS takes the position in a private letter ruling and Technical Advice Memoranda[8] that you only can count the hours spent by the fiduciary in his/her capacity as a fiduciary irrespective of whether the fiduciary also is an employee or manager in the business.

The Tax Court has taken a different view. In Frank Aragona Trust v. Commissioner, 142 T.C. No. 9, March 27, 2014[9], the court held that the trust was a "real estate professional" based upon the activities of the trustees as both trustees and employees of the limited liability company in which the trust had an interest. The court did not opine as to the activities of non-trustee-employees. The term A "real estate professional" is a term of art in the tax world and the principles involved also come under the same code section and regulations as "material participation."

At this point, practitioners may be able to use the decision as authority for taking a similar position in a similar fact pattern where the fiduciary serves in a dual capacity as both fiduciary and employee/manager of the entity, thereby escaping the 3.8 percent surtax based upon material participation. The IRS did not appeal the decision, nor has it so far issued a non-acquiescence (i.e., a "we don't agree with the decision"), putting taxpayers on notice that it will litigate the issue further. In the meantime, the IRS has listed "material participation by trusts" as a priority project in its 2014-2015 Priority Guidance Plan.

The IRS encourages the receipt of comments and the AICPA has weighed in in its letter of September 22, 2014[10]. The points raised, inter alia, include "Count the combined activities of any trustee or executor who, under local law, has fiduciary duties and responsibilities with respect to the trust or estate, irrespective of the capacity in which the individual is performing those activities and irrespective of whether the individual also owns an interest in the same trade or business".

On January 20, 2015, the American Bar Association also weighed in with a 98-page letter to the IRS commissioner titled "Comments on Material Participation by a Trust or Estate Under Section 469."[11]

Recordkeeping

In the area of 'material participation', keeping contemporaneous records and retaining proof of hours worked is critical. Here's a recordkeeping reminder for all tax matters quoted from page 1 of the Form 8960 instructions (FN 5).

"For the NIIT, certain items of investment income and investment expense receive different treatment than for the regular income tax. Therefore, you need to keep all records and worksheets for the items you need to include on Form 8960. Keep all records for the entire life of the investment to show how you calculated basis. Also, you will need to know what you did in prior years if the investment was part of a carryback or carryforward."

§ 1411 Oddities

David Kirk, formerly of the IRS, was a principal author of the § 1411 regulations. In a presentation in July, 2014, he pointed out the following incongruities in the estates and trusts area. If you or the accountant arrive at an odd conclusion, it may be accurate, or maybe not. Remember, 2013 was the first year for this surtax. It may be years before the issues are litigated and resolved. Here, briefly, are the anomalies.

Normally, if the estate/trust has zero taxable income, it has no tax — but not necessarily with the 3.8 percent surtax. That's because the deductions for regular tax purposes don't dovetail with deductions allowed under the § 1411 regime. For example, real estate taxes are allowed as a deduction in calculating the regular income tax but might not be an allowable deduction when calculating the tax on net investment income because the property was not held for rental or investment.

Both for individuals and estates/trusts, only enumerated expenses in the regulations are allowed. They are investment interest expense, investment advisory and brokerage fees, expenses related to rental and royalty income, tax preparation fees, fiduciary expenses (in the case of an estate or trust), and state and local income taxes to the extent "reasonably" allocated to gross investment income.

Another oddity pointed out by Kirk had to do with a terminating trust and excess deductions passed out to the beneficiaries. Since some of the deductions might not be listed in the regulations as allowable in calculating net investment income, the estate/trust could wind up with NII.

This next point is especially irksome. It has to do with the calculation of the NIIT for a simple trust, i.e., one that is required to annually distribute its fiduciary accounting income. As a result, the only income item remaining in the trust would be a capital gain, if any. Assume that the trust has interest income, tax exempt income, a capital gain and allowable NII deductions. It is possible that the adjusted gross income of the trust will result in a NIIT greater than would have been applicable if only the undistributed capital gain was considered. How can that be when the statute says that the 3.8 percent tax is applied on the *lesser* of

"(A) the undistributed net investment income for such taxable year, or

(B) the excess (if any) of—

(i) the adjusted gross income (as defined in section 67(e)) for such taxable year, …"[12]

Allocating expenses in the trust world

Subject to the rules relating to the allocation of expenses between taxable and tax exempt income, trusts are permitted to allocate expenses to various types of income in any manner chosen by the fiduciary (providing the trust instrument does not direct otherwise). The fiduciary, however, cannot allocate the same expense one way for regular tax purposes and a different way for NII purposes.

