EDUCATION

The Dignity for All Students Act and Students with Disabilities

By Cory Morris

Cory Morris

Section 10 of the New York Education Law states that "students' ability to learn and to meet high academic standards, and a school's ability to educate its students, are compromised by incidents of discrimination or harassment including bullying, taunting or intimidation." In so finding, New York State enacted the Dignity for All Students Act ("DASA"). It took effect on July 1, 2012 and imposes uniform requirements on New York schools, including all Long Island Public School Districts[1], of which there are over a hundred.[2] DASA requirements have meaningful implications for disabled children and the parents of children with disabilities. No doubt prompted by nation-wide coverage of school bullying, DASA requires that School Districts impose training requirements and draft age-appropriate, plain language versions of the statute to appear in student codes of conduct. Individual school districts are charged with creating their own guidelines for training and prevention as well as policies for responding to harassment and discrimination. Various Long Island schools have already implemented training conducted by the New York Civil Liberties Union staff.[3]

What DASA requires of schools

DASA is an added protection for students with disabilities and should be considered something separate and apart from The Americans with Disabilities Act, Section 504 of the Rehabilitation Act of 1973 and Title IX of the Civil Rights Act of 1964[4]. Disability is defined broadly under the act. DASA prohibits "harassment or bullying by employees or students on school property or at a school function; [and no] student be subjected to discrimination based on a person's actual or perceived … disability … by school employees or students on school property or at a school function."[5] "These activities can include aggressive conduct, threats, intimidation or abuse that unreasonably and substantially interferes with another student's educational performance."[6] This applies to online or "cyber-bulling" as well. Furthermore "[o]ne employee from each school will need to attend an intensive training program. This person will become the *school's designated contact for handling bullying*."[7]

School districts must implement training for its staff. School districts must also track, report, and address *any* incident of bullying, harassment or discrimination, taking prompt measures to address and cure any such incident(s). Indeed, DASA mandates reporting by the Commissioner of Education "under which material incidents of harassment, bullying and discrimination on school grounds or at a school function are reported to the department at least on an annual basis." N.Y. Educ. Law § 15 (McKinney). The Commissioner of Education must provide direction, funding, regulations, guidance and educational materials for school districts to address bullying, discrimination and "helping families and communities work cooperatively with schools in addressing cyberbullying, whether on or off school property or at or away from a school function."[8] Lastly, DASA provides a provision that prohibits retaliation against someone who reports an incident of bullying, harassment, or discrimination under the act.[9]

What parents should know

School age children have a statutory right to a public education in New York[10], and all children with disabilities are entitled to receive a "free appropriate public education," as held in *Board of Education v. Rowley*, 458 U.S. 176, 207 (1982). This right is a property interest protected by the Fourteenth Amendment to the United States Constitution. Parents should automatically receive or request a code of conduct from their school district which will provide, amongst other things, ways for a student to report harassment, bullying or discrimination and measures the school must take once such incident is reported. A failure for the school to act and respond to a report of discrimination, harassment and/or bullying which results in a foreseeable injury may constitute negligence on behalf of the school or school district and subject these bodies to legal liability. Parents have a right to be informed and can challenge a decision taken by the school of which they disagree. Parents have the right to appeal to the Commissioner of Education (conforming with the stringent provisions of the regulations of the Commissioner of Education) relating to a decision taken on behalf of a school or school district relating to their child. In addition, a failure to train teachers and staff may also result in a foreseeable injury of which a parent can seek legal redress. DASA sets the bar and, hopefully, will prevent foreseeable injuries that are a result of unaddressed bullying, harassment and discrimination.

Parents should stringently advocate on behalf of their children should their child become the victim of bullying in

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PRO BONO

Attorney of the Month Lisa J. Fitzgerald

By Ellen Krakow

The Suffolk Pro Bono Project is pleased to honor Lisa J. Fitzgerald as its Pro Bono Attorney of the Month. Ms. Fitzgerald has devoted many hours to the Project's bankruptcy clients, both as a volunteer at the Project's Bankruptcy Clinic and in her representation of clients in Chapter 7 proceedings. This is the first time she has received this honor, and we are extremely pleased to recognize her for the great work she has done over the past two years.

Ms. Fitzgerald's legal career began in Texas in 1992. This native New Yorker moved to El Paso Texas shortly after obtaining her J.D. degree from SUNY Buffalo. It was in El Paso that Lisa first began providing legal assistance to indigent and disabled clients, as a staff attorney at El Paso Legal Assistance Society. Her cases there included landlord/tenant, divorce and bankruptcy representation. Lisa's desire to work with the indigent/disabled community developed, in part, from her experience teaching daily living skills to mentally ill residents in group homes, prior to attending law school. She remained at El Paso Legal Assistance Society until 1995, when she and her husband, Martin Coleman, also a public interest attorney, moved back to Long Island with their then, one-year-old daughter.

