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INSIDE...
DECEMBER 2014 FOCUS ON TRUSTS & ESTATES

NYSBA Calls For Mandatory Pro Bono Reporting on an Anonymous Basis Only and More

By Scott M. Karson

At its Fall 2014 meeting in Albany, the New York State Bar Association House of Delegates approved a resolution, which will – hopefully – resolve the ongoing dispute with New York State Chief Judge Jonathan Lippman and the Office of Court Administration over mandatory pro bono reporting.

The resolution, which was offered by NYSBA President Glenn Lau-Kee, proposes that Rule 118.1 of the Rules of the Chief Administrator be amended to (a) "provide for reporting of pro bono hours and financial contributions to the Office of Court Administration by attorneys on an anonymous basis only;" (b) "provide for reporting of pro bono hours and financial contributions by attorneys to the public on an aggregate basis only;" and (c) "provide for additional categories of reportable hours and financial contributions given by attorneys towards pro bono work and other public service."

Scott M. Karson

The resolution is aimed at addressing the principal objections of the organized bar to Rule 118.1, which became effective on May 1, 2013. First, the resolution would provide for anonymous reporting of pro bono hours and financial contributions by attorneys to the OCA. Second, it would provide for reporting of hours and contributions by attorneys to the public on an aggregate basis only. These provisions are intended to satisfy concerns that the reporting requirement as enacted constitutes an

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The SCBA Celebrates the Holidays

SCBA President Bill Ferris, left, Past President Barry Smolowitz (2007-2008) and Past President Douglas J. Larose (2003-2004) paused at the annual Holiday Party to have their photo taken in front of the Association's Christmas tree, which is always stunningly decorated each year by the staff. See more photos on page 17.

PRESIDENT'S MESSAGE

The Advantages of Membership

By Bill Ferris

As a Bar Association member, you have a wide range of benefits available to you, including case referrals, insurance programs, retail discount opportunities, and assistance in personal and confidential matters. This article will highlight some of the membership benefits.

Lawyer Referral and Information Service (LRIS)

This service refers fee-generating cases to participating attorneys every business day. Tens of thousands of dollars in legal fees are generated through this service annually. Potential clients are referred to participating attorneys based upon areas of law and geographic preference. The referral service is fully computerized and clients are served based upon an automated rotation basis. The LRIS logs over 13,000 calls annually and the service is manned Monday through Friday from 10 a.m. to 4 p.m. Participating attorneys receive regular reports, which they must complete in order to verify activity regarding referrals. Please contact Edith Dixon, LRIS Administrator, at the Bar Center.

Bill Ferris

Placement Service

The SCBA Lawyer Placement Service has resumes on file. If you are seeking an associate either for your firm or to assist you, this free member service could save you time, effort and expense in your recruitment process. All resumes are sent in the strictest confidence. If you are looking for a position, submit your resume to Tina, or if you are looking for an association, sub-

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BAR EVENTS

Judicial Swearing In and Robing Ceremony
Monday, Jan. 12, at 9 a.m.
Touro Law Center
All are invited to attend.

Cohalan Cares for Kids – BBQ & Brew
Thursday, Feb. 5, from 6 to 8 p.m.
Great Hall – Bar Center
Join us for an evening of local craft beer tasting by Brickhouse Brewery and Greenport Harbor Brewing Company, BBQ bites by Fireside Catering, music by Gerard Donnelly, Rafael Penate and Thomas Lavallee and photos by Barry M. Smolowitz. This fundraiser benefits Suffolk County Children's Center at Cohalan Court Center in Central Islip.

Meet the New Judges Night
Monday, Feb. 2, at 6 p.m.
Great Hall – Bar Center
Hosted by the Academy

FOCUS ON
TRUSTS AND ESTATES
SPECIAL EDITION

Suffolk County Bar Association

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SCBA Calendar

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

OF ASSOCIATION MEETINGS AND EVENTS

DECEMBER 2014

11 Thursday	Health & Hospital Law, 5:30 p.m., E.B.T. Room
15 Monday	Board of Directors – 5:30 p.m., Board Room.

JANUARY 2015

5 Monday	Executive Committee, 5:30 p.m., Board Room.
6 Tuesday	Appellate Practice, 5:30 p.m., E.B.T. Room.
8 Thursday	Health & Hospital Law, 5:30 p.m., E.B.T. Room.
12 Monday	SCBA's Annual Robing & Swearing in Ceremony, Touro Law School, 9:00 a.m.
13 Tuesday	Young Lawyers, 5:30 p.m., Board Room.
14 Wednesday	Lawyers Helping Lawyers, 6:00 p.m., E.B.T. Room. Surrogate's Court, 6:00 p.m., Board Room.
15 Thursday	Elder Law & Estate Planning Committee, 12:15 p.m., Great Hall.
21 Wednesday	Education Law, 12:30 p.m., Board Room. Traffic & Parking Violations Agency (TPVA), 6:00 p.m., Board Room.
26 Monday	Board of Directors, 5:30 p.m., Board Room.

FEBRUARY 2015

3 Tuesday	Appellate Practice, 5:30 p.m., E.B.T. Room.
9 Monday	Executive Committee, 5:30 p.m., Board Room.
10 Tuesday	Lawyers Helping Lawyers, 5:30 p.m., E.B.T. Room. Surrogate's Court , 6:00 p.m., Board Room.
19 Thursday	Elder Law & Estate Planning, 12:15 p.m., Great Hall.
23 Monday	Board of Directors, 5:30 p.m., Board Room.
25 Wednesday	Education Law, 12:30 p.m., Board Room.

MARCH 2015

2 Monday	Executive Committee, 5:30 p.m., Board Room
3 Tuesday	Appellate Practice, 5:30 p.m, E.B.T. Room.
11 Wednesday	Surrogate's Court, 6:00 p.m., Board Room.
12 Thursday	Health & Hospital Law, 5:30 p.m., E.B.T. Room.

Our Mission

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

Suffolk Academy of Law's Debut
Allison C. Shields, Interim Executive Director


Allison C. Shields

The Board of Trustees, the Academy Officers, volunteers, staff and The Suffolk Lawyer welcome Allison Shields, former Director of the SCBA and former Officer of the Academy, who was recently named the Academy's Interim Executive Director. Allison recently said that she has "big shoes to fill," but we all know she is definitely qualified for the job. She possesses all the attributes necessary and yes, words are truly inadequate to describe the qualities and character of this special person. Allison will work unceasingly for the betterment of the Academy and is an inspiring leader. Legwork and brainwork, or just plain hard work – in all of these Allison has already set the example for others to follow. It is because of these qualities and because she has won the affection and respect of all who know her that I am privileged to welcome her and look forward to working with her.

– Sarah Jane LaCova
SCBA Executive Director

THE SUFFOLK LAWYER

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LEGISLATIVE UPDATE

Surrogacy Agreements in New York

By Alison Arden Besunder

Surrogate pregnancies have existed since time immemorial. Those familiar with their Old Testament will recall that Abraham's wife Sarah "gave" her handmaid Hagar to Abraham because Sarah was barren. Hagar then gave birth to Ishmael, who Sarah raised.

Flash forward to 1984 A.D. New Jersey homemaker Mary Beth Whitehead signs a contract agreeing to be what is now referred to as a "traditional" surrogate mother for William and Betsy Stern, being artificially inseminated with William Stern's sperm using Whitehead's own egg. In addition to the $10,000 the Sterns agreed to pay Whitehead, they had also paid a $7,500 fee to a broker who handled the legal aspects of the transaction. Shortly after birth Whitehead decided she wanted to keep the baby — now known as "Baby M" — and refused her fee. She absconded to Florida with her husband and the baby, moving from motel to motel to evade law enforcement and, in recorded phone calls to William Stern, threatening to kill herself and the baby.

Alison Arden Besunder

Implicitly upholding the surrogacy contract, the trial court found the Sterns to be Baby M's "legal parents" and terminated Whitehead's parental rights. The New Jersey Supreme Court reversed, invalidating the surrogacy contract but effectively reaching the same result by granting full custody to the Sterns, with limited visitation rights to Whitehead.

The New Jersey Supreme Court broadly concluded that surrogacy contracts are "illegal and unenforceable," predicting widespread danger to society if surrogacy contracts were to be enforced. It wrote: "This is the sale of a child, or at the very least, the sale of a mother's right to her child, the only mitigating factor being that one of the purchasers is the father." (At the risk of digressing, it seems to have escaped the court's notice that one could view many hotly contested divorce actions through that lens, with a parent dangling custody and visitation rights as leverage for higher payments.)

Ultimately Baby M's fate turned on a "best interests of the child" analysis, with full custody going to the parent who never kidnapped nor threatened to kill the child. At the time, *Baby M* provoked an avalanche of contentious public debate on surrogacy's moral, legal, and cultural significance. At the time of New Jersey's decision, there was little if any law governing surrogacy in New Jersey or anywhere else. As with many

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Meet Your SCBA Colleague

Victoria Moore has been a principal law clerk in the Supreme Court for the past 14 years. Her husband, **J. Stewart Moore,** is a litigator. Both are passionately devoted to ensuring that African Americans are included in every facet of the legal profession on L.I.

By Laura Lane

Victoria when did you decide that you wanted to be an attorney? It was when I was advocating for myself during a dispute in a clothing store trying to get the sale price. My mother turned to me and said that I would be a good lawyer. That incident began my understanding of how law could effect positive change.

What did you do as a teenager to investigate the career? As a high school student I won oratorical contests involving the law through different organizations in the community, was very active in the NAACP, in our student government and the prelaw club. I was the president of my class.

Stewart when did you decide to become a lawyer? At four and a half I watched fire hoses turned on African Americans in the South, I listened to Dr. King and Malcolm X and I realized the way to make change was to be a minister attorney. I lived during a time when things changed significantly for African Americans.

Did you also become involved as a student when considering your career path? Rather than become involved in student government I was more interested in becoming involved in the black student government. Influenced by our older sisters and brothers in college we started the Black Student Union in high school.

You both have been involved in the public sector as well. How have you been involved Stewart? I did run for New York Assembly in 1994 but didn't win. I stay involved in the political process because I believe in it. For many of us young African Americans involved in local politics we looked to law school to make us better candidates. Victoria and I have been members of the executive committee of local political committees. And I am the founding member of the Suffolk County Caucus of Black Democrats.

How have you been involved Victoria? I started by working as an executive assistant to the Town Attorney in the Town of Babylon and then I joined the staff of New York State Comptroller H. Carl McCall as his Long Island Representative for Intergovernmental Affairs and later served as his legal counsel. I also worked as a legislative aide to Congressman Downey in D.C., as a special prosecutor and an assistant town attorney in the Town of Huntington. In most of these positions I was the first African American to hold the positions.

How did you meet? I met Stewart at a Suffolk County Caucus Black Democrats meeting.

Victoria is there any single event or person that influenced you to become an attorney? Not one major person, but as life unfolded around me I realized how important it is to have an understanding of law.

And for you Stewart? For me it was living the black experience from the 1960's to the 1970's when everyday there was something going on. Through these experiences I realized the more information I had the more I could challenge the law. It was the combination of events in America as well as locally.

Perhaps one of your biggest accomplishments was as two of the founders of the Amistad Black Bar Association. Victoria you were the president in 2004 and Stewart in 2011. What is the mission of the association Victoria? We work to increase the development of African American attorneys and gain exposure throughout Long Island for them. Our organization has been vocal on local and national legal issues concerning the African American community. When I was president we expanded to become the Amistad Black Bar Association of Long Island. Before we were only in Suffolk. We both worked to make Amistad an affiliate of the National Bar Association.

What do you enjoy about being an attorney Stewart? Empowerment. You have information that can help people and people seek you out. As an attorney I can give the court something to look at. It's a great feeling when there is someone you've known all of your life who suffered from poverty and as an attorney you can walk in there and convince a judge that these are good people that had bad breaks. And it's a great feeling when the judge comes back and gives this person no jail time but an opportunity to add to society.

And what do you enjoy Victoria? I like being in the know. When you aren't familiar with the law the world can be very overwhelming. And I like that this is not a limited profession. I like the options.

How can you help your community Stewart? What we see so often in our community, which is underserved, is a distrust of the judicial system. Having people of color be the bridge of the underserved and legal world, and we do have a duty to bridge this, the courts take into consideration what they wouldn't ordinarily consider. Explaining the process to a person of color so they can understand how the system works is of value.

How did you get involved in the SCBA Victoria? I was a student member but when we started Amistad the SCBA wanted to assist in the formation so it was a natural move for Stewart and myself to become actively involved in the SCBA, who were struggling at the time with diversity.

Victoria why do you believe SCBA membership is beneficial? To be among your colleagues is energizing and the benefits of legal bantering are priceless. Knowing the membership saves you a lot of time when you are approaching an issue. Being a member gives you the opportunity to hone your legal skills.

Victoria and J. Stewart Moore

Why do you believe membership is important Stewart? Black attorneys are a new phenomenon on Long Island and we tend to be younger and less experienced. The CLEs that the Academy offers are of great value to us. And we see a concerted effort to reach out for inclusion by the leaders of the SCBA and staff.

How have you both been reaching out to younger attorneys Stewart? We hold meetings at the law schools. We also spend a great deal of time in particular at Touro and offer internships.

Victoria do you both encourage young African American attorneys to join the bar association? Yes. The Bar Association is the advocate for the profession. If you aren't a member no one will know your opinion. Like when Sandy happened the SCBA was the first to have the information to navigate through the process of all of the relief that was available.

What is your opinion Stewart? There's also the question of advancement. If you want to be a member of the judiciary in Suffolk it makes sense to be friends with the other lawyers. And in general, you aren't going to effect change if you are on the outside.

BENCH BRIEFS

By Elaine Colavito

SUFFOLK COUNTY SUPREME COURT

Honorable Peter H. Mayer
Motion to dismiss denied; complaint stated cause of action for reformation.

In *Anthony F. Sirianni and Laura Sirianni Irrevocable Trust Under Agreement Dated November 4, 2010 v. John Hatgis, LLC,* Index No.: 6135/2013, decided on December 2, 2013, the court denied defendant's motion to dismiss. The court stated the pertinent facts as follows: defendant made a written offer to the plaintiffs to purchase real estate. The offer included a proposal that the seller would hold a note for a maximum of 24 months at 8 percent interest. Plaintiffs rejected the offer. The parties continued to negotiate and entered a contract of sale. Thereafter, a dispute arose between the parties regarding interest and the application of payments. Plaintiffs commenced this action to reform the note to reflect the proper interest rate on the grounds of mutual mistake. Plaintiff alleged that the initial offer included interest and that this was intended to be part of the final agreement. Plaintiff further claimed that the fact that the note specifically referenced interest payments but inadvertently failed to specify the rate. Defendant submitted an affidavit claiming that interest was not included because the purchase price was increased and additional collateral was provided as security instead. While the court found that this raised a question of fact, the complaint was sufficient to state a cause of action for reformation. Accordingly, the motion to dismiss was denied.


Elaine Colavito

Honorable Arthur G. Pitts
Summary judgment granted; assertion that discovery must be completed prior to rendering summary judgment was patently insufficient to warrant a denial of the motion; testimony indicated that plaintiff fell due to tripping on a cellar door, not because of damages to the sidewalk caused by the defendant.

In *Charles Etherson and Nancy Etherson v. Allied Optical Plan, Allied Optical Plan, Inc., Jerry I. Steiner, Kathleen Steiner, Posillico Civil, LLC, Welsbach Electronic Corp., Welsbach Electrical Corp of L.I., and Town of Riverhead,* Index No.: 30598/2012, decided on January 21, 2014, the court granted defendant, Posillico Civil, Inc.'s motion for summary judgment. In rendering its decision, the court noted that this matter was one for personal injuries sounding in negligence. The court pointed out that since a finding of negligence must be based upon the breach of a duty, a threshold question in tort cases was whether the alleged tortfeasor owed a duty of care to the injured party. Herein, defendant Posillico averred that it owed no such duty of care to the plaintiff. In support thereof, defendant proffered the affidavit of its division manager who, on the date of the subject incident was responsible for supervising defendant's contract with the Department of Transportation. He stated that the contract provided for defendant to perform asphalt work on various Town of Riverhead streets, as well as repair certain curb ramps, however, no work was authorized or done on any sidewalks. In further support, defendant submitted a transcript plaintiff's testimony wherein he stated that at the time he fell, the sidewalk appeared level, there were no issues as to the condition of the concrete and he tripped on a sidewalk cellar door. In opposition, plaintiff argued that the contract between defendant and the Department of Transportation provided that the defendant was responsible for the maintenance and repair of the project area if any damages occurred during the project. Plaintiff further averred that the motion should be denied because discovery had yet to be completed. In granting the motion the court stated that it was well settled that an assertion that discovery must be completed prior to rendering summary judgment was patently insufficient to warrant a denial of the motion. Further, the court reasoned that plaintiff's testimony indicated that he fell due to tripping on a cellar door, not because of damages to the sidewalk caused by the defendant.