Capital Gains

Normally fiduciaries cannot distribute capital gains to beneficiaries unless the governing instrument, or local law, provides otherwise. Therefore, capital gains will get trapped at the estate/trust level and, because of the low threshold for being subject to the 3.8% net investment income tax (taxable income of $12,150 for 2014 and $12,300 for 2015), almost always will be subject to the 3.8 percent surtax. However, in the world of "total return," "power to adjust," and "unitrust," capital gain distributions to beneficiaries may be possible. Whether it is allowable or wise to do so requires thoughtful consideration.

Conclusion

Every article should have a conclusion but this one doesn't because there are too many unknowns and much work to be done by the IRS, perhaps Congress, and eventually the courts. It's okay if you didn't understand the issues brought out in this article. The key words herein will cause you to be able to seek an answer because you will have recognized the problem(s) brought out above.

Note: Alan E. Weiner, CPA, JD, LL.M. is Partner Emeritus of Baker Tilly (formerly Holtz Rubenstein Reminick at which he was its founding tax partner (1975)). He served as the 1999-2000 President of the 30,000 member New York State Society of CPAs. He is the author of All About Limited Liability Companies and Partnerships and DFK International's Worldwide Tax Overview. The opinions in this article are the author's.

[1] http://www.nassaubar.org/UserFiles/NassauLawyer_Dec2013.pdf Pages 3 and 16.

2 http://www.gpo.gov/fdsys/pkg/FR-2013-12-02/pdf/2013-28410.pdf http://www.gpo.gov/fdsys/pkg/FR-2013-12-02/pdf/2013-28409.pdf

3 http://www.irs.gov/uac/Newsroom/Net-Investment-Income-Tax-FAQs

4 http://www.irs.gov/pub/irs-pdf/i8960.pdf

5 http://www.irs.gov/pub/irs-pdf/f8960.pdf

6 http://www.aicpa.org/Advocacy/Tax/DownloadableDocuments/AICPA%20Section%201411%20Comment%20Letter%20FINAL%20Dated%20060162014.pdf

7 http://www.irs.gov/pub/irs-pdf/p925.pdf

8 http://www.irs.gov/pub/irs-wd/0733023.pdf; http://www.irs.gov/pub/irs-wd/1029014.pdf; http://www.irs.gov/pub/irs-wd/1317010.pdf

9 https://www.ustaxcourt.gov/UstcDockInq/DocumentViewer.aspx?IndexID=6237272

10 http://www.aicpa.org/Advocacy/Tax/DownloadableDocuments/AICPA-comments-on-trusts-and-estates-material-participation-submit-92214.pdf

[11] http://www.americanbar.org/content/dam/aba/administrative/taxation/policy/012015comments.authcheckdam.pdf

12 Internal Revenue Code § 1411 (a) (2)

Plea Bargaining without Immigration Status (Continued from page 8)

Justice Court did not revealed specific recent instances of a probation officer reporting a "priority for removal" defendant to DHS, one attorney whose practice involves daily analysis of "crimigration" issues in Suffolk County warns that the risk of such a report is real, and that it will often be a luck of the draw situation with respect to the particular parole officer to whom the client is assigned.

New offense to avoid

Most criminal practitioners understand that following *Padilla,* they are best protected by hiring or having the client hire an immigration attorney to advise on the immigration consequences of a plea agreement. Nonetheless, most are also aware to avoid convictions for either "aggravated felonies" or "crimes involving moral turpitude," as well as crimes where the underlying facts involve allegations of domestic violence, possession of a firearm, marijuana or another controlled substance, or that signify a second or third misdemeanor for a particular individual. New to the list of immigration red flags, however, is the following offense, now listed as a category two removal priority.

DWI

Prior to the executive action, a single DWI offense, on its own, generally was not a cause for concern in the immigration context. An aggravated DWI, or a DWI in conjunction with other evidence showing an individual to be a "habitual drunkard" would require some additional inquiry into the defendant's particular immigration situation. Now, a first-offense DWI conviction is a cause for concern. If convicted and the disposition involves parole or jail time, the DOP could report the individual to DHS, who could then issue a warrant for the individual's arrest, and subsequently issue a notice to the defendant to appear in immigration court to face removal charges. Accordingly, should a plea agreement be the most prudent course on a DWI case for a non-citizen client, pushing for conditional discharge in place of parole may be worth the extra effort.