Between 1995 and 2012, in addition to expanding her family and parenting four children, Lisa worked part-time on civil rights and personal injury cases at the law firm her husband established in Woodbury. Her work there focused on Americans with Disabilities Act claims and personal injury matters.

In 2012, desiring to return to Chapter 7 bankruptcy practice, and looking for a place to refresh her bankruptcy knowledge, Lisa found Nassau Suffolk Law Services. She asked for the opportunity to shadow the bankruptcy attorneys at the Project's Bankruptcy Clinic under the tutelage of Rick Stern and the other very experienced bankruptcy attorneys participating in the bimonthly clinic.

It was not long after she started shadowing attorneys that Lisa was ready to interview and consult with clinic clients on her own. Shortly thereafter, she began accepting pro bono client referrals from the Project, and now has successfully completed several Chapter 7 cases. In addition, she still regularly attends the Bankruptcy Clinics to assist the Project in screening its clients.

"Lisa Fitzgerald is a great example of an attorney who took the initiative to reach out to see how she could help, and as a result, she also gained valuable legal experience," commented Maria Dosso, Director of Communications and Volunteer Services at Law Services. "We are lucky to have her enthusiastic participation in the clinic."

Lisa said she finds the bankruptcy work she has done for the Project both interesting and rewarding. "Bankruptcy practice really suits my strengths as an attorney. It is so rewarding to help people out of their financial crises."

Lisa J. Fitzgerald

One of her most rewarding Pro Bono Project matters involved a married couple. The husband had stage-four cancer. He lost his business due to the cancer, which resulted in the accumulation of substantial debt. Thanks to Lisa's efforts the debt was discharged in a joint bankruptcy petition. Lisa also helped the husband address his child support arrears that had accrued since his illness which could not be discharged in the Chapter 7 proceeding.

As the parent of four children (ages 20, 15, 14 and 7), Lisa continually balances the demands of work and family. In addition to representing the Project's bankruptcy clients, and assisting at the Project's Bankruptcy Clinic, she volunteers at the New York City Bar Association's bankruptcy clinic. At some point in the future, Lisa hopes to return to full time private practice to focus exclusively on bankruptcy work.

The Pro Bono Project greatly appreciates all that Lisa Fitzgerald has done on behalf of its clients over the past two years. It is with great pleasure that we honor her as Pro Bono Attorney of the Month.

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

VEHICLE AND TRAFFIC

2015 VTL Case Checklist

By David A. Mansfield

A defense lawyer should develop an extensive checklist of issues to be covered during the initial interview and the defense of their client's matter. This article is intended to serve as a basic overview.

A key initial inquiry is whether your client is a United States citizen, which should be asked as non-offensively as possible. Asking, "were you born here?" should suffice. This is important because collateral consequences of convictions by plea or trial can be more severe for non-citizens.

Another important question that needs answering is what type of vehicle was being operated and what type of license the client holds. Commercial drivers face additional collateral consequences under §510-a (4) for possible suspensions of the commercial driver's license.

Cell phone §1225-c (2a) and portable electronic device violations §1225-d allegedly committed while operating commercial vehicles as defined by Transportation Law §2 (4a) may be subject to different plea bargaining restrictions and treatment by various jurisdictions. A conviction for cell phone and portable electronic device violations committed during the probationary license period §510-b or while in Class DJ §501(2) (vi), or MJ license status §501 (2) (viii), or on a learners' permit §501(5), will result in a 120 day suspension of the permit or license for those violations committed on or after November 1, 2014.

David A. Mansfield

It is always important to get a copy of the actual notice for conference or for trial. Conference dates can usually be adjourned based on the fact that you have just been retained to represent your client.

Trial dates, particularly in the Suffolk County Traffic and Parking Violations Agency are generally not subject to adjournment at the request of defense counsel on the date of the trial. Prior to the trial date, defense counsel may have the opportunity to negotiate a disposition, or possibly seek an adjournment.

Your client must be informed that their appearance is required should the matter be set for trial, at the Suffolk County Traffic & Parking Violations Agency, unless arrangements are made well in advance with the approval of the prosecutor and the judicial hearing officer in open court prior to the court date under Criminal Procedure Law §350.20.

Should my client or must my client take a point/insurance reduction or defensive driver course? What are the collateral consequences of the anticipated plea? Defense counsel's role is to be able to the best of their ability advise their client of the points 15 NYCRR Part §131.3, mandatory Driver Responsibility Assessment fees §503(4) §1199 and possible suspension or revocation§510(2) (3) of the driver's license or privileges.