Honorable William B. Rebolini
Motion to appoint receiver granted; clear evidentiary showing appoint-

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Legislating Digital Assets

By Jill Choate Beier

Maybe you have noticed that an increasing amount of our transactions and daily interactions are occurring in a digital medium. Everything from personal conversations, business negotiations, banking transactions and travel arrangements can be conducted via the Internet. This digital interaction is sometimes referred to as our "digital assets." So, what will happen to these digital assets when we can no longer access them either because of our incapacitation or death? If you are like most people, you have not given this much thought and, as a result, you have no plan in place to deal with your digital assets after you are gone.

Without a plan, surviving family members are likely left with no access to these digital assets to preserve them.

FOCUS ON TRUSTS & ESTATES SPECIAL EDITION

Federal and state privacy laws, as well as the service provider's terms of service, make the process of accessing a deceased's digital assets difficult. Many state legislators in this country are keenly aware of this problem and either have already enacted or are working to enact legislation to make the process easier. As discussed in this article, however, legislating access to digital assets may not resolve the problem completely.


Jill Choate Beier

Current privacy laws impacting digital assets

To understand why state legislation may not resolve the problem, it helps to understand the other federal and state laws involved. There are two main federal privacy laws that govern most types of digital assets — the Computer Fraud and Abuse Act (the "CFAA") and the Stored Communications Act (the "SCA"). The CFAA criminalizes the unauthorized access of a computer.[i] The SCA criminalizes the unauthorized access of an electronic communication service.[ii] Therefore, anyone attempting to access a password-protected computer or online account is violating the law and could be subject to prosecution. In addition to governing access, the SCA also prohibits service providers from knowingly divulging the contents of a communication that is stored by or maintained on that service unless the disclosure is made "to an addressee or intended recipient" or with the "lawful consent of the originator or an addressee or intended recipient of such communication…"[iii] Recently many service providers, in fear of violating federal privacy laws, have refused to provide access or disclose an account holder's content to surviving family members.

Surviving family members must also be mindful of New York State laws that prohibit the unauthorized use and access of a computer as well as prohibit using such access to obtain "computer material."[iv] Violation of these laws could result in punishment of up to four years in prison. Although it is unlikely that federal or state prosecutors will pursue charges against a family member for such an arguably minor infraction, the potential for prosecution still exists. Accordingly, state digital asset laws authorizing access to digital assets are necessary to prevent inadvertent violation of these federal and state privacy laws.

State laws addressing fiduciary access to digital assets

To date, only eight states have enacted legislation dealing with digital assets.[v] The majority of these states have only provided for access by a personal representative to a deceased's digital assets. For example, Connecticut and Rhode Island each have enacted legislation that only addresses access to email accounts. Other states have enacted laws that address digital accounts other than email accounts. Indiana provides access to any documents or information stored electronically by the custodian. Oklahoma and Idaho each use language to provide the personal representative access to social networking accounts, email accounts, blogging services, and short messaging services in addition to email accounts. The Virginia state law only addresses digital accounts controlled by minors and specifically excludes those digital

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The Suffolk Lawyer wishes to thank Trusts and Estates Special Section Editor Robert M. Harper for contributing his time, effort and expertise to our December issue.

A DIY Disaster in Estate Planning

By Kera Reed

As a recent first time homeowner, the phrase "Do It Yourself" or "DIY" takes me back to the late nights this past February of spackling, sanding and painting all of the walls in my house with my husband. We were fortunate that this was the only work that needed to be done. We were also fortunate because there were no structural, electrical or plumbing problems. I say fortunate because we know our limits; we know that we are not equipped or skilled enough to take on major plumbing or electrical projects. I know that it is hard to resist the temptation of trying to save money in the short term by tackling these repairs and projects on your own. However, one has to be realistic about the possibility of a DIY disaster when trying to take on projects that should be left to professionals. This rule applies to home improvement as well as to estate planning.

In my career, I have seen some DIY at home estate planning blunders. One of the most memorable is an estate I handled last year where the testator signed her will at the bottom of every page, but not on the clearly marked signature line on the last page. In this case, my clients were fortunate that the proceeding was uncontested and that the Surrogate's Court found that the requirements of due execution set forth in EPTL §3-2.1(a)(1) were complied with and the will was admitted to probate.[1] This case was an exception, and as we all know these DIY situations often do not have a happy ending.

Kera Reed

FOCUS ON TRUSTS & ESTATES SPECIAL EDITION

In New York, for a Last Will and Testament to be considered valid to transfer the decedent's real and personal property, EPTL § 3-2.1 states that the following formalities must be followed:

- The instrument must be signed at the end by the testator;
- The testator must sign the instrument in the presence of the attesting witnesses;
- The testator must declare to the attesting witnesses that the instrument is his or her will; and
- There must be at least two attesting witnesses.

The general rule when it comes to publication is that where a testator exhibits a paper drawn and subscribed by him or her, with the subscription in plain sight, and declares to witnesses that it is their last will and testament and asks them to sign as witnesses, he or she has done all that statute requires and there is a sufficient publication of the will and acknowledgment of the testator's subscription thereto.[2]

When an attorney supervises the execution of a will, a presumption of due execution arises, meaning that there is a presumption that all of the proper statutory formalities were followed when the will was signed by the testator.[3] This is also known as a "presumption of regularity."[4] If an attorney does not supervise the will execution ceremony, this presumption does not exist. In order for the Surrogate's Court to admit an unsupervised will to probate, it must be satisfied from all of the evidence that the will was properly executed.[5] If a lay person executes a will themselves without attorney supervision, the lay person runs the risk of violating the provisions of EPTL § 3-2.1 and having the purported will denied probate.

A recent example where DIY estate planning failed to satisfy the due execution requirements of EPTL § 3-2.1 and was denied probate is in the *Matter of Martello*.[6] In *Martello*, the decedent was admitted to Stony Brook University Hospital for scheduled surgery on October 10, 2012. That day he executed a hand-written, one-sided, single page document, with the caption "The Last Will and Testament of Frank Martello 10/10/2012." The terms of this will give the decedent's entire estate to his "beloved companion and partner of the past twenty-two years."

At trial, both witnesses testified that they knew that the document for which they were acting as witnesses was a will, despite the fact that Mr. Martello never stated that the document was his will. However, there was never any testimony presented that Mr. Martello knew that the instrument he was signing was his will. One witness testified only that Mr. Martello had "wishes" that he wanted witnessed. The other witness asked Mr. Martello if the paper "was the paper he wanted to sign." Both witnesses were clear in their tes-

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Trust Decanting In New York

By Joseph T. La Ferlita

In the relatively static world of New York trust law, few topics, if any, have sparked as much debate in the last few years as has trust decanting. Interestingly, the debate has been passionate among some of the more seasoned Trusts and Estates practitioners.

One possible explanation for this is that decanting is understood by some as violating one of the basic, fundamental premises on which the Trusts and Estates practice is built: that of safe-guarding, implementing, and enforcing the grantor's intent, which, in our world, and in the view of American common law, is sacred. In other words, some see decanting as an end run around long-established precedent concerning the irrevocability of trusts and the centrality of the grantor's intent. However, not every seasoned practitioner shares this view.

First, let us be clear on what a trust decanting is. Interestingly, one will not find the word "decanting" in the New York statute that authorizes decanting. "Decanting" is an informal, colloquial reference to the authorization of a trustee to distribute the assets constituting the corpus of one, not to the beneficiary of the trust outright, but rather to a different, separate trust for the benefit of the same beneficiary. Just as one decants wine from the old bottle to a new bottle, a trustee can decant trust assets from an old trust to a new trust.


Joseph T. La Ferlita

Decanting arguably is rooted in the common law of certain jurisdictions. The seminal case is *Phipps v. Palm Beach Trust Company*.[i] Other notable cases are *Wiedenmayer v. Johnson* and *Matter of Spencer*.[ii]

About 22 states have codified their own version of trust decanting. New York was the first to do so. The New York decanting statute is found in EPTL 10-6.6 (b)-(t). It is worth noting that the enactment of the first decanting statute was originally related to allowing certain irrevocable trusts to remain grandfathered from the Generation Skipping Transfer tax laws, but practitioners soon realized that decanting offered numerous non-GST tax opportunities, not the least of which was effectuating a trust modification.

FOCUS ON TRUSTS & ESTATES SPECIAL EDITION

The power of decanting is rooted in the fact that it allows one to take assets that are subject to the terms and conditions of one trust and move them to another trust that has different terms and conditions, possibly without the beneficiaries' consent and court approval. For this reason, many practitioners rightly characterize decanting as one of the most powerful tools to have ever emerged in estate planning and trust administration.

One best appreciates the power of decanting when considering that, in New York, it can be very difficult, and sometimes impossible, to amend the terms of an irrevocable trust. That can be problematic because, while irrevocable trust instruments cannot change, life changes. Circumstances change. Beneficiaries change. Tax law changes. The problem, stated simply, is whether the irrevocable trust, even if well suited to the situation that had existed at the time of the trust's creation, is now, years later, still well suited to the situation in which the trustees and beneficiaries find themselves.

As more trustees attempt to jump onto the decanting bandwagon, they, and the attorneys advising them, should keep in mind at least four basic aspects of New York's decanting statute.

First, not every trustee is allowed to decant. The statute allows only "authorized trustees" to decant, who are defined as trustees "other than (i) the creator, or (ii) a beneficiary to whom income or principal must be paid currently or in the future, or who is or will become eligible to receive a distribution of income or principal in the discretion of the trustee (other than by the exercise of a power of appointment held in a non-fiduciary capacity)."[iii]

Second, even an authorized trustee has "a fiduciary duty to exercise the power in the best interests of one or more proper objects of the exercise of the power and as a prudent person would exercise the power under the prevailing circumstances."[iv] In other words, the decanting statute does not give a trustee a license to act in bad faith. This point is relevant in light of other portions of New York's statute, which make clear that the very act of decanting is subject to an objection in an accounting proceeding.[v]

Third, not even an authorized trustee is empowered to decant "if there is substantial evidence of a contrary intent of the creator and it cannot be established that the creator would be likely to have changed such intention under the circumstances

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The Trusts and Estates Expert Witness

By Hillary Frommer

Note: Each month Ms. Frommer submits the "Who's Your Expert" column to our publication.

A physician expert witness is required in a medical malpractice action. In a business divorce matter, a valuation expert often takes center court. In the trusts and estates arena however, there is not a specific expert witness who must testify. From planning to administration to litigation, trusts and estates matters involve a wide range of issues, which can lead to the utilization of almost any type of expert, such as appraisal experts, physicians, attorneys, scholars, and accountants, to name a few. Here are some examples of expert witnesses who are commonly utilized in trusts and estates litigations.

Psychiatric experts frequently testify (or submit affidavits) in proceedings where the testator's capacity is at issue. In a probate proceeding, for example, an objectant will present expert psychiatric testimony to establish that the testator lacked testamentary capacity at the time the will was executed. Similarly, in discovery and/or turnover proceedings under Article 21 of the SCPA, psychiatric experts often testify where the issue is whether the decedent lacked the capacity to make a particular gift or execute a specific deed which a fiduciary seeks to claw back into the estate. These experts may not carry the day however, because it is well established that courts may afford very little weight to the testimony of a psychiatric expert who never met the testator and formed his or her expert opinion based solely on a review of medical records. For example, in *Matter of Swain*,[1] a probate proceeding, the court determined that the expert's testimony that the testator was impaired by a stroke and could not have known the nature and extent of her assets or the natural objects of her bounty was purely speculative and afforded very little weight.


Hillary Frommer

FOCUS ON TRUSTS & ESTATES SPECIAL EDITION

Handwriting experts are frequently utilized in probate proceedings where the genuineness of the testator's signature on the will is at issue. In fact, a handwriting expert can be a key witness in contesting a will based on due execution. For example, in *Matter of Sylvestri*,[2] to refute the testimony of the attesting witnesses, the objectant presented a handwriting expert who compared the signature on the propounded will to signatures that were undisputedly those of the testator, and opined that the signature on the propounded will was not that of the testator. The Court of Appeals upheld the Surrogate's Court jury verdict, which rejected the will to probate based on that expert's testimony. In *Matter of Halpern*,[3] the petitioners produced a handwriting expert to authenticate the signatures of the decedent and supervising attorney on the will they sought to admit to probate.

Financial investment experts commonly testify in contested accounting proceedings as to whether the fiduciary complied violated the prudent investor rule, which provides that "[a] trustee has a duty to invest and manage property held in a fiduciary capacity in accordance with the prudent investor standard."[4] The prudent investor standard requires a trustee "to diversify assets unless the trustee reasonably determines that it is in the interests of the beneficiaries not to diversify, taking into account the purposes and terms and provisions of the governing instrument."[5] For example, in *Matter of Rowe*,[6] a bank was appointed the trustee of a charitable lead trust, which was funded solely by IBM stock. The respondents objected to the fiduciary's accounting of the trust on several grounds, including that the fiduciary imprudently managed the trust's assets. They presented Loren Ross, a seasoned investment manager and CFA (chartered financial analyst), as an expert to testify how the fiduciary's failure to diversify the trust's assets was imprudent. Mr. Ross also testified as an expert in *Matter of Janes*,[7] in which the Surrogate's Court found that the fiduciary had acted imprudently by failing to diversify the estate's high concentration of Kodak stock. In its seminal decision addressing the prudent investor rule, the Court of Appeals affirmed the finding of liability, but reversed the Surrogate's calculation of damages based "lost profits."

An expert testifying as to a fiducia-

(Continued on page 19)

AMONG US

On the Move…


Jacqueline M. Siben

Louis DeVito and **Melissa Forgas-Gartland** have joined Sahn Ward Coschignano & Baker, PLLC. Ms. Gartland and Mr. DeVito concentrate their practice in the areas of estate planning and administration; estate and trust litigation; asset protection planning; elder law and special needs planning; guardianships; real estate and business law.

Announcements, Achievements, & Accolades…

Alan J. Schwartz has been elected as President of AANG, The Accountant Attorney Networking Group. AANG is comprised solely of practicing accountants and practicing attorneys who service multiple clients.

James F. Gesualdi, whose practice is concentrated on animal welfare and wildlife conservation, participated in the Center for Zoo Animal Welfare Symposium, "Advancing Zoo Animal Welfare Science and Policy", at the Detroit Zoological Society in Royal Oak, Michigan (November 21-22). Gesualdi's presentation, "The Excellence Beyond Compliance Approach: Enhancing Animal Welfare Through the Constructive Use of the Animal Welfare Act", was part of the "Advances in Animal Welfare Policy" session. For more information on, *Excellence Beyond Compliance: Enhancing Animal Welfare Through the Constructive Use of the Animal Welfare Act,* go to http://excellencebeyondcompliance.com/.

Alan J. Schwartz, a solo practitioner in Garden City, has been elected president of the Accountant Attorney Network Group, which facilitates networking between lawyers and accountants.

Regina Brandow was appointed by the Town of Brookhaven to be a member of the Special Needs Task Force for a one year term on September 30. Additionally she was asked to present at a Guardianship Workshop on November 12 at Sachem High School East and to participate in the Centereach High School Transition Expo on November 13.

Thomas J. Killeen, a partner at Farrell Fritz, has been elected to the Board of Directors of the Maurer Foundation in Hauppauge.

Congratulations…

Brian Andrew Tully, of Tully & Winkelman, P.C. has been named for the fourth straight year to the list of New York Metro SuperLawyers, recognized in the practice areas of Elder Law and Estate Planning & Probate.

Cheryl Fratello, Fratello Law, PC and **Sheila Johnson**, Nassau/Suffolk Law Services' Director of Development and Government Affairs were selected by Long Island Business News to receive the Leadership in Law Award. Cheryl received the award in the Partnership category and Sheila received her award in the Unsung Hero category. The awards were presented at a gala dinner on November 13 at the Crest Hollow Country Club in Woodbury, LI.

Condolences

To the family and colleagues of long time SCBA member **Lawrence M. Kenney** who passed away last month.

To the family and law firm of Twomey, Latham, Shea, Kelley, Dubin, Quartararo, LLP on the sudden passing of **Thomas A. Twomey, Jr.**

New Members…

The Suffolk County Bar Association extends a warm welcome to its newest members: **Erica C. Diner, Frank T. Gargano, Elisa P. Gerontianos, Gregory A. Goodman, Helma J. Hermans, William C. Heuer, Keri Anne Mahoney, Caroline P. Raffa-Tyree, Stacey Ramis Nigro, Michael H. Ricca, Adam M. Tavares** and **Jaclyn Ann Weber-Cantrell.**

The SCBA also welcomes its newest student members and wishes them success in their progress towards a career in the law: **Javier D. Cruz-Perez, Gregory DeTolla, Andrew Filipazzi, Arielle Howe, John Mazzaro** and **Nicholas A. Pagano.**

In Terrorem Provisions That Violate Public Policy

By Robert M. Harper

In terrorem clauses generally provide that, where a beneficiary under a testamentary instrument unsuccessfully challenges the instrument's validity, the beneficiary will forfeit any interests obtained under the instrument. Testators include in terrorem clauses in their wills in order to dissuade estate beneficiaries from taking action that is contrary to the testators' wishes, as expressed in their testamentary instruments. While a paramount objective of the Surrogate's Court is to act according to testators' wishes, in terrorem clauses must be narrowly construed, and certain in terrorem provisions are violative of public policy. This article provides examples of in terrorem clauses that contravene public policy and, thus, are unenforceable under New York law.