Future policy changes

To cover all of the bases, because the executive branch sets removal priorities, attorneys may also advise clients that the removal priorities can be amended or expanded with the next administration. Accordingly, a plea to an offense that is not a "priority for removal" trigger today could be a priority trigger in the future.

In light of the streamlined removal priorities announced in November and discussed above, criminal defense attorney's practicing in District Court should step carefully when advising a client who lacks immigration status. The immigration consequences for a particular fact-pattern that were true in October might not hold true today.

Special thanks to Cheryl David of the American Immigration Lawyers Association (AILA) and Bridget Kessler, immigration practice staff attorney at Brooklyn Defender Services, for their kind review and comments on this article.

Note: Christopher Worth is a solo practitioner with an office on East Main Street in Riverhead, where he represents non-citizen clients in immigration, criminal and family court. After graduating from Brooklyn Law School, Christopher reviewed appeals from the Board of Immigration Appeals and federal district courts as a clerk for an associate judge on the United States Court of Appeals for the Second Circuit. Christopher then joined the New York office of Clifford Chance US LLP as a corporate associate, and thereafter served as an immigration staff attorney with non-profit organizations in Westchester and Suffolk counties.

Bench Briefs (Continued from page 4)

were exclusively within the defendants' knowledge, the plaintiff should have had the opportunity to complete discovery prior to a determination of the summary judgment motion.

Honorable William B. Rebolini

Motion for an order directing the issuance of a subpoena denied; no action could be taken until there was a proper substitution of parties.

In *Gurwin Jewish Nursing & Rehabilitation Center of Long Island f/k/a The Rosalind and Joseph Gurwin Jewish Geriatric Center of Long Island v. The Estate of Irene Monahan and Edward Monahan,* Index No.: 31136/2010, decided on July 10, 2014, the court denied plaintiff's motion for an order directing the issuance of a subpoena for the production of the institutional Medicaid file of Irene Monahan, deceased, in this action to recover sums allegedly owed and owing for room, board and skilled nursing care services provided to Monahan. In denying the application, without prejudice, the court found that the decedent's estate was a necessary party to the action, however no estate representative had been appointed. The court reasoned that no action could be taken until there was a proper substitution of parties because the death of a party divested the court of jurisdiction.

Motion to disqualify counsel denied; defendant failed to show that the prior involvement of the attorney was substantially related to the current representation of the plaintiff.

In *Niki Mouzakiotis v. Styliani Mouzakiotis,* Index No.: 11682/2013, decided on December 16, 2013, the court denied defendant's motion for an order disqualifying counsel of plaintiff. The instant matter arose out of the transfer of ownership of real property in 2008 and the encumbrance of a mortgage on such property. The defendant sought an order disqualifying plaintiff's counsel on the ground that he allegedly represented the defendant in 2004 for the incorporation of an entity known as L'Etoile, Ltd. It was also claimed that the attorney was retained to transfer the title of the subject property to L'Etoile, Ltd with the reservation of a life estate for plaintiff. A copy of an incomplete deed dated February 10, 2004 bearing no acknowledgement of the plaintiff's signature and no identification of the consideration for the transfer was submitted to the court. Neither party disputed that the 2004 deed was not filed, or that a transfer of title to the property was not effectuated at that time. Plaintiff disputes that his attorney represented the defendant. In denying the motion, the court noted that the defendant failed to show that the prior involvement of the attorney was substantially related to the current representation of the plaintiff. The court also stated that there was no evidence whatsoever before the court that counsel's prior involvement in 2004 included the sharing of confidential information by the defendant. In addition, as there was no evidence that an actual transfer of title to the property was made in 2004, the issues now raised in this action were not substantially related to the previous transaction. Furthermore, it had not now been demonstrated that the disqualification of plaintiff's attorney was necessary to preserve the integrity of the proceedings.

Motion for summary judgment granted; plaintiffs failed to produce even the slightest evidence that movant had anything whatsoever to do with the construction site in question; CPLR §3212(b) requires that motions for summary judgment be supported by a copy of the pleading; CPLR §2001 permits a court at any stage of an action to disregard a party's mistake, omission, defect or irregularity if a substantial right of a party is not prejudiced.