Will have your client have accumulated in excess of 11 points within 18 months and be subject to administrative action under Part §131.4 and should they take a motor vehicle accident prevention course under Part §138?

Will your client be subject to a §19-a disqualification from driving a school bus for having accumulated nine or more points within 18 months and would a motor vehicle accident prevention course solve that problem?

When representing defendants on driving while intoxicated charges with a chemical test refusal, be sure to obtain a copy of the notice of the temporary suspension with the chemical test refusal hearing date §1194 so that you will have the opportunity to defend the hearing. This is very important because if the hearing is not defended, your client will be found to have refused by default and you are deprived an opportunity for discovery. It is important to have the notice because if the officer does not appear, the administrative law judge may not have the notice to be able to take favorable action to restore your client's license or privilege pending the rescheduling of the hearing.

Appearing at a hearing without the

(Continued on page 31)

A Rare Glimpse of Cuba
LI Lawyers Visit Island Frozen in Time

By David Sperling

Note: This article was written after a visit to Cuba in 2013.

Our adventure in Havana from April 9-13 was amazing. We owe a great debt of gratitude to Long Island Hispanic Bar Association's (LIHBA) President Ray Negron for organizing this once-in-a-lifetime journey to an island frozen in time.

I have always wanted to visit Cuba and see for myself what the country is like. I know many Cubans who speak with great nostalgia about pre-Castro Cuba – how it was a paradise — at least for them.

The trip shattered many of my illusions and conceptions about Cuba. I thought we were going to be followed around by "minders" who would watch our every move. In fact, although we were required to "follow the program," our tour guides were surprisingly tolerant of our irreverent gang of nine.

When we went to the University of Havana Law School, our tour guide gathered us around a statue of "Ruben" — as in "Fidel" and "Che" — of Ruben Martinez Villena, a distinguished Cuban writer and revolutionary leader. We wanted to know whether they named a sandwich after him.

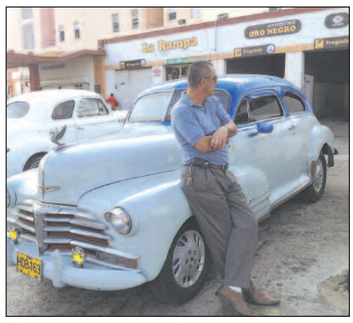
Every morning our tour guide – a beautiful and charming young Cuban woman named Viviana – would show up with our bus driver Jorge at the elegant Hotel Nacional. Every day we had a new adventure — touring the law school, the rum museum, a cigar factory, old Havana, Hemingway's home, a synagogue and the national university.

The gangsters built the Hotel Nacional, where we stayed for four nights, and high rollers who made Havana a glamorous tourist destination before Fidel Castro seized power in 1959. My only complaint was that the only internet available was dial-up for $22 a day. Yes, no broadband! I saw a few students with laptops and some people had cell phones, but I was the only person with an I-Pad, which isn't terribly practical without broadband. However, I did put my I-Pad to good use and took about 500 large-screen photos that I immediately showed our Cuban friends. They were amazed at the technology.

Cuba is definitely low-tech. Since the United States imposed an embargo many years ago, and the old Soviet Union crumbled, Cuba does not have the capability of importing costly technology and other important resources.

The streets of Havana are filled with 1950s Chevys and other American classics, jerry-rigged throughout the years and still running. Some now have Toyota motors under the hood. Roy Aranda, who along with his son Ari was part of our LIHBA delegation, had visited Cuba in 1990 to do forensic research related to the deadly Happy Land nightclub blaze in the Bronx. When asked by a Cuban local how the country has changed, he remarked: "The buses are newer." Yes, Havana now has modern-looking, Chinese-made buses. But pretty much everything else remained the same.

Attorneys took a moment to pose for a photo op while in Cuba including David Sperling.



There were many American classic cars.

I was very fortunate to be able to speak Spanish and converse with the locals without any interference. Fortunately, the country is very safe – no need for gun control in Havana. I walked by myself around the hotel neighborhood the first night, and even though the streets were barely lit, I never felt I was in any danger. Truth be told, Havana is safer than New York City.

As part of our program, certified by the State Department, we were not to have contact with government leaders. This was a people-to-people cultural exchange. However, we did have the opportunity to have a spirited discussion with two law school professors. We weren't shy. We asked about property rights, human rights, privatization, the embargo and the conflicted relationship between the government and lawyer associations. I wished we could have had more time, but after an hour and a half, we were back on the bus.

We found very few defenders of the revolution among the locals. No one would venture a critical comment about Fidel or Raul Castro, but it was clear that the vast majority of the Cuban people long ago lost their revolutionary fervor. As jokey mementos, some of us purchased Che Guevara t-shirts and other memorabilia. I even bought a made-in-China green beret with a red star in front – just like Che's!