Though in terrorem clauses are intended to prevent attacks on the validity of a will, Surrogate's Courts have recognized that in terrorem provisions which purport to preclude a beneficiary from seeking the removal or suspension of a fiduciary nominated in the governing instrument, based upon the fiduciary's misconduct, are violative of public policy. Indeed, it "is disingenuous for [a party] to contend that [a testator] intended that [a fiduciary acting under a will] serve [as a fiduciary] even if [the fiduciary] violated [his or] her obligations under [the governing instrument] and [his or] her sacred duties of undivided loyalty."


Robert M. Harper

Former Surrogate Holzman's decision in *Matter of Rimland* is highly instructive. There, the petitioner, the income beneficiary of a testamentary trust, commenced a proceeding for the appointment of a fiduciary to pursue claims against the trustee. In response, the trustee argued that the petitioner had triggered the governing will's in terrorem clause and, therefore, forfeited her interest in the trust. Surrogate Holzman was not persuaded by the trustee's arguments, holding that the trustee's interpretation of the in terrorem clause was violative of public policy.

Much like in terrorem clauses which purport to prevent a beneficiary from seeking the removal or suspension of a fiduciary on the basis of the fiduciary's wrongdoing are violative of public policy, so too are in terrorem clauses which attempt to preclude a beneficiary from questioning the fiduciary's conduct. As Surrogate Czygier has explained, "any attempt by a testator to preclude a beneficiary from questioning the conduct of the fiduciaries, from demanding an accounting from said fiduciaries or from filing objections thereto will result in a finding that the pertinent language is void as contrary to public policy and the applicable statutes of the State of New York."

For example, in *Matter of Egerer*, Surrogate Czygier construed an in terrorem clause which purported to disinherit a beneficiary under the testator's will who filed "objections to [the] fiduciaries' conduct, bad faith or for any other basis." The Surrogate found that the in terrorem clause was unenforceable as a matter of public policy, to the extent that it could be interpreted as preventing the beneficiaries from objecting to the fiduciaries' conduct.

The lesson to take away from this article is that, while testamentary intentions are entitled to great respect, there are limits to which the Surrogate's Courts will adhere to the wishes expressed by testators, especially concerning in terrorem clauses. Practitioners should be mindful of the limitations, including the public policy based concerns discussed in this article, in advising their clients with respect to in terrorem provisions.

Note: Robert M. Harper is an associate in the trusts and estates department at Farrell Fritz, P.C. He serves as a Co-Chair of the Bar Association's Surrogate's Court Committee; an Officer of the Suffolk Academy of Law; and is a Special Professor of Law at Hofstra University.

[1] *Matter of Rimland*, 2003 WL 21302910 (Sur. Ct., Bronx County 2003).; *Matter of Fromartz*, N.Y.L.J., Oct. 22, 2005, at 29, col. 1 (Sur. Ct., Kings County).
[2] *Matter of Egerer*, 30 Misc.3d 1229(A) (Sur. Ct., Suffolk County 2006); *Matter of Lang*, 60 Misc.2d 232 (Sur. Ct., Erie County 1969).

Valuation Discounts Must Result From a Careful and Thoughtful Analysis

By Russell T. Glazer

A common objective of making a gift of an interest in a closely-held business to a family member (either through a trust or directly) is the opportunity to receive a valuation discount upon the transfer of the subject interest. Any discount(s) must be adequately explained and supported in a timely filed gift tax return in order for the statute of limitations to commence.

Perhaps the two most common valuation discounts are the discount for lack of control and the discount for lack of marketability. Although these discounts are frequently applied, their application is not automatic, and should only be applied after a careful analysis of both the facts and circumstances of the subject interest, and of the relevant empirical data for each type of discount.

The applicability of these discounts is also dependent on the nature of the interest being valued (control or non-control) and the valuation method(s) used to arrive at the pre-discount value. For example, a discount for lack of control would not apply to the valuation of a controlling interest. In addition, certain valuation methods already have a discount for lack of control or discount for lack of marketability "baked into" the analysis; in this circumstance, and assuming the valuation method(s) was properly employed, applying a discrete discount for lack of control or for lack of marketability would be double-counting the discount.


Russell T. Glazer

A discount for lack of control would be considered when the subject interest lacks control over the business enterprise. However, the degree of control may not always be obvious. For example, if there are two 49 percent owners who have been at odds with one other for years, the owner of the remaining 2 percent may have effective control in the form of a tie-breaking swing vote.

Similarly, a 49 percent owner may have effective control if the remaining 51 percent is scattered among many other owners who individually have small ownership interests. In this case, the 49 percent owner may need to only persuade one or two other owners in order to exercise effective control over the enterprise. There may also be circumstances where a supermajority is needed to take certain actions, so that a 51 percent owner may not have unilateral control over certain key decisions.

It is for this reason that we typically refer to a "control or non-control" interest, rather than a "minority or majority" interest. Someone may have a numerical minority interest, but may actually be a controlling owner.

Circumstances within the company will also determine the magnitude of the discount for lack of control. In this situation, if a controlling owner is not siphoning off cash flow for personal use or other non-business expenditures, and is operating the company in an effective and efficient manner, the non-controlling owner may not be suffering any significantly reduced distributions. In this circumstance, the discount for lack of control may rightfully be quite low.

Likewise, the discount for lack of marketability should be applied only after careful consideration of all the facts and circumstances of the subject interest and the empirical discount studies.

Marketability is defined in the *International Glossary of Business Valuation Terms* as "the ability to quickly convert property to cash at minimal cost," and the standard for full marketability is being able to call your investment broker to sell a marketable security, and then receiving cash in three days. From this end of the spectrum, marketability declines along a continuum to the other extreme, where sale of the interest is very difficult to achieve. Hence, the marketability of the subject company's shares can fall anywhere along that continuum, depending on the specific circumstances at the valuation date. According to the *International Glossary*, the discount for lack of marketability is "an amount or percentage deducted … to reflect the relative absence of marketability."

As with the discount for lack of control, the valuation method(s) used by the valuator may already have incorporated the appropriate consideration of a discount for lack of marketability in the analysis. In this case, a separate discount would be inappropriate.

Numerous studies have been published regarding the empirical data on the discount for lack of marketability for a non-controlling interest. The valuation analysis should focus on the company-specific factors that impact

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TAX

Transferring the Family Business — Part V: Compensation

By Louis Vlahos

This is part five of a five part series. To find prior parts go to scba.org.

"Call it what you want, incentives are what get people to work harder."
-Nikita Khrushchev

Most of our clients are closely held, often family-owned businesses. The current owners may be the founders of the business, or they may be a generation or two removed. Sometimes, the owners have children who are active in the business and who may have manifested an ability to take over the business. In those cases, our goal is to provide for the smooth transition and succession of management and ownership of the business to those children.

No heir? Or not sure yet?

Quite often, however, the children may have no interest in the business, may not be capable of operating it effectively, or they have not yet exemplified the ability or inclination to do so.

This could put the owners in a quandary, with the only feasible option being a sale of the business at some point down the road. Of course, the owners' first priority in this instance will be to maximize the return on their investment, both for themselves and for their family. Depending upon the business, this may require the retention and cooperation of some key executive employees.


Louis Vlahos

The question then, is how to incentivize and reward these key employees; how to align their interests with those of the owners; how to entice them to stay with the business, to keep growing the business, to help prepare the business for a likely sale?

There are several options to consider.

Incentive compensation choice 1: equity (or something like it)

On the one hand is "equity-based" compensation, which may take two forms.

A. Employee becomes an owner.

Under the first form, the employee may become an owner through grants of stock in the employer, bargain sales of employer stock, and non-qualified options to acquire such stock. In any of these scenarios, the stock may be voting or nonvoting, it may be vested immediately or it may vest over time, and the right to exercise the option may or may not be immediately vested.

B: Employee feels like an owner

The second form does not involve the actual issuance of employer stock but, rather, seeks to mimic, to some extent, the "economics" of stock ownership. This includes phantom stock plans (on which there are many variations) and stock appreciation rights. Each of these is basically just a form of non-qualified deferred compensation, the amount of which is tied either to the value of the "shares" credited to the employee's account or to the appreciation in the value of such shares. (Where the employer is a partnership or LLC, a so-called "profits interest" may be issued, which entitles the employee to a share of future profits and future appreciation.)

The ultimate decision as to which equity-based plan is best suited for a particular business depends upon a number of factors, including the existing owner's tolerance for minority-interest shareholders, as well as the relative bargaining/negotiating positions of the employer and the key employee.

In my experience, the preference of most business owners is to avoid the actual issuance of equity (even as to family members, at least not until they have proven themselves in the business). Even with a tightly-drafted shareholders agreement, the rights afforded to a minority shareholder under state common law, and the potential for litigation – especially with an employee with whom there is no familial relationship – can make issuing equity a risky choice. Additionally, employees often do not want the obligations that often come along with ownership, e.g., personal guarantees of business loans and leases, restrictions on transfer, etc. (We will cover the issuance of stock options in a future post.

Incentive compensation choice 2: non-equity compensation

Alternatively, the incentive may take the form of a deferred compensation arrangement where the amount of the

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CONSUMER BANKRUPTCY

Time to Call Mandatory Bankruptcy Counseling a Failure

Recent study by law professor confirms need for reform

By Craig D. Robins

"It was an absolute waste of time." This was the most common phrase consumers used to describe both of the credit mandatory counseling courses upon being interviewed for the most recent study of the credit counseling requirement.

Yet, these days, consumer bankruptcy practitioners and judges don't even question the credit counseling that Congress imposed by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA).

Without blinking an eye, we have become so accustomed to telling our clients to take the required two courses that we don't even think about it. It has become just a routine component of the filing process; another box to check off. Done that. On the court side, clerks mindlessly check to ensure that debtors have met this obligation.

Unfortunately, it continues to appear that this requirement is an utter failure and serves no purpose while creating an unnecessary cost to the consumer, and potentially causing a delay before the petition is filed. It is nothing but a nuisance that creates, in essence, a supplementary filing fee, as consumers must pay an additional fee for this.

Craig Robins

For those unfamiliar with bankruptcy practice, consumers seeking bankruptcy relief are obligated to engage in a credit counseling course as a prerequisite to filing, and a second course several weeks later as a prerequisite to obtaining a discharge.

The reason we have these compulsory courses is because the credit card and banking industry relentlessly lobbied Congress a decade ago and convinced them that if consumers were aware of non-bankruptcy alternatives, a good 15 percent of them would likely change their mind about filing bankruptcy. In addition, Congress wanted those who did file to learn effective financial management techniques to employ after they emerged from bankruptcy.

When the courses were first offered, they were done almost exclusively through telephone sessions, with the debtor speaking directly to a credit counselor. Today, however, the vast majority are done on a home computer, through an automated computer program, with no human interaction whatsoever.

One study that was done shortly after the law went into effect concluded that rather than 15 percent of consumers changing their minds, as the lobbyists projected, the figure was about one-half of one percent — quite a difference.

Almost 10 years ago I commented extensively about the controversial credit counseling requirements and suggested that they were merely a device to delay and drive up the costs of bankruptcy protection for those who could barely afford it.

My *Suffolk Lawyer* column in June 2007 was entitled, "No Proof that Credit Counseling Requirement is Working." I discussed a report that the United States Government Accountability Office had just issued at the request of Congress, to review the value of the credit counseling requirement. The GAO essentially concluded that those who need bankruptcy relief will go forward to get it in any event, and the counseling requirement often serves more as an administrative obstacle than as a timely presentation of meaningful options.

The GAO concluded that there was absolutely no proof that the credit counseling requirement was working or meeting its intended objective. It was also critical of the United States Trustee program for failing to track and monitor the outcomes of counseling sessions.

I wrapped up that article by stating: "While Congress may be slowly assessing the failure or success of the new bankruptcy laws, it appears that

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EDUCATION

Changes to Emergency Medical Treatment in Schools

By Candace J. Gomez

Governor Cuomo recently signed legislation that expands access to emergency medication for students and school personnel. One new law, which goes into effect on March 5, 2015, allows school employees to administer epinephrine auto-injectors ("epi-pens") to students or staff without prescriptions in emergency situations. The other new law, which goes into effect on July 1, 2015, allows students diagnosed with asthma, allergies or diabetes to self-administer prescribed medical treatments.

Emergency administration of epi-pens

Public Health Law §3000-c(1)(a) has been expanded to include school districts, boards of cooperative educational services, county vocational education and extension boards, charter schools, and non-public elementary and secondary schools (collectively "schools") or any person employed by those schools among the list of entities authorized to possess and use epi-pens.

The Education Law was also amended to include a new Section 921 that allows schools to provide and maintain epi-pens on-site in each instructional school facility. The legislation will allow epi-pens to be administered by trained school employees regardless of whether the person receiving the epi-pen has a prescription or a previous history of severe allergic reactions.

Candace Gomez

Any person employed by a school who has successfully completed a training course approved by the Commissioner of Health may administer an epi-pen in an emergency situation. There is no requirement that school employees must complete the course, and the training requirement does not apply to licensed or certified health care practitioners, such as school nurses, acting within the scope of their practice. Trained employees who administer epi-pens in emergency situations will be insulated from potential liability so long as the epi-pen was not administered in a grossly negligent manner.

Student self-administered medication

Education Law § 916 has been amended to permit students who suffer from asthma or other respiratory diseases, allergies or diabetes to carry and self-administer medications such as inhalers, epi-pens and insulin while in school or at school functions if they have authorization from a physician or health care provider and written parental consent.

The physician's or health care provider's authorization must confirm the following: (a) that the student is diagnosed with a condition for which the rescue medication has been prescribed; (b) that the student has demonstrated that he or she can effectively self-administer the prescribed medication; (c) the name of the prescribed rescue medication; (d) the dose; (e) the times when the medication is to be taken; (f) the circumstances that may warrant the use of the medication; and (g) the length of time for which the medication is prescribed. A record of the physician or health care provider's authorization and a record of written parental consent must be maintained in the student's cumulative health record. In addition, upon the written request of a parent or person in parental relation, the school must allow a student to maintain extra medication in the school building under the custody of a licensed nurse, nurse practitioner, physician assistant or physician.

Schools are authorized, but not obligated, to have licensed registered professional nurses, nurse practitioners, physician assistants and physicians train unlicensed school personnel on how to inject prescribed glucagon to students in emergency situations where an appropriately licensed health professional is not available and the parent has given written consent.

This law specifies that, as long as schools and school employees attempt to reasonably and in good faith comply, they will be protected against legal or financial liability as a result of any harm or injury sustained by a student or other person as a result of self-administering medication.

Schools should modify any existing policies regarding administration of medication to reflect the new legislation.

NOTE: Candace J. Gomez is an attorney with the law firm of Lamb & Barnosky, LLP in Melville. She practices in the areas of education law and civil litigation. Ms. Gomez is a member of the Suffolk County Bar Association and also serves as a member of the New York State Bar Association President's Committee on Access to Justice. Ms. Gomez is also the Nassau County President of the Long Island Hispanic Bar Association. Follow her at http://nyedulaw.com/ *and* https://twitter.com/@nyedulaw.

PRO BONO

Honoring the volunteers at luncheon

By Maria Dosso

We are proud of our attorneys in Suffolk County who have demonstrated their active commitment to pro bono in the true spirit of volunteerism. In gratitude for the dedication shown by our pro bono attorneys, the Suffolk County Bar Association (SCBA), in collaboration with Nassau Suffolk Law Services' Pro Bono Project and the Suffolk County Bar Pro Bono Foundation, hosted a Pro Bono Recognition Luncheon on Thursday October 23, 2014.

Attorneys who completed a pro bono case during the last 12 months were invited to the event to salute their generous donation of time and expertise. The chair of the Suffolk County Pro Bono Foundation, Patricia Meisenheimer, presided over the program and presented the awards to the honorees along with Barry Smolowitz who co-administers the Pro Bono Foreclosure Settlement Project.

It was an honor to have in attendance Judge C. Randall Hinrichs, District Administrative Judge for Suffolk County, who addressed the honorees and commended them on their dedication to pro bono representation of disabled and low-income litigants in Suffolk County. He expressed the great appreciation that the judiciary has for the critical role that pro bono attorneys play in providing access to justice.

William Ferris, SCBA President, thanked the honorees for their commitment and stated how proud the SCBA was of their pro bono attorneys. The Suffolk Pro Bono Project staff, Ellen Krakow and Maria Dosso, spoke of the outstanding commitment shown by Suffolk attorneys as demonstrated by their willingness to provide full pro bono representation, especially on matrimonial and bankruptcy cases, as well as the ongoing commitment of the Foreclosure Settlement Project volunteers. They affirmed that the success of the pro bono mission is made possible by the staunch support and strong partnership with the SCBA, led by the president, Bill Ferris and Executive Director Jane LaCova and the Pro Bono Foundation under the leadership of Patricia Meisenheimer.