In *Anita Zheng, as guardian for Joseph Zheng and Anita Zheng, individually v. ALAC/Carp Construction, LLC, ALAC Contracting Corp., URS Corporation-New York, URS Corporation, Afridi Associates, Haider Engineering PC and EnTech Engineering, PC,* Index No.: 1350/2013, decided on January 5, 2015, the court granted the motion by defendant, EnTech Engineering, P.C., for an order awarding summary judgment in its favor dismissing the complaint and all cross-claims against it. In opposing the application, the plaintiffs claimed that the motion for summary judgment was premature. The court noted that to successfully contend that a motion for summary judgment was premature, the party in opposition must demonstrate how further discovery might reveal the existence of material facts which are currently within the exclusive control of the moving party. The opposing party must also demonstrate how further discovery is likely to revel facts which would affect the outcome, as an opposing party's mere conclusions, expressions of hope of unsubstantiated allegations or assertions are insufficient to defeat a motion for summary judgment. Here, the court found that the plaintiffs failed to produce even the slightest evidence that movant had anything whatsoever to do with the construction site in question at or near the date of plaintiff's accident, and that it was not apparent from the record that facts essential to justify opposition to the motion may exist but were within the exclusive knowledge of the appellants. As such, the motion was granted. With regard to CPLR §3212(b), which requires that motions for summary judgment be supported by a copy of the pleadings, the court pointed out that CPLR §2001 permits a court at any stage of an action to disregard a party's mistake, omission, defect or irregularity if a substantial right of a party is not prejudiced. In the instant matter, no substantial right was prejudiced by the corrective inclusion of a copy of its answer with movant's reply.

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% of her class. She is an Associate at Sahn Ward Coschignano & Baker, PLLC in Uniondale. Ms. Colavito concentrates her practice in matrimonial and family law, civil litigation and immigration matters.

Practice in the Outlying Districts (Continued from page 10)

General Civil Claims

The monetary jurisdiction of District Court in civil matter is $15,000.00. Any case that seeks $6,000.00 or less in damages must go to mandatory arbitration with the right to a subsequent Trial de Novo (not necessarily requested by the "loser").

Dangerous Dog Hearings

Are only scheduled and held after the filing of a sworn complaint pursuant to N.Y.S. Agricultural and Markets Law Section 123 (please note that recent amendments to this statute became effective as of January 1, 2011). The venue of the hearing is predicated upon the situs of the alleged occurrence and not the residence of the complainant so please make sure you file in the correct town. Also, the complaint must allege personal knowledge of the attack but not necessarily by the complainant; very often, a witness (who must appear at the hearing and testify) saw the attack and told the animal owner/complainant about it.

(The foregoing was gleaned from a treatise by my learned colleague Acting County Court Judge James P. Flanagan, the current Dean of the Suffolk Academy of Law).

I currently preside at the First and Fifth Districts in Ronkonkoma. Since 2011, the number of matters conducted at the Fifth District Court has increased tremendously. There are *many* Wednesdays when the Town Ordinance calendars are in excess of 300 cases. This does not take into account the fact that I have the responsibility for the First District Court on Mondays, Tuesdays and Fridays, where the usual calendar totals over 100 cases which include Infant Compromise Orders, Motions, Conferences, Traverse Hearings and both small claims de Novo and Commercial Trials (for which I have written over 300 decisions in the past three years). In addition, on Thursdays the Fifth District Court's Landlord and Tenant calendar is frequently between 100-130 cases.

Attorney applications and "on consent" adjournments are taken as soon as possible. Any stipulations handed up to the court will be done after first call. At second call, stipulations will come first, attorney applications next, and then we proceed with the second call.

I expect attorneys who appear before me to:

- Be Prepared: Know your file, have your file with you and be prepared to answer any questions concerning it that I might have.
- Be on Time**:** Especially if the court has marked your case for trial.
- Have Authority: To fully discuss and settle any matter appearing before me if you do not have your client present.
- Be Courteous: Not only to fellow attorneys and pro se litigants but to the court staff as well.
- Be Ready: To answer any question by the court concerning any representations made whether they pertain to the facts of the case at bar or even when requesting an adjournment.