Speaking of Che, I had an incredible experience at our very first meal – in a family-run "paladar." These are private homes that are authorized by the government to serve foreign tourists. I started speaking to the owner, an elderly Spanish gentleman named Fernando Barral. It turns out that he was a retired doctor and friend of Che Guevara who had come to Cuba in 1961 to help build the revolution. On the walls of his Mediterranean-style home were photos and hand-written letters from Che along with a newspaper clipping of an interview he had conducted in North Vietnam with a captured American soldier named John McCain.

If anyone is looking for a culinary expedition, don't go to Cuba. The food is mediocre at best, and there are literally no private-run restaurants. It seemed that the more elegant the locale, the worse the food. Mrs. Paul's fish sticks would have been a great improvement over the "mahi-mahi" we were served on the 25th floor of a well-known tourist hotel. Most of us were already nauseous from the local elevator service to the restaurant, although it included a breathtaking view.

In any event, we came for the cultural experience, not the food. In all fairness, Cuba makes the absolute best mojitos on the planet and the cigars are legendary.

Another highlight was our trip to Havana University where several English-speaking students showed us around and championed the triumphs of the revolution. Ari Aranda and I got into an impassioned debate with several students about the relative merits of socialism and capitalism. To its credit, Cuba does not have homeless people or serious crime, and its free health care and educational system are impressive. One of the student guides who was most passionate in her defense of the revolution was a stylishly dressed young woman with large pink earrings who admitted to an obsession with Vogue magazine. After I gave her and her friends a bag of Skittles, her revolutionary ardor seemed to wane and we all became great friends. Other than the 1950s antiques puttering along the streets, there were almost no products made in America.

The Cuban people were very friendly. It wasn't as if we were in North Korea or the former Soviet Union where foreigners would be viewed with great suspicion. No one I met expressed any anger or hatred toward Americans – they just wanted the blockade lifted.

Lift the blockade! I agree. The Cuban government uses the U.S. as a scapegoat for its economic failure. I think we all know that Cuba will be transformed in another 10 or 15 years when the government collapses and U.S. investors flock to Cuba with its pristine beaches, vibrant history, balmy climate, and friendly people.

When that happens, there will probably be a Starbucks or McDonald's on every street corner in Havana. Or maybe somehow Havana will be able to preserve its historical districts and proud traditions.

In any event, Cuba will never be the same again. I was thrilled to be able to join my LIHBA colleagues on this unforgettable journey.

Note: David Sperling is an immigration lawyer based in Central Islip. From 1982-1984, he lived in Latin America, where he worked as a young foreign correspondent.

TRUSTS AND ESTATES

Estate Planning with Assisted Reproductive Technologies

By Alison Arden Besunder

Two years ago I wrote on article on the advancement, development, and expansion of assisted reproductive technology ("ART"), and how it has transformed the meaning of parenthood and biological relationships in a "family." The material ranges from frozen ovaries, stored embryos and fertilized eggs, and beyond. Separately, couples can now store "cord blood" at storage centers around the country for an annual fee in case stem cell research advances to the point of curing chronic diseases such as diabetes or potentially life-threatening diseases such as leukemia.

Leaving aside the question of how the physical genetic material is distributed under the will, the more complex issue presented has been whether children conceived through ART *after* a parent's death can inherit from the deceased parent. State law dictates inheritance rights. Although some states have had specific legislation concerning ART children's inheritance rights there is no unified law on the topic.

Governor Cuomo signed into law EPTL 4-1.3 and amendments to EPTL 11-1.5 to address the issue of inheritance rights of a posthumously conceived child in New York. The legislation allows New York to join 20 other states that have addressed this thorny issue revolving around reproductive technologies.

After-Born "ART" children Law

Technological advancements in reproductive technology have allowed for genetic material such as ova, semen, and fertilized embryos to be preserved for later use. For estate planning and intestacy purposes, this can lead to pre-humous conception and post-humous birth, or post-humous conception and birth. As to the former, EPTL § 4-1.1(c) specifically states that "distributees of the decedent, conceived before his or her death but born alive thereafter, take as if they were born in his or her lifetime." Under Section 4-1.1(c), a posthumous child may inherit if he or she qualifies as decedent's "distributee" in intestacy. EPTL § 6-5.7 also specifies that "posthumous children are entitled to take in the same manner as if living at the death of their ancestors," if "a future estate is limited to children, distributees, heirs or issue. . . ." EPTL § 6-5.7(a).