Pro bono service is alive and well in Suffolk County and we are proud to honor those who give so much of themselves to our neighbors in need. Congratulations to all the honorees!

PRACTICE MANAGEMENT

Recent NY Ethics Opinions Address Lawyers and Technology

By Allison C. Shields

Lawyers today are faced with issues that didn't exist 20, 10, or sometimes even 5 years ago, including issues involving electronic communication, data storage and security, "cloud" services, websites and virtual law offices. In the past several months, the New York State Bar Association Committee on Professional Ethics has issued a number of ethics opinions that deal with some of these topics.

Here is a quick overview of those opinions.

Remote Access to Law Firm Electronic Files

Perhaps the most comprehensive of the recent New York opinions dealing with the application of the New York ethics rules to modern technology is Opinion 1019, discussing confidentiality and remote access to a law firm's electronic files. The opinion concludes that, "*A law firm may give its lawyers remote access to client files, so that lawyers may work from home, as long as the firm determines that the particular technology used provides reasonable protection to client confidential information, or, in the absence of such reasonable protection, if the law firm obtains informed consent from the client, after informing the client of the risks.*"


Allison C. Shields

This reasonableness standard comes from Rule 1.6, Confidentiality. Rule 1.6(c) provides that a lawyer must "exercise reasonable care to prevent... others whose services are utilized by the lawyer from disclosing or using confidential information of a client" except as provided in Rule 1.6(b).

Comment 17 to Rule 1.6 provides some additional guidance regarding reasonableness, and notes that "special circumstances might require additional security precautions." Comment 17 also sets forth factors to be considered in determining reasonableness, including the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement.

Opinion 1019 concludes that, *Because of the fact-specific and evolving nature of both technology and cyber risks, we cannot recommend particular steps that would constitute reasonable precautions to prevent confidential information from coming into the hands of unintended recipients, including the degree of password protection to ensure that persons who access the system are authorized, the degree of security of the devices that firm lawyers use to gain access, whether encryption is required, and the security measures the firm must use to determine whether there has been any unauthorized access to client confidential information. However, assuming that the law firm determines that its precautions are reasonable, we believe it may provide such remote access. When the law firm is able to make a determination of reasonableness, we do not believe that client consent is necessary.*

However, if a law firm cannot make such a conclusion, the client's informed consent may be obtained.

Use of Cloud Services for a Transaction

In Opinion 1020, issued September 12, 2014, the committee addressed a question raised by a real estate attorney who wanted to use an electronic project management tool which would allow sellers' attorneys, buyers' attorneys, real estate brokers and mortgage brokers to post and view documents, including contracts and building financials, using a cloud-based data storage tool.

As they did in Opinion 1019, the committee referred to Rule 1.6(c) and the reasonableness standard, stating that,

> "*Whether a lawyer to a party in a transaction may post and share documents using a 'cloud' data storage tool depends on whether the particular technology employed provides reasonable protection to confidential client information and, if not, whether the lawyer obtains informed consent from the client after advising the client of the relevant risks*," and that lawyers must "*exercise reasonable care to prevent … [persons] whose services are uti-*

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LAND TITLE LAW

'Legal Access' and 'Physical Access'

By Lance R. Pomerantz

Many landowners believe their title insurance policy will protect them if they are physically unable to access their property. Such lack of access may be attributable to natural features such as dense vegetation, rock formations or swamps. Or, it may be attributable to human interference such as a neighbor's parked vehicles or accumulated debris. A recent case contains the clearest explanation yet that New York courts will not extend title insurance protection to cover merely physical barriers to access.

The latest word

In *43 Park Owners Group, LLC, et al. v. Commonwealth Land Title Insurance Company, et al.,* 2014 NY Slip Op 07120 (Second Dept., Oct. 22, 2014) the insured parcel adjoined a public street. For many years, the City of New York had maintained a 1½-foot-thick stone retaining wall along the length of the street boundary. Due to the steep slope of the parcel, the wall was eight feet above grade at its shortest point and 34 feet above grade at its tallest. Vehicular access was impossible and pedestrian access would require a ladder.


Lance Pomerantz

Despite obtaining construction permits that allowed partial demolition of the wall, the insured owner commenced litigation against the title insurer. The insured alleged a policy breach for failing to disclose that the wall blocked access from the public street.

The Appellate Division upheld a grant of summary judgment in favor of the insurer. The panel expressly held the policy provision insuring against a 'lack of a right of access to and from the land'[i] only protects against the absence of a legal *right* of access and "does not cover claims concerning lack of an existing means of physical access."

This is the first New York appellate case to clearly enunciate the law. The existing New York law, *Mafetone v. Forest Manor Homes, Inc.,* 34 A.D.2d 566 (Second Dept., 1970) involved a change to the abutting street grade. The court found "the provisions of the standard title insurance policy here in question are concerned with matters affecting *title* to property and do not concern themselves with physical conditions of the abutting property" [emphasis in original], did not recite the policy provisions at issue.

Welcome to the Club

This holding puts New York in line with the majority rule on this issue. As summarized by the New Mexico federal court construing the identical provision, "courts in other jurisdictions have found that coverage for a 'lack of right of access' to the insured property is not triggered where access is merely impractical or difficult as long as the right to access exists." *Riordan v. Lawyers Title Insurance Corporation,* 393 F.Supp.2d 1100, 1104 (U.S.D.C., D. New Mexico, 2005).[1] Courts in Florida, California and Missouri have considered the issue and agree with the Second Department's holding.

The only outlier is a case out of North Carolina, *Marriott Financial Services, Inc. v. Capitol Funds, Inc.*, 288 N.C. 122, 217 SE 2d 551 (1975), which, in *dicta,* construed the provision to insure against a lack of physical access. *Marriott* was cited in the brief for appellants in *43 Park Owners Group,* but was not even mentioned in the Second Department appeal.

Homeowners can obtain protection

The form of owner's title insurance policy presently authorized in New York State insures against damage caused "by reason of … [n]o right of access to and from the land." A purchaser of a one-to-four family residence may purchase a "TIRSA Owner's Extended Protection Policy," which protects against a lack of "both actual vehicular and pedestrian access to and from the Land," as long as the access is based upon a legal right.

Note: Lance R. Pomerantz is a sole practitioner who provides expert testimony, consultation and research in land title disputes. He also publishes the widely read land title law newsletter "Constructive Notice." For more information, visit www.LandTitleLaw.com.

[1] From this language, as well as the date the policy was purchased (2005) it appears the policy being construed is the 1992 ALTA Owner's Policy. This policy cannot be issued in New York after May 1, 2007. The current owner's policy contains a slightly different coverage provision.

SCBA Members Pull Together to Help Needy Children

SCBA's Charity Foundation held a very successful wine and cheese fundraising event at the Association on Friday, October 17. The rock band Just Cause Band (a group of musicians that are mainly lawyers), shared their passion for rock playing great music for the charity benefit.

Our special thanks and appreciation go to Fireside Caterers, who sponsored and supplied the cheese, crackers, mini hot dogs and a wonderful display of fruit and pastries. Managing Director Len Badia, as well as the Foundation's Board of Managers, sends it gratitude to the members and guests who attended the event for their generosity, which will enable us to continue helping underprivileged children of Suffolk County.

~LaCova

Photos by Barry Smolowitz

TOURO

Supreme Court Decision in *Lane v. Franks*

By Thomas Schweitzer

This is part two of a two part series.

Applying the Garcetti test, the District Court in *Lane v. Franks* noted that while Lane's testimony against Schmitz at the grand jury and at trial did not occur in the workplace, Lane had learned of its substance while serving in his official capacity as Director at CITY. Thus, it concluded that Lane's speech was made as part of his official job duties as Director of CITY and not made as a citizen on a matter of public concern. Accordingly, it granted summary judgment for defendants. The Eleventh Circuit affirmed in a per curiam opinion, while noting that courts in the Seventh and Third Circuits had reached the opposite conclusion and had conferred First Amendment protection on public employees' deposition testimony.

The Supreme Court, in a unanimous opinion by Justice Sotomayor, reversed the lower courts, both of which had held that the mere fact that Lane had testified pursuant to subpoenas at the Grand Jury and at Schmitz's trial did not necessarily make his speech a matter of public concern. It had granted certiorari to consider "…whether the First Amendment…protects a public employee who provided truthful sworn testimony, compelled by subpoena, outside the course of his ordinary job responsibilities." 134 S. Ct. at 2374-'s. The court's answer: "We hold that it does."

Citing 18 U.S.C. Sec. 1623, which criminalizes false statements under oath in judicial proceedings, the court noted that the obligation to testify truthfully while under oath "…is a quintessential example of speech as a citizen …" 134 S.Ct. at 2379. The court acknowledged that when testifying under oath pursuant to a subpoena, "…a public employee clearly has various obligations to his employer…" but "… he also has a separate, independent obligation as a citizen to speak the truth." Id. Thus, "[i]n holding that Lane did not speak as a citizen when he testified, the Eleventh Circuit read Garcetti far too broadly." Id.


Thomas Schweitzer

The court noted that government policies are of interest to the public at large, and public employees "are uniquely qualified to comment" on such matters because of what they learn on the job. 134 S.Ct. at 2377, citing *San Diego v. Roe*, 543 U. S. 77, 80 (2004). Moreover, employee speech is especially important in the context of a public corruption scandal; there are more than 1000 prosecutions for federal corruption offenses annually, and they often require testimony by other government employees. Obviously, corruption on the part of public officials is a vital matter of public concern, and it would be perverse if public employees, speaking publicly to disclose wrongdoing and thereby serving the public interest, could be fired with impunity and be without the remedy of a retaliation claim based on violation of their free speech rights. The government defendants in *Lane v. Franks* were unable to cite any governmental interest that would counter-balance Lane's free speech rights on "the Pickering scale." 134 S.Ct. at 2377.

The Eleventh Circuit in *Lane v. Franks* had taken a literal, doctrinaire view of *Garcetti v. Ceballos*, which led them to an outrageous result. It is eminently in the public interest to identify, expose and prosecute criminals, and it is not surprising that the Supreme Court's decision reversing the Eleventh Circuit was unanimous. The Supreme Court sent a clear message that its jurisprudence limiting the free speech rights of public employees could no longer be used to shield vindictive scoundrels like Schmitz or to leave those who expose them and are dismissed in reprisal without a legal remedy.

Commentary

I believe that the unanimous decision in *Lane v. Franks* is obviously correct. It can be argued, however, that the entire case should have been unnecessary, and the Supreme Court itself in Garcetti may have invited the extreme and unacceptable Eleventh Circuit approach, which it unceremoniously uprooted in *Lane v. Franks*. It left itself open for such an approach when Justice Kennedy stated flatly in *Garcetti v. Ceballos*: 'We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.' 547 U.S. at 421.

While the precise scope of public employees' "official duties" may be debatable, this rather absolute statement is susceptible of the extreme interpretation placed on it by the Eleventh Circuit. After Lane, it is plain that this statement can no longer be taken literally. The Supreme Court apparently has qualified it by implication, but it would have been preferable and more candid if the court had done so explicitly.

In any event, the jurisprudence of Garcetti and Connick, both decided by bare majorities, has imposed on federal courts the challenging and unnecessarily complex task of determining whether a particular public employee's utterances were made as part of her official duties or otherwise. I agree with Justices Stevens and Souter who anticipated such difficulties in their dissents in Garcetti. As Justice Stevens stated there, "The notion that there is a categorical difference between speaking as a citizen and speaking in the course of one's employment is quite wrong." 547 U.S. at 426 (Stevens, J., dissenting). He felt it was "senseless" to let constitutional protection for the same words depend on whether they fell within a job description, and that it was "perverse" to adopt a rule that gives employees an incentive to voice their concerns publicly before talking frankly with their superiors. Id. Surely, the convoluted analyses made necessary by the Garcetti decision and the resultant legal confusion anticipated by Justices Stevens and Souter should have and would have been avoided if the result in Garcetti had been 4-5 instead of 5-4.

Note: Professor Thomas Schweitzer is on the Touro Law Center faculty. He graduated from Holy Cross College and received a Ph.D. in Modern European History from the University of Wisconsin and a J.D. from Yale Law School.

HEALTH AND HOSPITAL

Affordable Care Act in NY: Where it's Been and Where it's Going

By James G. Fouassier

At the annual Fall Institute of the Metropolitan New York Chapter of the *Healthcare Financial Management Association* held on October 15, Wendy Darwell, the Executive Director of the Nassau-Suffolk Hospital Council, presented on the present and future of the ACA in New York. Ever on the alert for subject that is of general interest to our membership I thought I would sum up her presentation for our readers.

As you know, the ACA health exchange "marketplace" in New York is called *New York State of Health*. Between October 1, 2013, the enrollment "start" date, and April 15 of this year our state exchange plan enrolled nearly one million people. Six of the eight highest enrolling counties were in the downstate area and eighty percent of the enrollees previously were uninsured. Arguably the ACA in New York is meeting its stated goal of insuring those who previously were uninsured.


James G. Fouassier

The New York marketplace currently offers 16 individual "exchange" plans (*i.e.* those qualifying by offering the several categories of "essential health benefits" mandated by the ACA) and 10 small business (SHOP) plans. While not every plan is licensed to offer product in every county, there are several (and in some counties, many) choices in every county. Making the program even more attractive is the fact that it's turning out that individual premiums approximate half of previous direct pay plans (but obviously not group plans) and more than 30 percent less than the national average for small business plans.

In reviewing this data please keep in mind that in New York applicants for both Child Health Plus programs (i.e. under the age of 18) and Medicaid now must apply through the marketplace (although those particular plans are not "exchange plans; an issue that is often a source of confusion among providers uncertain as to whether they are participants in particular plan networks). Also, the data exclude those over age 65 who presumably will enroll in Medicare.

Only 15 percent of enrollees fall between the ages of 18 and 25; the figure is better for the 26 through 34 year olds (20%). As you may know, one of the drivers of the ACA was the idea that many uninsured "young invincibles" would join exchange plans and help spread the risk of loss, keeping premiums (and government subsidies of premiums and of cost shares) down. Is this enough? Maybe not; it looks like a number of exchange plans across the country already are petitioning their

(Continued on page 23)

COMMERCIAL LITIGATION

BCL § 626(b) as a Bar to a Derivative Action

By Leo K. Barnes Jr.

Consider the facts of *Koryeo Int'l Corp. v. Hong*, 45 Misc. 3d 1208(A) (N.Y. Sup. Ct. 2014), a recent decision by Judge Carolyn Demarest of the Kings County Commercial Division. Plaintiffs Koryeo International Corp. (Koryeo) and Steve Hong (an attorney, the current sole shareholder of Koryeo and the son of the defendant) filed suit against the defendant, Kyung Ja Hong ("Defendant") (the former sole shareholder of Koryeo and the mother of the plaintiff's current shareholder). According to the decision, the dispute had its origins in an agreement between Steve Hong and his parents wherein Steve Hong agreed to work for Koryeo for a minimal salary in exchange for future control and ownership of Koryeo. In 2012, Defendant duly transferred all of Koryeo's outstanding shares to Steve Hong, who at that time became the sole shareholder, director, and officer of Koryeo. Shortly after the transfer, Steve Hong discovered that only $54,201 had been deposited into Koryeo's bank account, despite millions in previous income.

Steve Hong, now the owner of a debt-riddled and cash-strapped business, concluded that Defendant had pillaged the corporation's assets prior to the transfer and sought to pursue damages via litigation, initiating claims on behalf of Koryeo against Defendant for breach of fiduciary duty, misappropriation, conversion, corporate waste, and unjust enrichment. Mr. Hong also asserted claims in his individual capacity against the Defendant.


Leo K. Barnes, Jr.

Defendant moved to dismiss the plaintiffs' case pursuant to CPLR §§ 3211(a)(3), (a)(5), and (a)(7). As to Koryeo's claim, Defendant asserted that Koryeo did not have standing because it would "constitute an improper attempt to sidestep the contemporaneous ownership rule that applies to derivative actions under Business Corporations Law § 626(b)." Koryeo at 1. Pursuant to BCL § 626(b), in order to pursue a derivative suit on behalf of the company, the plaintiff has to be "a holder at the time of bringing the action and… a holder at the time of the transaction of which he complains, or that his interest therein devolved upon him by operation of law." Bus. Corp Law § 626(b). In opposition to the motion, Plaintiffs asserted that BCL § 626(b) did not apply because the claim was a direct suit brought by Koryeo and not a derivative suit brought by Steve Hong for the benefit of Koryeo.

Citing the Court of Appeals, Judge Demarest observed that: "The rule is that, when stockholders are individually estopped from questioning wrongs done [by] their corporation, they cannot redress those same wrongs through a suit brought directly by the corporation or derivatively, by themselves for the corporation." Koryeo at 2 citing *Diamond v. Diamond*, 307 N.Y. 263, at 266 (1954) (where a corporation was denied recovery stemming from unscrupulous actions by the defendant because the shareholder bringing the derivative suit on behalf of the corporation had also participated in the wrongdoings).