The court staff and I try to make our best efforts to accommodate all individuals who appear before me to answer the calendar, so if you have other matters on please let us know.

Note: Judge Vincent Martorana has presided in the Fifth District Court in Ronkonkoma since his election in 2012. He graduated from St. John's University School of Law. Prior to his election, he practiced in the areas of personal injury, insurance law, contract and medical malpractice.

ABA Gathers in Houston (Continued from page 3)

promulgate execution protocols in an open and transparent manner.

- Urging legislative bodies and government agencies to refrain from enacting Stand Your Ground laws that eliminate the duty to retreat before using force in self-defense in public places, or repeal existing Stand Your Ground laws; and
- Supporting government appointed counsel for unaccompanied children in immigration proceedings, and urging that immigration courts should not conduct any hearings, including final hearings, involving the taking of pleadings or presentation of evidence, before an unaccompanied child has had a meaningful opportunity to consult with counsel about his or her specific legal options.

Following tradition, at the conclusion of the meeting, the Illinois delegation rose to invite delegates to attend the August 2015 ABA Annual Meeting in Chicago.

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

Industrial Design (Continued from page 18)

Furniture International, Inc. v. Collezione Europa USA, Inc., 618 F.3d 417 (4th Cir. 2010), the court upheld plaintiff's copyright in decorative three-dimensional shells, leaves and other carvings on furniture, while emphasizing that it was not protecting the industrial designs, however aesthetically pleasing, of the furniture. Although the carvings were affixed to the furniture they were representational, playing no part in its function, and could be perceived apart from it. In *Heptagon Creations Ltd. v. Core Group Marketing LLC,* 507 Fed. Appx. 74, 75 (2d Cir. 2013), the Second Circuit rejected copyright protection for a chair, stool and vase because the plaintiff failed to allege that their designs were "independent of functional needs of the furniture (*i.e.*, to support weight or house plants)." Thus, in *Heptagon*, the merger of artistic and functional considerations may have produced more aesthetically appealing furniture but the furniture — the industrial design — in essence was the art and therefore the doctrine of conceptual separability precluded copyright protection. The court followed the Second Circuit's test in *Brandir Int'l, Inc. v. Cascade Pacific Lumber Co*., 834 F.2d 1142, 1145 (2d Cir. 1987), which denies copyright protection when the "design elements reflect a merger of aesthetic and functional considerations …." This merger is frequently a critical element in the creation of industrial design when the shape and texture of the useful article are intrinsically artistic.

Part II will continue the discussion of the reasons why copyright protection is not appropriate for industrial design. It will then consider the advantages of a different paradigm for industrial design protection.

The author would like to thank Stephani Schendlinger for her invaluable research assistance.

Note: Professor Rena C. Seplowitz is on the Touro Law Center faculty. She graduated from Barnard College and

Private Practice and the Army Reserve (Continued from page 5)

a ridiculous sense of security in this world is if that persons has lived their entire lifetime free from imminent threats. We (in the military) must be doing our job very well.

What we don't need is to be patronized. For example, take the moment of silence as a "tribute" to us. Honestly, I doubt you could find a single service member or veteran who appreciates blatantly wasting time at the beginning of a meeting or event and calling it some sort of show of respect to us. Actions speak louder than words.

In the matter I have described, the Village of Port Jefferson's position is to demand that the Village Judge forbid defendants from hiring attorneys who serve in the military. This village has a Veterans' park and claims to be a supporter of veterans. However, given the opportunity to show some respect toward a service member in a tangible form, the village chose to attempt to disregard the rights of a criminal defendant and take advantage of that defendant's attorney's service; statutory rights that are respected every single week regarding scores of defendants in that same courtroom.

After 28 years of serving in the Army Reserve, I have experienced several instances of discrimination because of that service, but none of them have ever been worthy of concern. To find out that the Village of Port Jefferson hires attorneys in order to advocate that the judge should not grant adjournments to defendants *at arraignment* who have hired attorneys who are deployed in defense of this country and need a six-week adjournment is despicable. "There are a hundred thousand attorneys" who are not deployed that this defendant can hire. This is what members of the Reserve and Guard have to deal with. This is an example of a reason we place on the side of "why I should NOT serve" when considering re-enlistment or retirement. This is the real person behind the mask of "We Support Our Troops!"