Alison Arden Besunder

The sole New York case addressing the latter question of post-humously conceived and born children is *In re Martin B*, where the New York Surrogate considered whether EPTL § 2-1.3 – dealing with non-marital children – encompasses posthumously conceived children. *In Re Martin B,* 841 N.Y.S.2d 207, 209-10 (N.Y. Surr. 2008). There, a grantor executed seven trust agreements in 1969 and died in 2001, survived by two of his three children. The grantor's predeceased son left cryopreserved semen for his wife's use. His wife later gave birth to two sons. The grantor's trusts gave discretion to the trustee to sprinkle principal among "Grantor's issue" during his surviving child's lifetime, and thereafter to the grantor's "issue" or "descendants." The specific issue presented was whether the term "issue" and "descendants" include children conceived by means of IVF with cryopreserved sperm of a predeceased child. The court held that a child born from biotechnologies with a parent's consent is entitled to the same rights as a natural born child. Accordingly, held the court, the after-born child was included in the class of beneficiaries of the trust.

The dearth of case and statutory law pre-dated the rapid progression of technology. Perhaps in recognition of this void in New York's statutory scheme, Governor Cuomo signed EPTL 4-1.3 and 11-1.5. Under EPTL 4-1.3, a posthumous child of a genetic donor (called a "genetic child" in the statute) will be recognized as a distributee of the genetic parent in intestacy or under a will or trust if one of four conditions is met:

The genetic parent (the one storing the sperm or ova) expressly consents, in writing, to the use of the genetic material for posthumous conception and authorizes a specific person to make decisions about its post-death use. The writing must have been executed no more than seven years before the genetic parent's death. In other words, a genetic parent must update the writing every seven years.

The person authorized under (1), above, must give notice to the personal representative of the estate within seven months of the issuance of letters.

The authorized person must record the consent/authorization with the Surrogate's Court within seven months of the genetic parent's death.

The child must be in utero within 24 months of the genetic parent's death or born no later than 33 months after the genetic parent's death (better plan that scheduled c-section carefully!).

The statute includes various prerequisites for the writing and provides a sample form that would behoove anyone to follow closely. It also provides mechanisms for revoking the consent.

Other Legislative changes

The New York Legislature recently introduced Senate Bill 2708 (NY S02708) to the 2015-2016 General Assembly. The bill would amend the Domestic Relations Law and enact provisions relating to the execution of written forms, prior to assisted reproductive technology services, for consent and directives for the transfer, use, and disposition of cryopreserved embryos or gametes. It would provide for notice prior to the implementation of the terms of such directives. The status of the bill as of January 28, 2015 is that it was referred to the judiciary.

My last article concluded, "New York's laws on posthumously born children has not been updated to consider the application of those laws to children conceived and born as a result of assisted-reproductive technologies. This presents a minefield of potential disputes that can arise." The New York Legislature has now caught up to the advancement of science. This new legislation will help guide the courts in addressing the needs of children, parents, donors, and other beneficiaries of the estate, as well as preventing abusive use of genetic material to improperly gain access to an estate's assets. That said, it remains unclear how the new legislation will impact a specific bequest in one's Last Will and Testament of such genetic material; or whether such a bequest would be deemed to comply with EPTL 4-1.3 and the attending changes to EPTL 11-1.5.

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.

Bad Client Warning Signs *(Continued from page 13)*

Refine Your Pre-qualification Process

In addition to your list of warning signs, your pre-qualifying process might include some elements that help you to determine how committed the client is to the process, how much value they place on your services and how willing they are to pay for them. For example, you may want to spend a few minutes on the telephone or require clients to complete an intake form or questionnaire *before* they come to your office for an initial consultation. Clients who fail to complete the form may not be serious about their matter or may be uncooperative in the future.

You may also consider requiring up-front payment for your initial consultation. This payment can be applied towards the work for any client who ultimately retains you, but it ensures that potential clients understand that there is value in speaking with you, even if they don't decide to hire you. You can always decide to refuse or refund the payment when you deem it appropriate, but requiring a payment can eliminate tire-kickers.

Your pre-qualification process might also include

- A questionnaire that can help identify clients who may be uncooperative or secretive later. Responses can help you identify their needs better.
- A minimum fee for 'basic' or 'general' services. If a client is unwilling to pay the minimum fee, they may not value your services.
- Packaging or bundling services. This prevents clients from squabbling over the fee for any one finite service, and lets you communicate the added value of each package.

Turning away potentially problematic clients may be the best thing you do for your practice this year. But in order to do so effectively, you need to be prepared by taking the time to determine in advance what kinds of clients you want in your practice and what kinds of clients you're willing to turn away.

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 her blog at www.LegalEaseConsulting.com. This post is excerpted from the book, "How to Do More in Less Time: The Complete Guide to Increasing your Productivity and Improving Your Bottom Line," *co-authored with Dan Siegel and published by the ABA Law Practice Division.*

AMERICAN PERSPECTIVES

New Challenge to Obamacare — How Will the Supreme Court Rule This Time?