Judge Demarest relied upon the Diamond Court's analysis to support her decision to dismiss Koryeo's claims against Defendant. First, because Defendant was the sole shareholder of Koryeo at the time of the alleged misappropriations, she must have been deemed to "have unanimously ratified her own acts of waste and misappropriation." Koryeo at 2 referencing *Capital Wine & Spirit Corp*., 277 A.D. 184, at 187-188 (1st Dept. 1950). Because of her sole ownership, "[a]ny wrongdoing by [Defendant] is therefore imputed to Koryeo, which is equitably estopped from obtaining redress for its own actions." Koryeo at 2. Secondly, Koryeo could not maintain an action because its sole shareholder and the sole beneficiary of its recovery, Steve Hong, did not acquire his shares until after the alleged actions by Defendant. Because of the timing of Steve Hong's possession of Koryeo's shares, he was barred from bringing a derivative suit on behalf of Koryeo pursuant to BCL §626 (b). Koryeo at 2. The Koryeo decision cited *Captial Wine & Spirits*, supra, which provides an excellent analysis of the point.

If a corporation may not recover due to the fact that all of the 'stockholders are so circumstanced that no relief

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VEHICLE AND TRAFFIC

SCTPVA on Trial

By David A. Mansfield

When interviewing a client to be retained in a prospective matter at the Suffolk County Traffic & Parking Violations Agency, (The Agency) the first inquiry should be whether the case is on for an initial return date, pretrial conference or a trial. The Agency is flexible within limits on adjournment of conference dates as defense counsel will ordinarily be afforded one or two conference dates before the matter will be set for trial.

But the same cannot be said for a case that has been set down for trial.

Defense counsel cannot rely upon the fact that they have just been retained to appear on the date the trial is scheduled or even in advance to have a request for an adjournment granted. While The Agency will accept an Affidavit of Actual Engagement, preferably in advance of the court date, defense counsel must be prepared to proceed to trial.

The Agency's position is that the defendant must appear under §350.20 of the Criminal Procedure Law unless arrangements in compliance with statute have been made in advance to excuse the defendant's appearance.

Should you wish to have your client's appearance waived as discussed in the previous article, you must make arrangements in advance, obtain the consent of the Agency through one of the supervisors and appear prior to the trial date before a Judicial Hearing Officer for their approval. This is important because it will avoid extended discussions as to why your client is not present and reduce the chances of prejudicing the case against your client.


David A. Mansfield

The Agency instructs the prosecutors to try to encourage pro se defendants to consult with counsel before setting these matters for trial.

Some individuals are just not persuadable and insist they want a trial.

Many times attorneys will be retained at the very last minute and will not have the opportunity to get their client's appearance waived and approved in advance as required by Agency policy and the Criminal Procedure Law. Another pitfall of being retained on the eve of trial may be the inability to obtain documentary evidence in admissible form such as wireless service providers billing records.

The plea offers are withdrawn and will in most cases not be reinstated on the date of trial. The trial notice will set forth warnings about the consequences of not showing up, will say one must appear and that the plea offers are being withdrawn.

Defense counsel and their client should arrive at the appointed hour.

The Agency will take a default conviction in the event no one checks in within a reasonable time. The best practice is to budget the entire morning, afternoon or evening session or whatever is required to see the matter through to a conclusion on the merits.

Your standard fee agreement when representing clients before The Agency should include the fact that it covers a disposition without a trial, appeal or an appearance before a Department of Motor Vehicles safety hearing. You should specify the additional costs for a trial on and for additional trial appearances.

The Agency does not operate like the former Suffolk Traffic Violations Bureau in that under 15 NYCRR Part §124, the motorist had an hour to check in and the officer had roughly an hour to arrive and testify.

Defense counsel should arrive promptly, be prepared with their client or having made arrangements in advance for a waiver with written authorization on file to proceed. Experience has shown that it may take at least a few hours to have the matter heard, adjourned or dismissed.

The conduct of the actual trial is governed by CPLR §350.20 of the Criminal Procedure Law and provides that the opening statements are optional, which most defense counsel would agree in a trial of a traffic violation is not necessary. What is more surprising is that the judicial hearing officer has the discretion to grant defense counsel the opportunity to have a summation. Should the judicial hearing officer grant defense counsel the option of a summation, the prosecution will be entitled to close. A denial of a request to sum up for a brief period of time, in defense of your client whether they are present or not, is not a desired situation for defense counsel.

Our clients have been conditioned by watching decades of movies and television that their lawyer will speak up

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AMERICAN PERSPECTIVES

U.S. House of Representatives Sues Obama

By Justin Giordano

In late July 2014 the U.S. House of Representatives voted 225-201 to authorize the Speaker of the House John Boehner to sue President Barack Obama, While there have been individual members of Congress that sued presidents in the past, this is the first time that an entire chamber of Congress has approved a lawsuit against a president. According to Professor Charles Tiefer, of the University of Baltimore Law School, who is an expert on separation of powers, "The closest was when the Senate Watergate Committee sued President Nixon to get the Watergate tapes."

What is the basis for the lawsuit?

Speaker Boehner indicated that the focus of the lawsuit would be on the delay of Obamacare's employer mandate. Boehner stated in a press release, "In 2013, the president changed the health care law without a vote of Congress, effectively creating his own law by literally waiving the employer mandate and the penalties for failing to comply with it. That's not the way our system of government was designed to work." In essence, the Speaker is demanding that the quite unpopular mandate, (if we look at the polls), be enforced. Incidentally Speaker Boehner and overwhelming the Republican Party, had opposed the mandate as damaging to the American people. So the natural question is why should he and the Republican House of Representatives majority sue to enforce the mandate?


Justin Giordano

Obviously these opposing positions seem to display blatant hypocrisy. However the two positions should not be conflated, since the opposition to the employer mandate is a position based on political philosophy, while the suit requesting that the mandate be enforced by the President is strictly a legal matter. The legal issue is whether the President under the constitution has the right to unilaterally choose to enforce some parts of legislation and not other parts of that same legislation.

The U.S. Constitution has traditionally permitted some latitude to the executive in the manner in which it chooses to roll out and enforce a new law. However the constitution is also clear in that the executive branch does have the authority to modify the law or parts thereof that in effect create new legislation. This is the situation that we have in this case according to Speaker Boehner's lawsuit.

The "standing" issue

In order to have "standing," a plaintiff must establish that the defendant has caused them harm. Only in such cases the plaintiff is said to have gained "standing" to have a federal court hear it and adjudicate it. Thus if "standing" cannot be established the case will not be heard by the court, and it will be dismissed. As previously indicated, there have been many lawsuits against the executive branch from members of Congress and the overwhelming majority of them have been dismissed by the courts due to lack of standing.

Speaker Boehner has made his case for the lawsuit against President Obama by principally adopting the legal arguments made by two prominent constitutional experts, namely Florida International University Professor of Law Elizabeth Price Foley and lawyer David Rivkin. Their arguments are essentially threefold.

First they state, it is quasi impossible for any private plaintiff to demonstrate harm. In a situation where a president refuses to enforce a law and this action does not seem to be causing harm to anyone, the legislative body should still be able to sue the executive branch; otherwise no one at all will have standing to sue the president. Consequently the executive branch will not be held accountable for not enforcing the law as intended by the constitution.

Second, based on the ruling in *Raines v Byrd*, where Chief Justice, in addressing a suit with individuals not an entire chamber of the Congress had sued, wrote that, "We attach some importance to the fact that members of Congress suing have not been authorized to represent their respective houses of Congress in this action." In the case at hand Speaker Boehner has addressed that issue by having taken a vote in the lower chamber and received, albeit along a party line vote,

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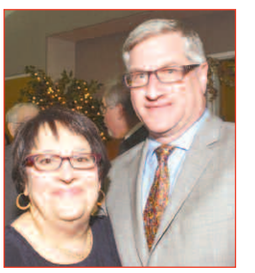
SCBA Celebrates the Holidays in Style



NYSBA Calls for Mandatory Pro Bono Reporting on an Anonymous Basis Only (Continued from page 1)

invasion of the privacy of lawyers. The amended rule would, if approved, preclude disclosure of information gathered with respect to any individual attorney, including disclosure pursuant to the Freedom of Information Law. There would be no linkage between the number of hours worked, the amount of money contributed and the name of the reporting attorney.

Third, the resolution calls for expansion of the definition of pro bono to include a broad range of activities in which lawyers voluntarily engage that contribute to their communities and to society at large, including discounted fees for poor clients and service to bar associations.

President Lau-Kee reported to the House that his resolution was the product of negotiations, which took place at a series of meetings with OCA representatives, including Chief Judge Lippman and Chief Administrative Judge A. Gail Prudenti. Justice Prudenti expressed optimism that amendments to Rule 118.1 proposed by the State Bar would be approved by the Administrative Board of the Courts, which is comprised of the Chief Judge and the four Presiding Justices of the Appellate Divisions.

In other action

The House passed a resolution proposed by the NYSBA Legal Education Committee calling for the OCA to delay implementation of its plan to join 14 other states in adopting a nationally-standardized bar examination, known as the Uniform Bar Exam ("UBE"), in order to allow further study. Legal Education Committee Co-Chairs Eileen Millett of Epstein Becker & Green and Patricia Salkin, Dean of Touro College Jacob D. Fuchsberg Law Center presented the resolution.

The NYSBA Nominating Committee announced that Claire Gutekunst had been nominated to run for the office of NYSBA President Elect; Ellen Makofsky (of Nassau County) to run for the office of Secretary; and Sharon Stern Gerstman to run for the office of Treasurer. For the Tenth Judicial District (which is comprised of Nassau and Suffolk Counties), the Nominating Committee selected Scott M. Karson to run for another term as Tenth District Vice President; and John Gross, Marc Gann and Peter Mancuso to run for Tenth District Elected Delegates.

The next meeting of the House of Delegates will be held on Friday, January 30, 2015, at the New York Hilton in Manhattan, in conjunction with the 2015 NYSBA Annual Meeting. The election of the nominees will take place at that meeting and, if elected, they will take office on June 1, 2015.

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 also serves as Chair of the NYSBA Audit Committee. He is a member and former Chair of the NYSBA Committee on Courts of Appellate Jurisdiction. He is also a former president of the SCBA, a member of the ABA House of Delegates, a member of the ABA Judicial Division Council of Appellate Lawyers and a partner at Lamb & Barnosky, LLP in Melville.

Bench Briefs (Continued from page 4)

ment necessary for the protection of the parties and to avoid further irreparable loss.

In *Karen Hession v. Scott Gilmore,* Index No.: 18091/2011, decided on September 17, 2014, the court granted the motion to the extent that if defendant did not execute a listing agreement on or before September 24, 2014, a Temporary Receiver and Referee was to be appointed. The court noted the facts as follows: plaintiff and defendants were owners of a single-family house, which they purchased in 2006. Involved at that time in a personal relationship, the parties took title to the property and lived together in the home until plaintiff moved out in 2010. While the parties as joint tenants initially held the property, it was now held as tenants in common. Defendant continued to live at the property. In 2011, plaintiff commenced this action seeking partition and sale of the property, an accounting and an award for costs. During the course of the proceedings, the parties entered into a written stipulation of settlement in 2013 wherein they agreed that the subject property would be listed with a broker and placed on the market for sale. At the present time, the property was not listed for sale and the parties were not in agreement as to the listing price. In granting the motion, the court noted that the appointment of a temporary receiver was an extreme remedy resulting in the taking and withholding of possession of property from a party without adjudication on the merits. A temporary received should be appointed only where there had been a clear evidentiary showing of the necessity for the conservation of property at issue and the need to protect the moving party's interests. Here, the court granted the motion as it found that plaintiff made a clear evidentiary showing for the appointment of a receiver, which was necessary for the protection of the parties and to avoid further irreparable loss.

Motion pursuant to CPLR §311(b) directing the manner of service upon T.G.S.P., Inc. denied; T.G.S.P, Inc. is no longer a legal entity and it is not subject to the jurisdiction of this Court and there is no manner of service that would satisfy due process by being reasonably calculated to apprise interested parties of the pendency of this action and afford them the opportunity to present objections.

In *Gregory Linakis v. Plover Lane East Homeowners Association, Inc., Fox Meadow Lane Homeowners Association, Inc., Huntington Hills Homeowners Association, Inc., Fox meadow Lane Extension Homeowners Association, Inc., T.G.S.P., Inc., Steven Goldman, Christina Goldman, Joseph Lociero, Clare Lociero, Jan Dauer and Evelyn Dauer,* Index No.: 5516/2011, decided on July 11, 2014, the court denied plaintiff's motion pursuant to CPLR §311(b) directing the manner of service upon T.G.S.P., Inc. In rendering its decision, the court noted that plaintiff alleged that a title search of the situs of plaintiff's accident revealed that T.G.S.P., Inc. was the titled owner of the roadway and that T.G.S.P., Inc. was a corporation that was dissolved by the filing of a certificate of dissolution with the NYS Department of State on or about August 24, 1973. The court pointed out approximately 38 years had passed between the filing of the certificate of dissolution and the commencement of this matter. According to the plaintiff, the corporate officers and directors of T.G.S.P., Inc. were either deceased or they could not be located. Thus, the court found that T.G.S.P, Inc. was no longer a legal entity and it was not subject to the jurisdiction of this court and there was no manner of service that would satisfy due process by being reasonably calculated to apprise interested parties of the pendency of this action and afford them the opportunity to present objections. Furthermore, the court noted that it was well settled that when an owner of property sells lots with reference to a map, and those lots abutted upon a street as shown on the map. The grantor had presumably conveyed the fee to the center of the street on which the lots abutted, subject to the rights of the other lot owners and their invitees to use the entire area of the street for highway purposes. Accordingly, the court denied the motion.

Motion to dismiss complaint pursuant to CPLR §3211(a)(1) denied; multiple motions under CPLR §3211 were procedurally barred under the single motion rule of CPLR §3211(e).

In *Louise Victor v. Donald H. Hazelton, P.C.,* Index No.: 20669/2012, decided on September 24, 2013, the court denied defendant's motion to dismiss the complaint pursuant to CPLR §3211(a)(1). In rendering its decision, the court noted that multiple motions under CPLR §3211 were procedurally barred under the single motion rule of CPLR §3211(e). The court further reasoned that though it was suggested in the defendant's reply papers that an answer to the complaint was served, a copy of such answer was not submitted to the court, and therefore a determination could not be made based upon the record before the court whether the defendant that the defense based upon documentary evidence was preserved or waived.

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, a full service law firm concentrating in the areas of zoning and land use planning; real estate law and transactions; civil litigation; municipal law and legislative practice; environmental law; corporate/business law and commercial transactions; telecommunications law; labor and employment law; real estate tax certiorari and condemnation; and estate planning and administration. Ms. Colavito concentrates her practice in matrimonial and family law, civil litigation and immigration matters.

DIY Disaster In Estate Planning (Continued from page 5)

timony that Mr. Martello never declared the document to be his will, despite the title of the document clearly stating that the document was his will.

After a bench trial on the matter, Surrogate Czygier held that testimony of the witnesses did not support due execution. This was because there was no publication of the instrument offered for probate, as Mr. Martello never declared to the witnesses that the instrument was his will.

The Surrogate based his decision on the holding in the matter of *Matter of Pirozzi*.[7] In *Pirozzi*, the decedent had two identical wills prepared by her attorney. The second will was executed the day before she died. The attorney only prepared the will and was not present for the execution ceremony of same. This second will gave all of decedent's real and personal property to the petitioner. The second will was offered for probate. Two of the three attesting witnesses had died between the signing of the will and the petition for probate. At trial, the sole surviving witness testified that only she, decedent and petitioner were present at the signing and that decedent did not state her intention that the document serve as her will. The court held that without such a declaration, the document should not be admitted to probate.

In its decision, the court quoting the Appellate Division Second Department case of *In re Roberts* stated that "Publication can be through words or actions, but something must occur to show that there had been a meeting of the minds between the testator and the attesting witnesses that the instrument they were being asked to sign as witnesses was testamentary in character."[8]

A similar holding on a self-prepared will was reached in *Matter of Griffin*.[9] In this case, the decedent prepared a writing that she intended to be her will in her home. She later brought one page of that writing into the town clerk's office and requested that two women in the office witness her signature on the paper. At trial, it was revealed that the decedent never stated to the witnesses that the writing was her will. The nominated executor of the estate attempted to admit the writing to probate, and the guardian ad litem argued that the will was not valid due to lack of publication. The Surrogate's Court, Ulster County, denied probate of the writing. On appeal, the Appellate Division, Third Department, affirmed the judgment. The court determined that under EPTL § 3-2.1(a)(3), the decedent had to declare to each of the attesting witnesses that the writing was her will. Because the decedent's publication was insufficient, the court agreed that the writing could not be admitted to probate.