I still serve. I just have to keep my chin up, and deal with people like the mayor, board, and prosecutor of Port Jefferson Village who use their position to make service in the Reserve more difficult than it has to be.

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Expert Preclusion as a Discovery or Spoliation Sanction (Continued from page 12)

there were issues with some of the work that the defendants had performed. The plaintiffs immediately terminated their contracts with the defendants and barred them from the premises. The plaintiffs then commenced the action, and hired new professionals to complete the renovation project. However, because the plaintiffs completed the project before the defendants' expert witness had an opportunity to inspect the premises, the defendants moved for spoliation sanctions. The court granted the motion, which was upheld by the Appellate Division, and precluded the plaintiffs' expert from offering his report and testifying as to the amount of work completed, the alleged deficiencies in the work that was performed, and the costs to complete the renovation – which were all central to the plaintiffs' claims. The plaintiffs attempted to circumvent that preclusion order by calling their expert witness to testify as a fact witness to explain certain percentage calculations he made based on site visits and examinations of project plans. The court rejected that argument, determining that such type of evaluation "is outside the purview of a lay witness and constitutes an expert opinion." The court allowed that witness to testify only as to facts that "could be easily observed by a lay person, as determined by the trial court," and whether a specific construction item had been started.

The preclusion orders in the aforementioned cases are not surprising. In all three instances, a party sought to offer expert testimony that was based, at least in part, on facts, documents, and other information that was not available to the opposing party, either because the offering party intentionally withheld it or acted with gross negligence in destroying it. Courts impose sanctions "as a matter of fundamental fairness."[8] As the case law demonstrates, that balance can sometimes be achieved by preventing an expert witness from utilizing certain facts, which essentially give it an unfair advantage.

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[1] *See Liang v Yi Jing Tan*, 98 AD3d 653 (2d Dept 2012);
[2] *See Residential Funding Corp. v DeGeorge Fin. Corp.*, 306 F3d 99 (2nd Cir 2002); *Zletz v Wetanson*, 67 NY2d 711 (1986).
[3] *Kubacka v Town of North Hempstead*, 240 AD2d 374 (2d Dept 1997).
[4] 102 AD3d 201 (2d Dept 2012).
[5] *Id.* at 208-209.
[6] This decision, decided on December 5, 2007, was reported in the New York Law Journal, and is cited as NYLJ 12/26/07, at 30 col. 1 (SDNY 2007).
[7] 2013 NY Slip Op 33439(U) (Sup Ct, NY County Dec. 4, 2013).
[8] *E.W. Howell Co., Inc. v S.A.F. Sala Corp.*, 36 AD3d 653, 655 (2d Dept 2007).

Freedom of Information Law (Continued from page 11)

§87(2)(a) through (i) of the Law."[6] Indeed, FOIL "declares all agency records open to the public unless they fall within one of eight categories of exemptions." Given the statute's broad objectives, the Court of Appeals has consistently held that " 'FOIL is to be liberally construed and its exemptions narrowly interpreted so that the public is granted maximum access to the records of government.' " "By their very nature such objectives cannot hope to be attained unless [access to government records] becomes the rule rather than the exception."

> To ensure maximum access to government documents, the exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption. As this Court has stated, only where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld.[7]

Should the government fail to turn over documents, it must articulate the reasons why disclosure can be withheld. FOIL requires a "particularized and specific justification"[8] for denying access to demanded documents rather than a "blanket" exemption.[ix] While the government may turn over certain documentation, it may elect to redact other portions of the documentation as following within one of the above mentioned exceptions.

This requirement applies to portions of documents as well as the whole document itself. The Freedom of Information Law permits an agency to deny public access to "records or portions thereof." This requires agencies to release portions of documents after redacting those portions that are exempt from disclosure. It is important that the public and practitioners alike understand that the government cannot simply hide behind an exemption but must articulate the reasons for withholding documents or the portions of which it redacts.

Forty years of FOIL

FOIL is relatively easy to use and there are free templates online. The Court of Appeals observed that the statute "can be a remarkably effective device in exposing waste, negligence and abuses on the part of government; in short 'to hold the governors accountable to the governed.' " We see this public accountability in recent local news, specifically the Nassau County Speed Camera debacle. "[T]he statute affords the public the means to attain information concerning the day-to-day operations of State government. By permitting access to official information long shielded from public view, the act permits the electorate to have sufficient information in order to make intelligent, informed choices with respect to both the direction and scope of governmental activities."