By Justin Giordano

Here we go again.

On November 7, 2014 the U.S. Supreme Court agreed to once more hear a challenge to the legality of the Affordable Care Act (ACA), which is more commonly referred to as Obamacare reflecting the primary proponent, advocate, and supporter of the act. This appears to be a déjà vu situation, since the high court rendered its decision regarding its original challenge in late June 2012, some two and a half years prior to accepting to hear this new challenge.

There are however, distinct differences between the two lawsuits. The original challenge to the ACA was premised on whether the act called for a "mandate," forcing individuals and organizations to purchase health insurance, or whether it could be interpreted as a new tax. The former would have been considered as unconstitutional, as most constitutional scholars opined as well as four of the nine Supreme Court justices, as they generally underscored that in their dissenting opinion(s).

Ultimately in a five to four decision, with the fifth and deciding vote being Chief Justice Roberts, the High Court ruled that the ACA was constitutional. The decision was principally premised on Chief Justice Roberts' interpretation of the question at issue being a new tax rather than a mandate.

Most critics accused the Chief Justice of rewriting the law to make the mandate provision be interpreted as a new law. This assertion is partly based on the presumed history of the justices' deliberations leading to the decision where apparently Justice Roberts vacillated between first considering the ACA's provision as a mandate, and thus unconstitutional, and then revising his position to see it as a new tax. The pronouncements by President Obama and its supporters in Congress had also vehemently argued that the ACA did not incorporate a new tax. Nonetheless Justice Roberts indicated in a later commentary that he did not feel comfortable overturning the will of the Congress and that it was an issue that should be decided by the electorate via election of its political representatives. The aforementioned is presented to provide historical context and for comparative purposes to the current challenge. It is not intended to reargue the 2012 ACA case since the bottom line is that the ACA was upheld as constitutional and consequently the law of the land.

Justin Giordano

The 2014 challenge bears some similarity to its 2012 counterpart only in so far as once again the Supreme Court will be interpreting the meaning of the language in one of the provisions of the ACA. However it differs considerably in that it is not the legitimacy of the ACA as a whole that is being re-litigated but rather its application. More precisely the case at hand will evaluate whether the Internal Revenue Service (IRS) usurped the powers of Congress when it created a regulation that in essence permits a massive transfer payment, namely the awarding of billions of dollars in tax subsidies to individuals signing up for ACA health care plans.

The facts surrounding the case — *King v Burwell*

The ACA states that the awarding of tax subsidies is for those consumers who purchase health care policies on a health care exchange established by a state. The objective being to assist low and moderate income individuals in buying health insurance for themselves and their families. The lawsuit thus seeks to enforce that provision, which would mandate that the Obama administration must strictly adhere to limiting its subsidies to state-established exchanges only.

According to the authors of the lawsuit, the restrictive provision was seemingly formulated as financial incentive for all 50 states to participate and cooperate with the ACA's ultimate objective to set up exchanges throughout the nation. Therefore this was to serve as the old "carrot and stick" model. Participate and get healthily compensated or do not and face the loss of billions of dollars in federal health care subsidies. Perhaps this was as an offer the states could simply not refuse. The problem is that only 16 states have to date established their own health exchanges. The remaining 34 states have staunchly refused to go along with the plan.

The fact that two thirds of the states have opted to oppose the establishment of exchanges goes to the core of the law in terms of its viability. The reason is based on the numbers. For example and according to the brief filed in this case, to date some 7.3 million people have signed up for insurance through a health care exchange. Roughly 74 percent, or 5.4 million, have done so by through a federal government established exchange. The critical factor is that out of that 5.4 million people 9 out of 10 would be unable to afford the insurance premium without government assistance. Based on government figures, the average tax credit paid out to each of these newly insured individuals accounts for 76 percent of the cost of the premium. The problem for the ACA becomes amply evident. Without the federal subsidies the aforementioned 74 percent of these new enrollees will be unable to afford their insurance premiums going forward, resulting in the effective undoing of the ACA according to most experts.

The Issue(s) the Supreme Court must consider

As previously referenced, the key issue is whether the IRS has the constitutional authority to act — through the enactment of regulation (essentially on its own) — to hand out billions of dollars in the form of tax credits to individuals, or is that a power that is exclusively reserved for Congress.

Posed differently, or in conjunction with the above, the critical legal question the Supreme Court must address is whether the ACA provision that links tax credits to state-established health exchanges in effect also prohibits the awarding of said credits under federal exchanges.

Mr. Donald Verrilli, the U.S. Solicitor General, addressed the issue(s) and question by stating in his brief to the Supreme Court that "Congress determined that the tax credits at issue here are essential to the Affordable Care Act's goals of making affordable health coverage available to all Americans and ensuring functional insurance markets." Furthermore he added: "Petitioners' argument that the [ACA] denies those credits to millions of people in 34 states is contrary to the act's text and structure and would render the act unrecognizable to the Congress that passed it."