As you already know as practitioners, when clients decide to take estate planning matters into their own hands and prepare their own wills either in writing on through a service on the internet, there can be unintended consequences. In many cases the consequences of this DIY estate planning involves litigation that ends up costing far more than if the client would have just seen an attorney in the first place to have their will prepared. If you have clients that balk at your fees and say that they are going to prepare their own wills the above are some stories you can share to try and prevent them from having their own DIY estate planning disaster.

Note: Kera Reed is an associate at Nancy Burner & Associates. Ms. Reed is a member of the Bar Association's Surrogate's Court Committee.

1. *Matter of Miller*, Suffolk County Surrogate's Court File No. 2013-531/A (July 9, 2013).
2. *Matter of Bassett's Will*, 84 Misc. 656 (Sur. Ct., Lewis County 1914).
3. See *Matter of Kindberg's Will*, 207 N.Y. 220 (1912).
4. *Matter of Hedges*, 100 AD2d 586 (2d Dep't 1984).
5. *Matter of Collins*, 60 NY2d 466 (1983).
6. *Matter of Martello*, N.Y.L.J., July 31, 2014, at 27, col.6 (Sur. Ct. Suffolk County).
7. *Matter of Pirozzi*, 238 A.D.2d 833 (3d Dep't 1997).
8. *Matter of Roberts*, 215 A.D.2d 666 (2d Dep't 1995).
9. *Matter of Griffin*, 81 A.D.2d 735 (3d Dep't 1981).

FREEZE FRAME

Welcome to the World

Photo courtesy of Robert Quinlan

Patricia and SCBA past president Robert F. Quinlan (2005-06) are delighted to announce the birth of their second grandson Cameron Chase Hurst.

The Trusts and Estates Expert Witness (Continued from page 6)

ry's prudency need not necessarily be an "investment" expert. However, the expert should have the appropriate background and experience necessary to support the party's position. In *Matter of Duffy*,[8] an accounting proceeding, the objectant put forth expert testimony of a financial planner to support his theory that the executor of an estate was liable for losses the estate sustained due to the post-9/11 stock market decline. He relied heavily on his expert's testimony that cash was the proper investment method of a short-term investment, such as an estate, and that the executor breached the Prudent Investor Act by maintaining stocks rather than selling them "immediately" and converting them to cash. The executor's rebuttal expert was an attorney "with considerable experience in representing fiduciaries of estates." The lawyer proved to be the better choice for an expert witness, as the court found that the objectant's "expert lacked credibility because he sought to apply his idea of prudent liquidation time lines for brokers and financial planners to an estate relationship. [The executor's] expert, on the other hand, was addressing prudence solely with respect to estate administration, and as such his testimony is more relevant and due more weight." In fact, the court found the financial planning expert to be a "poor witness overall," and disregarded his testimony.

Experts in the laws of foreign countries are commonly utilized in proceedings where the court must apply a foreign law in determining certain property or distribution rights. That was the situation in *Matter of Monsen*,[9] a construction proceeding, where the decedent was a New York domiciliary and resident of Norway, and had a will, which purported to dispose of property located in New York, Norway, and England. The effectiveness of the will to dispose of certain property in New York was established through an affidavit of an expert in Norwegian law. Experts in Swiss law were critical in *Matter of Schneider*,[10] an accounting proceeding, where the decedent was a naturalized American citizen of Swiss descent, a New York domiciliary, and owned real property in Switzerland. The decedent's will purported to dispose of the real property in a manner contrary to Swiss internal law, and the New York court had to determine property rights and whether the decedent had the power to dispose of the property in Switzerland under the will.

This is a mere small sampling of the types of experts who are frequently utilized in trusts and estates proceedings. The issues that arise in the various proceedings can allow for just about any type of expert witness to testify, so long as the individual's knowledge, skill, and expertise in a particular area will assist the trier of fact.

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

1. 125 AD2d 574 [2d Dept 1986]
2. 44 NY2d 260 [1977]
3. 76 AD3d 429 [1st Dept 2010]
4. EPTL 11-2.3 [a]
5. EPTL 11-2.3 [b] [3] [C]
6. 274 AD2d 87 [3d Dept 2000]
7. 90 NY2d 41 [1997]
8. 25 Misc 3d 901 [Sur Ct, Monroe County 2009]
9. 204 Misc 245 [Sur Ct, NY County 1953]
10. 198 Misc 1017 [Sur Ct, NY County 1960]

Valuation Discounts (Continued from page 8)

the marketability of the subject company's shares in the absence of a ready and active market. These factors include, among others, the company's size as measured by its revenues, the regularity and magnitude of its distributions to shareholders and its profit margins.

How this company-specific information affects the discount for lack of marketability, and thus the ultimate value of the subject shares, is important to understand. However, it is also important to bear in mind what underlies the reasons why size, distributions and profit margins are determinants of the discount for lack of marketability.

Among the reasons investors desire marketability is that the lack of it greatly limits their options. If an investor wishes to change a portfolio allocation, and must sell an illiquid asset to do so, there can be a long delay before the investor is able to convert a security to cash and effect the reallocation. Similarly, if the investor needs to sell such an asset to raise cash to make personal expenditures (pay college costs, purchase a home, pay significant medical bills) the delay could result in missed financial opportunities, or worse.

If the subject company has strong profit margins, or is making significant distributions of cash, this mitigates the risk of holding an illiquid asset, and should result in a lower discount for lack of marketability, other things being equal.

Thus, a careful analysis of the circumstances is needed in order to arrive at a proper conclusion for the discount for lack of control or for the lack of marketability in any particular case.

Note: Russell T. Glazer, CPA/ABV, MCBA, ABAR, ASA, CVA, MBA, is a Partner with Gettry Marcus CPA, P.C. and is a member of the firm's Business Valuation & Litigation Services Group. The group, one of the largest in the New York metropolitan area, has multiple credentialed business valuation professionals and a team of forensic accountants. Mr. Glazer is a Certified Public Accountant, Certified Valuation Analyst, Master Certified Business Appraiser, is Accredited in Business Valuation and is an Accredited Senior Appraiser.

Surrogacy Agreements in New York (Continued from page 3)

heavily covered events then and now, *Baby M* sparked legislative action across the country. Within a year of the ruling, bills to prohibit or regulate surrogacy were proposed in half the states. Only a stone's throw across the Hudson from the Whiteheads, New York was among them.

In 1992, eager to send the message that children should not be treated as "commodities to be bought and sold," New York codified legislation in its Domestic Relations Law ("DRL") Sections 122-124 to prohibit surrogate pregnancies of any type in exchange for financial compensation. The only surrogate arrangement that is permitted in New York is "compassionate surrogacy," performed without any financial compensation. To this day, in New York, surrogacy contracts "are contrary to the public policy of this state, and are void and unenforceable" and a court cannot consider a birth mother's "participation in a surrogate parenting contract as adverse to her parental rights, status, or obligations."

One year later, at the shores of the other ocean, California went in the opposite direction, enforcing a surrogacy agreement to hold that the intended parents and not the surrogate were the legal parents in the case of *Johnson v. Calvert*. In the two decades since the *Baby M* case, 17 states have laws that allow surrogacy but regulate it.[1]

Now flash forward to 2014. New York legalized same-sex marriages in July 2011, but the 1992 law prohibiting those unions from employing surrogates to reproductively assist them remains. It is a strange anomaly: New York permits children to have two legal fathers, and permits a spouse to adopt stepchildren with the biological parent's consent, but prohibits surrogacy. This disproportionately impacts men — both those in same-sex relationships and those who may want to be a single parent — but also impacts any New Yorker struggling with fertility or reproductive issues who must travel to another state in order to have a child by surrogate.

Many have reportedly circumvented the laws by transporting frozen embryos to clinics in surrogacy-friendly states nearby in Connecticut, Massachusetts, Pennsylvania, or Maryland to be implanted in the surrogate. Neither the expense ($10,000 per egg, as much as $100,000 per baby), nor the inconvenience, has stopped celebrities (such as Sarah Jessica Parker and Matthew Broderick, Nicole Kidman and Keith Urban, Angela Bassett, Neil Patrick Harris and Ricky Martin) from engaging in the practice, some of who reside in New York.

The currently pending bill of the Child-Parent Security Act (CPSA), co-sponsored by Amy Paulin in the Assembly and Brad Hoylman in the Senate, seeks to change the current law to make compensated surrogacy legal in New York State.[2] The bill would permit compensated gestational carrier agreements within the state. The last action on the bills was a reference to the Judiciary Committee and the Children and Families Committees on January 8, 2014. In California, both same-sex parents who procured the surrogacy are on the birth certificate, which is also sought to happen in the proposed New York law.

According to the American Society for Reproductive Medicine, 1,600 babies a year in the U.S. are born through gestational surrogacy ("traditional" surrogacy, using the surrogate's own egg, is an infrequent practice today). This is more than double the number 10 years ago.

The cultural reality is already driving a change in the interpretation of the DRL statutes. Recently a man petitioned to adopt the biological twins of his husband, who were conceived with a donor egg and gestated by a woman in Mumbai, India with the husband's sperm. The carrier gave birth to twins and relinquished them at birth to the genetic father. Although foreign born, the twins were granted U.S. citizenship by descent and have lived with the biological father and his husband since birth. The case raised a question about the validity of the adoption in light of New York's surrogacy laws: Does New York's statutory ban on surrogacy prevent a court from using adoption to give effect indirectly to the surrogacy contract? A family court judge in the case of *In the Matter of J.J.H.C.* ruled no, and allowed the co-parent adoption. The judge deemed the surrogacy agreement that led to the twins' birth legally irrelevant. The existing Domestic Relations Law does not address whether the illegality of the surrogacy contract is relevant to the proposed second-parent adoption. Indeed, at the time the anti-surrogacy laws were passed in 1992 it was perhaps not even conceivable (pardon the pun) that same-sex marriages would ever be legal, the 1993 Hawaii decision in *Baehr v. Lewin* still a year away. As one assessment of *JJHC* case noted, when a contract is "void and unenforceable" it is not legally binding. But that does not mean that such a contract cannot exist. Only that it takes one person to want to back away from it by either not performing or challenging it in court. If the parties carry out the contract, and no dispute arises, there is no reason for a court to intervene or consider the meaning or scope of the contract or the resulting obligations. In the *JJHC* cases, none of the parties sought the assistance of the New York court to enforce the contract, thus the "void and unenforceable" language of the current DRL was irrelevant.

A string of cases similar to *JJHC* suggests that the surrogacy precedents and the existing DRL do not bar or prohibit approval of an adoption simply because it indirectly approves an underlying surrogacy arrangement. In 2004 in *Doe v. NY Dept. of Health*, a family court judge declared a genetic mother and father the legal parents of triplets born to a gestational surrogate. In a 2011 case, *T.V. v. NY Dept. of Health*, the Appellate Division Second Department granted intended parents a declaration of their legal parent status to a child born through gestational surrogacy.[3] These three cases suggest that legal parentage can still be established even when the underlying surrogacy contract is unenforceable.

Regardless of the outcome of the pending bill, there are other potential permutations that can result from the surrogacy relationship, which must be considered. For example, Sherri Shepherd, former co-host of the *View*, and her husband contracted to have a baby via surrogate a year after their wedding. Six months into the pregnancy Shepherd initiated a divorce. The pair continues to fight a legal battle over their newborn child who was born via surrogate on August 5. The fight is not with the surrogate but rather that Shepherd is disclaiming financial responsibility for the baby, whom Shepherd has never met and whose birth certificate says "mother unknown." While much of the surrogacy discussion revolves around the enforceability of the contract, the situation of intended parents disavowing responsibility for the child are also a possibility that must be considered. What happens when pre-natal care reveals a genetic defect or disability? Who legally has the right to decide whether to terminate the pregnancy? Disruptions such as these that arise out of the surrogacy relationship are sure to evolve along with the advance of reproductive technologies.

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

[1] *States that permit surrogacy with restrictions*: NH, CT, DE, WA, ND, IA, IL, WV, CA, NV, UT, NM, AR, TN, VA, TX, FL; *Statutes prohibit enforcement of surrogacy contracts*: NY, MI, IN, DC, NE, AZ; *At least one court opinion upholds some form of surrogacy*: MA, WI, OH, PA, MD, SC, and NJ, with case law being very restrictive in New Jersey; *No statute or published case on surrogacy*: AK, ME, VT, RI, MT, SD, MN, OR, ID, WY, CO, KS, MO, KY, OK, LA, MS, AL, GA, HI. Interestingly, West Virginia, Tennessee, North Dakota, Utah, Arkansas, and Texas permit surrogacy contracts but are among the states that prohibit same-sex marriage by constitutional amendment and state law, or where gay marriage bans have been overturned but where appeals are in progress. Conversely, New York, which permits same-sex marriage, joins states like Michigan and Indiana – which ban same-sex marriage – in prohibiting surrogacy contracts. *See http://www.nytimes.com/2014/09/18/us/surrogates-and-couples-face-a-maze-of-laws-state-by-state.html.*

[2] http://open.nysenate.gov/legislation/ bill/S4617-2013; http://open.nysenate.gov/legislation/bill/S4617-2013.

[3] http://law.justia.com/cases/new-york/appellate-division-second-department/2011/2011-06229.html,

FREEZE FRAME

Happiness Abounds in Judge Whelan's Courtroom

National Adoption Day was celebrated on Friday, November 21, in Family Court Judge Theresa Whelan's courtroom. The courtroom was filled that day with happy children, festive balloons, good food and good cheer. The National Adoption Coalition was created to give hope to children in the foster care system waiting for placement and to encourage people to adopt. Family Court Judges Theresa Whelan, left, Caren Loguercio and Supervising Judge David R. Freundlich were at the celebration.

Legislating Digital Assets *(Continued from page 4)*

accounts associated with a financial institution. The Nevada statute only allows the personal representative to *terminate* various types of digital accounts, excluding those accounts associated with a financial institution.

Notwithstanding the sanctioned access to digital assets, most state legislation includes a disclaimer which provides that the custodian is not required to disclose the account holder's information if such disclosure would violate applicable state or federal laws, or the service provider's terms of service. The effect is that service providers may take the position that the account holder did not authorize access to the account or disclosure of the content and, therefore, complying with the state digital asset law will violate federal and state privacy laws.

As states continue to grapple with legislating digital assets, the Uniform Law Commission (the "ULC") formed a drafting committee to address the issue of fiduciary access to and administration of digital assets. The Uniform Fiduciary Access to Digital Assets Act ("UFADAA"), approved by the ULC in July 2014, provides broad access by a fiduciary to digital assets and addresses four types of fiduciary roles: personal representative, agent, trustee and conservator (or guardian). [vi] Delaware is the first state to enact a digital asset law that is largely based on the language used in UFADAA. Delaware's law, like UFADAA, provides access to digital assets for a guardian, agent and trustee, in addition to a personal representative.[vii] This access is granted unless contrary language is included in the applicable governing instrument.

The Delaware law (similar to UFADAA) attempts to comply with the SCA and CFAA by providing that the fiduciary is an "authorized user" of the account and has the "lawful consent" of the account holder so that the custodian may divulge the contents of the digital account and not risk violating the SCA.[viii] It remains to be seen whether service providers will provide access to the fiduciary in accordance with the Delaware law or will continue to refuse on the basis of federal privacy laws.

State laws may not be enough

Although state legislation with respect to digital assets provides a meaningful step forward in addressing fiduciary access to digital assets, many issues still remain that may prevent such access.

Permissive nature of SCA

One issue lies in the permissive language used in the SCA. Section 2702(b) provides that a service provider "may divulge" the contents of an account with the lawful consent of the account holder. Nothing in the SCA *requires* the service provider to divulge the content. Indeed, a District Court in California confirmed this interpretation by holding that even if family members of a deceased account holder could provide lawful consent to access the account; the service provider is not required to disclose the content. [ix] The SCA merely permits the disclosure of such content upon receipt of lawful consent.

Preemption

The enactment of state laws in the area of digital assets raises the issue of preemption. Federal law may impliedly preempt state law where there is a conflict between state law and federal law. This type of preemption can occur either (1) when it is impossible for someone to comply with state and federal laws simultaneously, or (2) when the purposes and objectives of federal law would be thwarted by state law. Consequently, a challenge to any state law providing access to digital assets on the ground that such law conflicts with federal privacy laws may be eminent.

Service Provider Agreements (a.k.a. Terms of Service)

Virtually every online account is governed by the service provider's terms of service ("TOS"), which must be agreed to by the account holder upon the establishment of the account. Each service provider's TOS contains its own provisions with respect to transferability, account information sharing, and disposition upon the death of the account holder. For example, Shutterfly's TOS states that the account holder agrees not to disclose his or her username or password to any third party and acknowledges that the account holder's access to the account is non-transferable. LinkedIn, Twitter, and Instagram all have similar provisions regarding disclosure of secured access information and non-transferability.[10]

In addition, most, if not all, service providers include a choice of law provision in the TOS. For instance, many service providers are located in California and the TOS naturally states that the laws in California govern any conflict arising out of the TOS. To date, California has not enacted a law addressing access to digital assets. Therefore, it is conceivable that a service provider will rely on the choice of law provision to justify its refusal to provide access to a fiduciary or to release the content of an account. Arguably, this may be the case regardless of the existence of a digital asset law in the state where the account holder legally resides.