FOIL is now over four decades old. Celebrating this accomplishment, the 2014 Annual Report to the Governor and State Legislature opens with the statement, "Meeting the public's legitimate right to information concerning government is good government."[10] A number of observations and recommendations are made in this report but, one of the major areas of focus is the use of force by police officers. Perhaps the mid-life crisis of FOIL, the use of force by police, from Eric Garner to the Nassau County Police Officer Anthony DiLeonardo, is certainly newsworthy and a great source of public concern and confusion.

"The Committee recognizes that our police do a remarkable service for the citizens of this State, but current laws keep vital information about police activities from the public. This corrosive lack of transparency about police activities undermines accountability and diminishes public trust. Greater transparency is urgently needed." The committee discusses the progressive expansion of Section 50-a of the Civil Rights Law, preventing disclosure of personnel records of police officers. The report takes an extreme position on this section of law.

"If no other recommendation in this Report is implemented this coming year, the Legislature and the Governor should make it a top priority in 2015 to remove secrecy that currently surrounds some activities of police departments across this State." The committee asks for the outright repeal of Civil Rights Law Section 50-a or, alternatively, its amendment. "Section 50-a as it is written and construed, defeats accountability, increases public skepticism and foments distrust. In addition, the Committee Report recommends

> that there are certain changes to the law that should be made to enhance [FOIL's] application and interpretation. For example, awards of attorney's fees should be mandatory in certain instances; far too often we learn of resistance and delays that can defeat the intent of FOIL. Proactive disclosure requirements should be codified; government agencies at the state and local level, "to the extent practicable," should post records online that are clearly public and of general significance.

The entire report is online and details the history of FOIL, additional recommendations and an explanation of the aforementioned position on police officers' use of force. Although much has been accomplished, it seems there is still a great deal of work that can and should be done to improve FOIL.

One thing is beyond dispute - the Committee on Open Government is extremely diligent — "During the past year, with a staff of two, the Committee responded to nearly 4,800 telephone inquiries and more than 750 requests for guidance answered via email." "Since its creation in 1974, the Committee's staff has prepared nearly 25,000 written advisory opinions in response to inquiries regarding New York's open government laws." With his staff of one, Executive Director Robert J. Freeman is very accessible, often answering the phone and fielding e-mails himself, even for yours truly.

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[1] Fink v. Lefkowitz, 47 N.Y.2d 567, 571, 393 N.E.2d 463, 465 (1979).
[2] Russo v. Nassau County Community College, 81 N.Y.2d 690, at 697 (1993).
[3] Capital Newspapers v. Whalen, 69 N.Y.2d 246, 252 (1987), quoting Fink v. Lefkowitz, 47 N.Y.2d 567, 571 (1979).
[4] Westchester Rockland Newspapers, Inc. v. Kimball, 50 N.Y.2d 575, 579 (1980); in accord Buffalo News, Inc. v. Buffalo Enterprise Dev. Corp., 84 N.Y.2d 488, 492, 619 N.Y.S.2d 695, 697 (1994) ("to assure accountability and to thwart secrecy").
[5] In the Matter of Professional Standards Review Council of America, Inc. v. New York State Department of Health, 597 N.Y.S.2d 829, 831 (3d Dept. 1993) (external quotation marks omitted) (quoting from Polansky v. Regan, 440 N.Y.S.2d 356 (3d Dept. 1981)).
[6] Committee on Open Government FOIL, Advisory Opinion 12579 (Mar. 16, 2001).
[7] Gould v. New York City Police Dep't, 89 N.Y.2d 267, 274-75 (1996) (external quotation marks, citations and internal quotations omitted).
[8] Data Tree, LLC v. Romaine, 9 N.Y.3d 454,463 (2007); Gould, 89 N.Y.2d at 276.
[9] DLJ Restaurant Corp. v. Department of Buildings of City of New York, 710 N.Y.S.2d 564, 566 (1st Dept. 2000); see also Matter of Capital Newspapers Div. Of Hearst Corp. v. Burns, 67 N.Y.2d 562, 566 (1986).
[10] New York DOS, Committee on Open Government, *Annual Report to the Governor and State Legislature* (Dec. 2014); *available at* http://www.dos.ny.gov/coog/pdfs/2014AnnualReport.pdf.