Looking at the lower courts, i.e. Federal Appellate Courts, does not provide great insights in terms of establishing a legal trend or consensus opinion, at least at the appellate level since the two courts that have rendered conflicting opinions. In July 2014 in the Washington, D.C. court a three-judge panel struck down the IRS rule by a 2 to 1 vote. However on that same day, merely a few hours later, in Richmond, Va. another three-judge panel voted 3 to 0 to uphold the IRS rule.

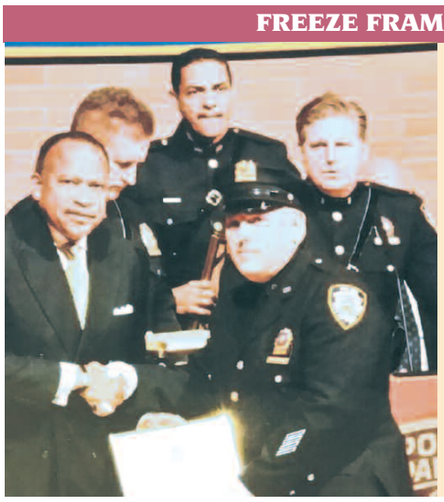
Interpreting the intent of Congress has traditionally and historically been quite a challenging task. This is particularly so when it pertains to as controversial a piece of legislation as the ACA. And this is as it should be since in terms of magnitude, given that the ACA affects one sixth of the American economy. As a matter of constitutional principle however, neither the IRS nor any other agency has the authority to make its own law, whether that is called a regulation or a rule. Obviously the question before the Supreme Court in this case is exactly that — did the IRS exceed its authority and substitute its own intent and that of the ACA supporters, including President Obama, instead of what is actually written in the relevant provision of the act?

Will the Supreme Court weight the value of the actual words as written without broader interpretation or will they evaluate these limiting few words in an amplified context (whatever that may be), or perhaps more inline with Solicitor General Verrilli's brief.

It's difficult to assess with any confidence how the Supreme Court will react. What is clear is that two thirds of the states chose not to open their own exchanges. This is perhaps due to opinion polls consistently showing that the ACA has never been widely supported ever since its inception some four years ago. The nine justices on the High Court must nevertheless arrive at their decision based on the Constitution and not the popular sentiment of the time.

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

FREEZE FRAME



Past President's Son Promoted

Congratulations to Ruth and SCBA past president Arthur E. Shulman and their son, Lennard Shulman, who received a promotion to First Grade Detective on January 30, at NYPD Police Plaza.

SCBA past president Art Shulman's son, Lennard with First Deputy Commissioner Benjamin Tucker at his promotion to First Grade Detective.

SUFFOLK ACADEMY OF LAW

OF THE SUFFOLK COUNTY BAR ASSOCIATION

FEBRUARY/MARCH CLE

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

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

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

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

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

NOTES:

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

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

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

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

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

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

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

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

INQUIRIES: 631-234-5588.

SEMINARS & CONFERENCES

Afternoon Matinee Program

ELDER LAW UPDATE

Friday, February 13, 2015

SCBA's resident Elder Law guru George Roach provides his annual update to changes and developments in Elder Law that could affect the advice you provide to clients. Valentine's Day snacks will be served.

Faculty: **George Roach, Esq.**

Time: 2:00p.m. – 5:00 p.m. (Registration from 1:30 p.m.)

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

MCLE: **3 Hours** (2 1/2professional practice; ½ ethics) [Transitional or Non-Transitional]; $125

Matrimonial and Family Law Series at CI Courthouse

EVIDENCE

Wednesday, February 25, 2015

Come learn about the latest updates in Evidence in Matrimonial and Family Law cases. A light lunch will be served.

Faculty: **Robert DelCol, Esq.**.

Time: 12:45-2:00 p.m.

Location: District Court Jury Room, Cohalan Court Complex

MCLE: **1 Hour** (professional practice) [Transitional or Non-Transitional]; $30

Full Day Seminar

TRIAL PRACTICE, THE CPLR AND THE UNIFORM RULES

February 27, 2015, 9a.m.-4 p.m.

This advanced program will feature prominent trial attorneys and Justices of the Supreme Court presiding in Suffolk County parts, discussing the interplay of the CPLR and the Uniform Rules for trial attorneys.

Faculty: **TBD**.

Time: 9:00 a.m. – 4:00 p.m. (Registration from 8:30 a.m.)