The issues related to digital assets will not disappear any time in the near future. In fact, there will likely be more issues that arise as we continue to move our daily lives from the physical paper to the online world. Despite all the issues raised with legislating digital assets, it is preferable to have a state digital asset law in place. State laws may provide at least some measure of authority for a fiduciary to attempt to gain access to the digital assets of an account holder. Perhaps public pressure and sentiment will force Congress to address the problem by amending the outdated federal privacy laws that have hamstrung fiduciaries and surviving family members. It is unlikely, however, that Congress will act in a timely manner. Perhaps the best solution is not to wait on state or federal legislation or for the service provider to change the TOS. The best solution may be for each of us to give specific authority (e.g., in a will) to a third party to deal with our digital assets. With a plan in place, we can rest assured that our digital assets will be protected and preserved after we are gone.

Note: Jill Choate Beier, Esq. is an assistant professor at Marymount Manhattan College teaching courses in accounting, business law and income taxation. Her research interests focus on the areas of trusts and estates law and income, estate and gift taxation. In addition to her teaching responsibilities, Professor Beier acts as the Faculty Advisor and Coach to the MMC Mock Trial Team and involves her students in community service work by coordinating MMC's participation in the Volunteer Income Tax Assistance program. Professor Beier is very active in the New York State Bar Association and is currently the Chair of the Estate and Trust Administration Committee.

1. 18. U.S.C. § 1030(a).
2. 18 U.S.C. § 2701(a).
3. 18 U.S.C. §2702(b)(1) and (3).
4. *See* N.Y. CLS Penal Article 156 *et. seq.*
5. *See generally* Conn. Gen. Stat. § 45a-334a (2013); R.I. GEN. LAWS § 33-27-3 (2012); BURNS IND. CODE ANN. § 29-1-13-1.1 (2012); OKL. ST. § 58-269 (2012); IDAHO CODE § 15-3-715(28) (2012); VA. CODE ANN. §§ 64.2-109 and 110 (2013); NEV. REV. STAT. § 143.188 (2013).
6. *Available at* http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2014_UFADAA_Final.pdf.
7. *See* 12 Del. C. § 5001 through 5007 (effective Jan. 1, 2015).
8. 12 Del. C. § 5005(a) (effective Jan. 1, 2015).
9. U.S. Dist. Lexis 134977 (N.D. Cal. Sept. 20, 2012).
10. *See* http://shutterfly.com/help/terms.jsp; http://www.linkedin.com/static?key=user_agreement&trk=hb_ft_userag; https://twitter.com/TOS; http://instagram.com/about/legal/terms/ (all websites last checked October 24, 2014).

Transferring the Family Business (Continued from page 9)

compensation is not tied by some formula to the value of the equity or to the ultimate sale price for the business. It should be noted, however, that the actual payment of the deferred compensation might be contingent upon the sale of the business. Indeed, many employers are naturally inclined to defer, and even condition, the payment of the compensation until the occurrence of a major liquidity event. Of course, because the timing of a sale cannot be predicted, such a contingent arrangement may have to account for many factors:

- Should the executive be immediately vested?
- Should he or she vest over a number of years, or only upon a sale of the business?
- Should payments be allowed upon certain events prior to a sale, including at the death or disability of the employee, or for some hardship?
- Should the deferred compensation be "secured" in some fashion?

Regardless of how these questions are answered, it is important to note that the many ways of structuring a deferred compensation agreement for the key employee of a business all share two critical elements: (a) in order to successfully defer the employee's tax liability, the arrangement must comply with certain tax principles that have been developed by the IRS and the courts over several decades, and that were modified by § 409A of the Code in 2004; and (b) this compliance must be ensured at the inception of the deferred compensation arrangement – otherwise, the tax and economic results that the parties envisioned will not be attained and someone will be very unhappy.

Nonqualified plan basics

It should be noted that, for the most part, these executive compensation arrangements, so-called "nonqualified plans," are generally not creatures of statute. Rather, they are contractual agreements between the employer and the employee, and are very flexible. They may be structured in whatever form achieves the goals of the parties and vary greatly in design as a result.

Deferred compensation occurs when the payment of compensation is deferred for more than a short period after the compensation is earned (i.e., the time when the services giving rise to the compensation are performed). Payment is generally deferred until some specified event, such as the individual's retirement, death, disability, or other termination of service, or until a specified time in the future (e.g., 10 years from the inception of the arrangement, or upon the earlier sale of the business).

There are a number of reasons for deferring compensation. Employers often use deferred compensation arrangements to induce or reward certain behavior; e.g., to retain the services of an employee or to incentivize the employee to attain certain goals (either personal performance goals or operational benchmarks for the business or for the employee's division). In the latter situation, the attainment of those goals would trigger either the vesting or payment of the compensation.

Such an arrangement may provide for deferral of base compensation (salary) or incentive compensation (bonuses), or it may provide supplemental compensation (above qualified plan limits). It may permit the employee to elect whether to defer compensation or to receive it currently. Alternatively, it may provide for compensation that is only payable on the occurrence of future events. It may be structured as an account for the employee (to which amounts are credited; the benefits payable are based on the amounts in the account, which may even include an actual or "deemed" investment return), or it may provide for fixed benefits to be paid to the employee at some point, or upon some event, in the future.

The key question

The answer to the question of whether or not amounts deferred under a nonqualified deferred compensation arrangement are includible in the gross income of the employee depends on the facts and circumstances of the arrangement. A variety of tax principles and code provisions may be relevant in making this determination, including the doctrine of constructive receipt, the economic benefit doctrine, the provisions of Section 83 of the code (relating to transfers of property in connection with the performance of services), and the provisions of the Section 409A. Some general rules regarding the taxation of nonqualified deferred compensation result from these provisions. Usually, the time for inclusion of nonqualified deferred compensation depends on whether the arrangement is unfunded or funded. If the arrangement is unfunded, as is typically the case, then the compensation is generally includable in the employee's income when it is actually or constructively received, or when the plan fails to satisfy the requirements of § 409A of the code. An arrangement is unfunded if the compensation is payable from general corporate funds that are subject to the claims of the employer's general creditors. It is an unfunded and unsecure promise to pay money in the future — the employee has the status of a general unsecured creditor, and his or her rights may not be assigned or encumbered.

Section 409A

Under Section 409A, all amounts deferred under a nonqualified plan (for all taxable years) are currently includible in the employee's gross income to the extent they are not subject to a "substantial risk of forfeiture" (i.e., the employee's rights to the compensation are conditioned upon the performance of substantial services or the occurrence of a condition related to a purpose of the compensation, such as the attainment of a prescribed level of earnings), unless certain requirements relating to the timing of the distributions are satisfied.

Additionally, almost all incentive compensation arrangements impose certain restrictions upon the employee's right to distributions. For example, the plan may include "substantial forfeiture" provisions that impose "a significant limitation or duty which will require a meaningful effort on the part of the employee to fulfill." Note that whether such a forfeiture provision is effective or not in deferring the employees' income tax liability depends upon the facts and circumstances of the particular case. Thus, a provision that is tied to the performance of "consulting services" by a non-employee family member will not be given effect if it is not substantial.

Rabbi trust

In order to provide an employee with a sense of security with respect to his or her nonqualified deferred compensation, while still allowing deferral of income inclusion (and tax), a so-called "rabbi trust" may be established by the employer to hold assets from which the nonqualified deferred compensation will be paid. The trust is generally irrevocable and does not permit the employer to use the assets for purposes other than to provide the deferred compensation, except that the terms of the trust must provide that its assets are subject to the claims of the employer's creditor in the case of the employer's insolvency or bankruptcy. The creation of the trust does not cause the related deferred compensation to be includible in the employee's income because the trust's assets remain subject to the claims of the employer's creditors. As a result, income inclusion as to the employee occurs as payments are made from the trust, provided these comply with Section 409A.

Thus, an employee will not recognize income under a nonqualified plan until is it paid to him or her (or made available for his or her benefit) in cash or property. The employer, in turn, is not allowed a deduction for a benefit, contribution or payment until the compensation is taxed to the employee.

Final thoughts

The foregoing discussion highlighted the basic concepts underlying nonqualified deferred compensation and the basic features of such arrangements. As was noted several times, a family member who is also a key employee of the family-owned business is as likely a candidate for such an arrangement as may be an unrelated employee. The question to be considered is whether it makes sense from a business perspective to reward and retain such an individual. Given the flexibility of such an arrangement, it may be possible to tailor its terms in a way that accounts for the particular circumstances of a family member (e.g., for creditor protection). In the case of a family member-employee, of course, there is also the added benefit of shifting some value to the individual on an income-tax-deductible basis.

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

Affordable Care Act in NY (Continued from page 14)

local insurance regulators for premium increases. The remaining figures are: 15 percent for 35 to 44 years of age; 17 percent for the 45 to 54 group; and 16 percent for 55 to 64 year olds. In Suffolk County the figures are: 13 percent for the 18 to 25 group (an indication, perhaps, that more Suffolk parents have the financial wherewithal to maintain their children on their family health policies); 16 percent for the 26 to 34 year olds (this one is a surprise); 15 percent for the 35 to 44 year old group; 20 percent for the 45 to 54 year olds; and 16 percent for the 55 to 64 year old group. Taken in its entirety, the Suffolk figures simply may reflect the fact that there were relatively fewer uninsured and underinsured residents in this county than the statewide average.

For the upcoming year, it is important to note that open enrollment begins on November 15, 2014 and runs through February 15, 2015 (although there is no limiting enrollment period for Medicaid and Child Health Plus enrollments). Persons wishing to sign up for the first time, or switch plans, or drop more expensive commercial plans in favor of an exchange plan, may do so only during the open enrollment period *unless* they experience a "qualifying event". [1]

Those currently enrolled in an exchange product should know that renewal is *not* automatic. Enrollees are supposed to receive a renewal notification in the mail. It will offer three options: *full administrative renewal, partial administrative renewal* and *manual renewal.* If the enrollee's eligibility (including income), remains the same *and* if the plan is still being offered in 2015 (some plans are changing and/or dropping out of the exchange) *and* if the enrollee wants to keep it, he or she need do nothing; the plan will renew effective January 1, 2015. If eligibility (including income) changes, or if the plan is unavailable for 2015 or if the enrollee wants to change plans or ages out of the current plan then he or she *must select a new plan by December 15, 2014;* coverage beings on January 1, 2015. If the enrollee currently is enrolled in a *temporary or "pending" status* or is advised that the New York State of Health database cannot verify his or her data (e.g. missing or conflicting information) then the enrollee must update by way of a new application by December 15, including selection of a new plan. In this last case coverage will begin on the date eligibility is determined (and thus may be retrospective). (*NB*- Now is a good time for enrollees to assess any "out of network" provider access issues they may have been experiencing, to see if other exchange plans may include hospitals and doctors they prefer but which currently are not in their plan network).

Looking ahead into 2015 here is what we see. Basic ACA qualified health plan structures remain unchanged. Enrollees may anticipate some slight premium increases (6.7 percent is the statewide average). Sixteen individual plans are staying with the exchange, as are nine SHOP plans. Once again, and despite significant political pressure from a number of constituencies, there will not be any "out of network" coverage except for emergency services. Up-to-date provider listings must be posted on the marketplace directory, and plans must implement the new requirements for an "online" network cost estimator. (Regarding the latter, the reader may wish to consult my recent *Suffolk Lawyer* article on changes in New York law to afford some protections for "out of network" emergency and "surprise" billing.)

Are there issues and challenges? Of course! Accessing the website portals, accessing "live" help, complicated and time consuming applications, and technology confusion will still be with us. We still aren't comfortable with the way health plans intent to make available all the comparative services and cost information, provider directories and "in network" participant data that I know is required. Narrow networks remain a big problem; too many providers have elected not to participate in different exchange plans (principally but not exclusively because of low reimbursement issues).

No one said it wouldn't be interesting. Unlike a purely academic exercise, however, access to comprehensive and affordable health care is of real concern to almost all of us.

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

1. A "qualifying event" opens a *special enrollment period* of 60 days following certain life circumstances that involve a change in family status (for example, marriage or birth of a child) or loss of other health coverage. Job-based plans must provide a special enrollment period of 30 days.

Law School Recognizes Judicial Alumni

To honor the service of Hofstra Law School alumni who are current and past members of the judiciary, the Class of 2013, as its graduation gift, raised funds for a Judges' Wall to be permanently displayed at the school. Pictured in the photo in front of the Judges' Wall are Hon. William B. Rebolini and Hon. William J. Condon, both justices of the New York State Supreme Court in Riverhead. A special reception for the unveiling of the Judges' Wall was held on November 19 in the Leeds Morelli & Brown Atrium at the Maurice A. Deane School of Law.

Time to Call Mandatory Bankruptcy Counseling a Failure (Continued from page 10)

there is unanimous opinion from the bankruptcy bar that the credit counseling requirement is just an enormous burden and expense that impedes and deters the consumer from obtaining bankruptcy relief. Perhaps a new Washington regime will work to do away with it." However, in the ensuing seven years, nothing has been done.

Earlier this year, Professor Michael D. Sousa, of the University of Denver Sturm College of Law, published his own study of the effectiveness of the credit counseling requirement in a fascinating law review Article, "Just Punch My Bankruptcy Ticket: a Qualitative Study of Mandatory Debtor Financial Education," 97 Marquette Law Review 391 (2014).

This title, alone, highlights how perfunctory the requirement has become. The article makes for some fascinating reading, especially from a sociological perspective. Bankruptcy attorneys should enjoy reading it.

Professor Sousa sought to address two questions. First, do the courses help individuals in the way that Congress intended? And second, do consumer debtors change their financial behaviors as a result of participating in these courses?

He concluded that the vast majority of the participants in his study did not find the courses to be of any help to them in their financial lives, and for most, any positive changes made to their financial well-being following bankruptcy were not attributed to anything learned from the education courses themselves, but from the experience of going through the bankruptcy process.

The bottom line is that debtors receive little or no benefit from either of the two required credit counseling courses, which are merely unnecessary hoops to jump through.

Indeed, Professor Sousa described debtor education over the telephone or online to be a "laughingstock" as participants commented that they take the courses at work or while watching TV, and considering these factors, combined with the overall impersonal nature of the courses, he found it unsurprising that many consumers do not find the courses valuable.

Professor Sousa painted a rather grim picture of the credit counseling and debtor education requirements. He suggested that Congress failed to utilize insight and forethought in adopting this legislation and that for the past decade, Congress has, for whatever reason, repeatedly ignored the admonitions of bankruptcy law scholars regarding the misguidedness of BAPCPA overall.

He stated, "Perhaps the ever-growing body of evidence over the ineffectiveness of the debtor education requirements will prompt Congress to finally act, as another eight years or more of futility is too much to bear." Hear, hear!

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 twenty-nine 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.

ADR

Is Mandatory Mediation an Oxymoron?

By Lisa Renee Pomerantz

Mediation can be an attractive option to parties in a dispute. It can be far more expeditious and inexpensive than litigation. Most importantly, it allows the parties to negotiate resolutions that are more palatable to them than those available from courts or arbitrators.

Notwithstanding these advantages, parties often resist the suggestion that they mediate. They may feel that suggesting mediation is a sign of weakness or that a conciliatory approach is inconsistent with their feelings of anger and desire for vindication or revenge. Often, their counsel may advise against mediation because of discomfort with the process or the perception that extensive discovery is necessary first.

Legislatures and court systems have responded to these phenomena by mandating mediation of many categories of civil disputes. Mediation is now also an expected first step in arbitration. These mandatory mediation programs are often very successful, and seem to have the added benefit of promoting use of voluntary mediation. Perhaps official approval of its benefits makes mediation a more appealing option.

Lisa M. Pomerantz

Despite the apparent success of mandatory mediation programs, there is some resistance to them. Typically, mediation is a voluntary process empowering the parties to resolve their dispute on their own terms. Generally, control over the selection of the mediator and the process is ceded to the parties. The mediator makes even procedural decisions, such as whether to require written mediation statements, allow opening statements, or use joint sessions or caucuses, only after consultation with and consent of the parties. Moreover, the parties generally are free to terminate their participation as they see fit.

Mandatory mediation programs typically mandate not only participation in the process but various procedural aspects, such as:

- The credentialing of mediators;
- Requirements for written submissions;
- The timing of mediation;
- The duration of mandated sessions; and
- What party representatives must appear in person.

Notwithstanding these procedural constraints, even mandatory mediation retains the essential goal of helping parties resolve their own disputes on their own terms, at lower costs to the parties, and to society generally, which bears the cost of judicial systems. At the same time, it allows the courts to focus on the truly intractable disputes requiring judicial intervention.

Note: Lisa Renee Pomerantz is an attorney in Suffolk County, New York. She is a mediator and arbitrator on the AAA Commercial Panel and serves on NYSDRA's Board of Directors and the ACR Commercial Section Advisory Council.

Ethics Opinions Address Lawyers and Technology *(Continued from page 12)*

lized by the lawyer from disclosing or using confidential information of a client."

Virtual Law Offices

In Opinion 1025, issued September 25, 2014, the committee opined that a lawyer would be permitted to have an entirely virtual law practice in the State of New York (operating solely online, with no physical location to meet with clients or conduct the practice of law), as long as the attorney complied with the requirements of Judiciary Law §470.

The issue presented was based on Rule 7.1(h) of the Rule of Professional Conduct, which requires that advertisements contain the attorney's principal law office address. An attorney inquired about whether Rule 7.1(h) prohibited the attorney from operating via a purely virtual law office.

Previous New York Opinions concluded that Rule 7.1(h) required all attorneys who advertise to have and disclose a physical office address, however, based in part on court rulings applying Judiciary Law §470, Opinion 1025 comes to a somewhat different conclusion, stating that, *[W]e no longer believe that Rule 7.1(h) — a rule that on its face regulates only advertising — provides an independent basis for requiring a physical office.*"

The opinion points out that there is potential value to clients of having a lawyer who works solely through a virtual law office, particularly where the client themselves works only virtually, and stating that, "The robustness of electronic communications, and the appointment of a virtual law office service as an agent for accepting service of process, effectively combine to eliminate any concern that a physical office is necessary in all cases for the receipt of service and other communications," and that, "there is nothing inherently misleading about advertising a virtual law office."

The opinion cites N.Y. City opinion 2014-2, which deals with a similar issue. It was noted however, that the lack of requirement for a physical law office was not automatic, and would depend heavily on the circumstances.

New York Rule of Professional Conduct 1.1, Competence, requires all attorneys to ensure competence, which Opinion 1025 notes:

> *[N]ot only includes competence in performing the legal work but also competence in handling communications and storing and providing access to client files. An attorney should only use technology that he or she is competent to use. Attorneys owe duties of effective communication with clients to keep them promptly and reasonably informed and consulted about the means of achieving the client's objectives (Rule 1.4). Attorneys owe duties to maintain confidentiality (Rule 1.6), and there are unique concerns about confidentiality that relate to conducting all communications and client file storage electronically. Attorneys have numerous duties relating to the proper preservation of client materials (Rules 1.6(c) and 1.15). Attorneys must assure adequate supervision of subordinate lawyers and of non-lawyers (Rule 5.1 and 5.3). There is no "virtual law office exception" to any of the Rules.*

Website domain names

In mid-2013, the NYSBA Committee on Professional Ethics issued Opinion 972, in which it noted that attorneys are prohibited from listing their services under the heading "Specialties" on a social media site unless the lawyer is certified in conformity with the provisions of Rule 7.4(c).

On September 12, 2014, the Committee issued Opinion 1021, which addresses the issue of the use of the word "expert" in a law firm's domain name, citing New York Rule of Professional Conduct 7.5(e)(3), which prohibits firms from using a domain name that implies the ability to obtain results in the matter. The opinion notes that, "*The implication of the word [expert] is that the law firm may bring to the matter a seal of approval that provides comparatively greater assurance of some favorable outcome which no disclaimer may readily cure.*"

With the rapid pace of technology change in today's legal environment, all attorneys must remain up to date not only on the changes in technology that affect the delivery of legal services and advertising for those services, but in the ethical rules implicated in the use of such technology.

Note: Allison C. Shields, Esq. is the President of Legal Ease Consulting, Inc., which provides practice management, marketing and business development, coaching and consulting services for lawyers and law firms nationwide. Learn more at her website, www.LawyerMeltdown.com or blog at www.LegalEaseConsulting.com. A version of this article previously appeared on the Legal Ease blog.

Ignite Your Inner Leader – Is Leadership in Your Future?

The Nominating Committee of the Suffolk County Bar Association is soliciting recommendations and expressions of interest from members interested in holding the following positions: president elect, first vice president, second vice president, secretary, treasurer, three directors (terms expiring 2018) and three members of the Nominating Committee (terms expiring 2018). The Nominating Committee is accepting resumes from those interested in serving in a leadership position. Resumes may be sent to the Executive Director at the SCBA Headquarters marked for the Nominating Committee.

Members of the Nominating Committee: John L. Buonora; Harvey B. Besunder; Matthew E. Pachman; Louis E. Mazzola; Michael J. Miller; Arthur E. Shulman; Scott M. Karson; Diane K. Farrell; Dennis R. Chase.

–LaCova

House of Representatives Sues Obama (Continued from page 16)

the full authorization of the House of Representatives to sue the president.

Lastly, Foley and Rivkin argue that if that the president's actions in this case are "very bad, but *not* bad enough to merit impeachment." Therefore, they say, "The court should step in to ensure the laws are enforced properly." In essence their argument can be summed up as follows: the executive branch must be held accountable and liable for its actions that exceed the constitutional bounds. Nevertheless the president's overstepping his authority does not elevate the violation, an impeachable offense, in the opinion of these two lawyers.

It should be noted that many prominent experts on separation of powers on the right and on the left strongly disagree with Price and Rivkin. Others remain skeptical at best of the arguments they make and that the Speaker has adopted will hold water. It will be up to the Federal District Court, the U.S. Appellate Court and ultimately the U.S. Supreme Court to make that determination if indeed it makes it all the way up to it. There is also one other point of contention and that is whether for a lawsuit such as this to overcome the standing hurdle, it might require both houses of Congress authorizing the lawsuit against the President and not only one of them. Again since there is no precedent to rely upon this may be a valid or not so valid obstacle.

Is this strictly a political matter?

Many have argued that this is strictly a political matter and as such should be decided strictly in that realm. In addition, they will argue, Speaker Boehner and the House of Representatives have other tools at their disposal, which they can utilize to press their point. The most important and powerful in their arsenal of tools is the "power of the purse." More specifically all spending is initiated and authorized by the House of Representatives. Consequently the House could have and still can vote to withhold funding or certain portion thereof for implementation of the law where that is legally feasible. Or alternatively it can use its "power of the purse" as leverage to leverage its position with the President by withholding funding or re-authorization for other programs near and dear to the President's heart. This would inevitably generate a heated public argument and there could be a price to be paid on both sides of the isle. This seems to be a scenario that Speaker Boehner does not seem eager to embrace or at least not at this juncture.

Nevertheless, for purposes of constitutional clarity, it would be helpful to derive a judicial decision that would, at the very least, provide some parameters for this and most importantly, future presidential actions. There is no question that other such controversies will emerge in the future and shedding some new insights into the limits and boundaries of the separation of the powers doctrine, which lies at the center of the American constitutional system of government, will be most valuable. After all "separation of powers" was considered a vital principle in the minds of the framers of the constitution and that principle is still fundamental to the functioning of our government.

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

Trust Decanting (Continued from page 6)

existing at the time of the exercise of the power."[vi] The statute makes clear that the mere existence in the invaded trust of a provision that it is irrevocable, or of a spendthrift clause, does not constitute such substantial evidence.[vii]

Finally, and perhaps most significantly, the statute requires authorized trustees to consider the tax consequences that would flow from a decanting.[viii] Unfortunately, there are many open income, gift, estate, and GST tax issues, as there is not much guidance yet. In 2011, the IRS issued Notice 2011-101, which requested comments on a variety of such tax issues. Many bar associations, including the New York State Bar Association and the American Bar Association, have responded with very detailed comments to such issues, which practitioners would be well served to review. Unfortunately, to date, the IRS has not issued regulations addressing the issues raised in Notice 2011-101. Until then, trustees should proceed with caution by thoroughly considering the tax consequences of decanting.

Trust decanting has been the subject of great debate in recent years. In that regard, it will be interesting to see how the law affecting decanting develops as time moves forward.

Note: Joseph T. La Ferlita is a partner in the trusts and estates department at Farrell Fritz, P.C., concentrating in estate planning and estate and trust administration. Mr. La Ferlita serves as a District Representative of the New York State Bar Association's Trusts and Estates Law Section.

1. *Phipps v. Palm Beach Trust Company*, 142 Fla. 782 (1940).
2. *Wiedenmayer v. Johnson*, 254 A.2d 534 (N.J. Super. Ct. App. Div. 1969); *Matter of Spencer*, 232 N.W.2d 491 (Iowa 1975).
3. EPTL § 10-6.6(s)(2).
4. EPTL § 10-6.6(h).
5. See, e.g., EPTL § 10-6.6(j)(5).
6. EPTL § 10-6.6(h).
7. *Id.*
8. EPTL 10-6.6(o).

BCL § 626(b) as a Bar to a Derivative Action (Continued from page 15)

should be afforded them in a court of equity'… it makes little difference whether they have become so circumstanced due to having ratified unanimously the acts of officers and directors, purchased their shares after unanimous ratification had taken place by former stockholders, or whether all of the stockholders would be prevented from suing [on account of having purchased their shares subsequent to the time of the otherwise actionable transactions.

Judge Demarest concluded her decision by noting "with respect to both of these grounds for estoppel, a court will pierce the corporate veil and bar a direct action by the corporation when it would only benefit a shareholder who would otherwise be barred from raising the claims in a derivative action." Koryeo at 2. Accordingly, the court dismissed the derivative claims.

The court then made quick work in dismissing the remaining claims asserted in Mr. Hong's individual capacity. Interesting, with regards to his breach of contract claim alleging that Defendant had breached her contractual obligations, the court noted the following, "Without providing for a specific time frame, and in light of plaintiff's failure to seek enforcement of the alleged contract for over twenty years, the alleged promise to turn over ownership and control of Koryeo is too indefinite to establish a legally enforceable contract." Furthermore, Defendant delivered exactly what was promised, the entirety of her shares, and that the agreement was not contingent on the value of the shares at the time of the transfer. Without a viable breach of contract claim, and with the plaintiff's fraud claims dismissed on pleading failure, the action was dismissed in it entirety.

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

LIHBA Celebration Well Attended

The Long Island Hispanic Bar Association celebrated its 13th Annual Gala on Friday, October 24th, 2014 at Villa Lombardi's in Holbrook, NY. The event was a smashing success with opening remarks by President Roy Aranda and Cynthia Vargas, as Mistress of Ceremonies, making the welcome and introductions. The evening's keynote speaker was Suffolk's newest Associate Justice Hector D. LaSalle, Appellate Division, Second Judicial Department. Honored guests were the law firm Duffy & Duffy, PLLC and Linda K. Mejias, Esq., past president of the Nassau County Women's Bar Association. They were recognized for their continued dedication and support of the LIHBA.

~LaCova

President's Message (Continued from page 1)

mit your written request for resumes to Tina O'Connor by email tina@scba.org or call (631) 234-5511 ext. 222.

Fee Dispute Resolution

Your bar association has had an experienced fee dispute panel listening to and deciding fee disputes between attorneys and clients for many years. This invaluable service provides both attorneys and clients the opportunity to resolve fee disputes in a structured but informal manner at the bar center without resorting to costly litigation. The contact person at the bar center is Tina O'Connor.

Insurance Programs

Your bar association offers insurance programs for legal malpractice, disability income, and health care.

Legal Malpractice

We work closely with CBS Coverage Group, a Division of Assured SKCG Inc. for legal malpractice coverage. Please contact Regina Vetere, Executive Vice President, at (516) 394-7562 to discuss your needs and coverage.

Disability Income Insurance

Protect your income with disability income insurance. Policies are customized to individual needs. Our contact is John Marcel, CLU, CFP, Madison Park Consultants. He offers permanent discounts for members of the SCBA. John can be reached at jmarcel@madisonparkconsultants.com , or at (877) 859-0983.

Health Care Plans

To review the full range and benefits of the SCBA's health care plans, call Bob Bianco, CLU, who has been providing health insurance for law firms since 1985. He assists single persons or groups for Bar Association members for Group Life, Dental, LTD and Individual Plans. He can be contacted at rpb@stjamesfinancial.com or (631) 979-5339.

Car Rental Discount

Members of the SCBA are entitled to discounts when renting cars through Avis, Enterprise and Hertz. You must use the SCBA's special identification number when reserving your car to qualify for the group discount rate. Please call the Bar Center for this information.

Lawyers Helping Lawyers

Your Bar Association is fortunate to have a dedicated group of compassionate and knowledgeable attorneys who offer assistance dealing with financial, alcohol, substance abuse, stress and mental issues on a strictly confidential basis. Many attorneys have received critical services so they may continue their practice based on the services provided by members of this committee. The helpline is (631) 697-2499.

Other than these specific benefits, I want to remind our members of the role of committees and the Suffolk Academy of Law. Committees offer our practitioner members the ability to remain current on court practices, recent statutory and case law changes, and procedures at no additional cost. Our Academy of Law offers our member discounts for CLE.

Our Membership Benefits and Activities Committee are exploring new leads and advantages for us, including Fastcase (a leading next-generation legal research service) and retail merchants. We invite your suggestions to expand member benefits.

SCTPVA On Trial (Continued from page 16)

for them at the appropriate time. Most summations in defense of traffic cases will probably take less than two to three minutes. Should the judicial hearing officer not feel that the opportunity to sum up is necessary, you can just politely and professionally say I would just like to state for the record that I would like the opportunity give a summation. Should the judicial hearing officer not grant your request, just say thank you. It is on the record. Defense counsel can state to their clients that the request was made to sum up, and that it was within the judicial hearing officer's rights to say no. At least you are covered.

Another troublesome area in these cases for defense counsel is that the rules of evidence apply to the extent that was unlike the Traffic Violations Bureau, which took any evidence in whatever form it was presented. The people represented by professional traffic prosecutors will object to any documents that are not certified or at least came directly from the wireless service provider.

Usually the ability to have documentary evidence introduced is going to be an issue in the defense of a cell phone or portable electronic device case. You are going to seek to introduce billing records from the wireless service provider to demonstrate that the phone was not being used at the time the summons was issued. Therefore, it is important that your client obtain either certified records or records directly from the company, something with a cover letter indicating that the records were kept in a regular course of business pursuant to CPLR §4518 or at least not a record that it is a document anybody could go online and print out from a computer.

Having had the unfortunate experience of having evidence excluded of this nature even though there is some question as to whether it had a bearing on the outcome, your client expects you to be able to get this document introduced into evidence regardless of its actual impact on the outcome.

The Agency takes a very strong stand on the trials, so defense counsel should be aware that cases marked for trial that you should be ready to appear with your client and go to trial unless other arrangements have been made pursuant to statute. Defense counsel should have their client's present, documentary evidence in the best possible form to be introduced into evidence and request the right to sum up.

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

ACADEMY *Calendar* of Meetings & Seminars

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

JANUARY

5 Monday	**Brady/Rosario – 18b Mandatory Training @ Touro Law Center**. 6:00–9:00 p.m. Registration 5:30 p.m., light Supper. Restricted to 18b attorneys**.**
9 Friday	**Meeting of Academy Officers & Volunteers,** 7:30–9:00 a.m. Breakfast Buffet. All members welcome.
14 Wednesday	**Surrogate's Court Committee Meeting – New York State Estate Tax Changes –** 6:00–7:00 p.m.
22 Thursday	**Ethics in Matrimonial & Family Law** @ Central Islip Courts – 12:30–2:15 p.m.
27 Tuesday	**Meet the New Judges** – 6:00-9:00 p.m. Registration 5:30 p.m. (tentative date)
30 Friday	**Advanced Issues in Domestic Violence** – 9:00a.m.–5:00 p.m. Registration 8:30 a.m.

FEBRUARY

6 Friday	**Meeting of Academy Officers & Volunteers**, 7:30–9:00 a.m. Breakfast Buffet. All SCBA members welcome.
10 Tuesday	**Surrogate's Court Committee meeting:** Recovery of Assets Stolen by the Nazis, 6:00–7:00 p.m.
13 Friday	**Elder Law Update** – 2:00–5:00 p.m. Registration 1:30 p.m.
27 Friday	**CPLR** – Full Day Conference – 9:00–4:00 p.m. Registration 8:30 a.m.

SAVE THE DATE

Cohalan Cares for Kids Presents — BBQ & Brew
Thursday, Feb. 5
6 p.m. – 8 p.m. at SCBA Center

The SCBA will serve as host to this wonderful fundraiser for Kids. The Cohalan Care for Kids event this year will feature a BBQ sponsored by Fireside caterers and local craft beer tastings headed up for the second year by the Brickhouse Brewery. As most of you are aware, this event also sponsored by Suffolk County's Specialty Bar Associations including: The Long Island Hispanic Bar, the Suffolk County Women's Bar, the Matrimonial Bar, the Amistad Black Bar, and also the SCBA Charity Foundation and Enright Court Reporting. All have kept the Cohalan Children's Center in the Central Islip Court Complex efficiently running with staff to provide an alternative to crowded courtrooms and waiting areas. This wonderful environment for kids enable parents to attend to their court matters knowing that their children will have been read to, have snacks and play games with a caring staff. Our fundraiser will offer live music provided by attorneys Gerard Donnelly, Rafael Penate and Thomas Lavallee, raffles, fun and good cheer. For further information call Jane LaCova at (631) 234-5511, x 230 or jane@scba.org.