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

MCLE: **6 Hours** (3 professional practice; 3 Skills) [Transitional or Non-Transitional]; Morning Session: $90; Afternoon Session: $90; Full Day: $159

Full Day Seminar

RESIDENTIAL REAL ESTATE: NUTS & BOLTS TO ADVANCED PRACTICE

March 6, 2015, 9a.m.-4 p.m.

This program will cover all aspects of residential real estate from inception of a file in the office to post-closing issues. The program will be a "how to" for beginners, but include tips for the advanced practitioner as well.

Faculty: Peter D. Tamsen, Esq., Gerard J. McCreight, Esq., Lita Smith-Mines, Esq., Audrey Bloom, Esq., Peter C. Walsh, Esq., Joel A. Agruso, Esq., Vincent Danzi, Esp., Joseph J. O'Connor, Esq., Mitchell Borkowsky, Esq.

Time: 9:00 a.m. – 4:00 p.m. (Registration from 8:30 a.m.)

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

MCLE: **6 Hours** (3 Professional Practice; 2 Skills; 1 Ethics) [Transitional or Non-Transitional]; Morning Session: $90; Afternoon Session: $90; Full Day: $159

March Matrimonial Mondays Series

ADVANCED CUSTODY TRIAL

March 2, 2015, 6 p.m.-9 p.m.

This advanced program will include both a panel presentation and a mock trial presentation covering advanced custody issues encountered by family and matrimonial law practitioners.

Faculty: Hon. Carol MacKenzie, Philip Catrovinci, Esq., Donald Salah, Esq., Teresa A. Mari, Esq.

UNDERSTANDING TAX RETURNS IN MATRIMONIAL ACTIONS

March 9, 2015, 6 p.m.-9 p.m.

This advanced program will explain advanced tax issues that can arise in matrimonial actions.

Faculty: Steve Gasman, Esq.

ELECTRONIC EVIDENCE

March 16, 2015, 6 p.m.-9 p.m.

This program covers how to get electronically generated items (social media posts, text messages, etc.) as well as electronic evidence (smartphones and other devices) into evidence.

Faculty: Hon. James F. Quinn, Jeffrey Horn, Esq., Kathy Small, Esq., Donald Horn, Esq.

All Programs in March Matrimonial Mondays Series

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

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

MCLE: **3 Hours** (Professional Practice) [Transitional or Non-Transitional]; $90

Full Day Seminar

ESTATE PLANNING AND ADMINISTRATION "CRADLE TO GRAVE" - ELDER LAW

March 13, 2015, 9a.m.-4 p.m.

This program is part of a two part series of full day programs covering Elder law, Estate Planning and Administration. This first program begins with the initial client intake and goes through Medicaid planning, will drafting, advanced directives, trusts, including Medicaid trusts, special needs trusts and revocable trusts, and ethical issues in elder law.

Faculty: **TBD**.

Time: 9:00 a.m. – 4:00 p.m. (Registration from 8:30 a.m.)

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

MCLE: **6 Hours** (3 professional practice; 2 Skills; 1 Ethics) [Transitional or Non-Transitional]; Morning Session: $90; Afternoon Session: $90; Full Day: $159 (Ethics credits will only be offered for the afternoon session)

Evening Program

ANNUAL MATRIMONIAL UPDATE

March 30, 2015, 6 p.m.-9 p.m.

This annual program provides an update of recent significant cases in the field of Matrimonial Law.

Faculty: Vincent F. Stempel, Esq.

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

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

MCLE: **3 Hours** (3 Professional Practice) [Transitional or Non-Transitional]; $90

SUFFOLK ACADEMY OF LAW

OF THE SUFFOLK COUNTY BAR ASSOCIATION

FEBRUARY/MARCH 2015 REGISTRATION FORM

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

Sales Tax Included in recording & material orders.

COURSE	SCBA Member	SCBA Student Member	Non-Member Attorney	Season Pass	12 Sess. Pass	MCLE Pass	New Lawyer MCLE Pass	DVD	Audio CD	Printed Course Materials
SEMINARS & CONFERENCES										
Elder Law Update	$125	$0	$155	Yes	Yes	3 cpns	3 cpns	$150	$150	$25
Matrimonial & Family Law Series: CI Courthouse - Evidence	$30	$0	$40	Yes	Yes	1 cpn	1 cpn	$55	$55	$25
Trial Practice, The CPLR and the Uniform Rules – *Full Day Program*	Full Day: $159; a.m. OR p.m. only: $90	$0	Full Day: $199; a.m. OR p.m. only: $120	Yes	Yes	6 cpns	6 cpns	$184	$184	TBA
Real Estate – *Full Day Program*	Full Day: $159; a.m. OR p.m. only: $90	$0	Full Day: $199; a.m. OR p.m. only: $120	Yes	Yes	6 cpns	6 cpns	$184	$184	TBA
Matrimonial Mondays Series: 3 Sessions	Full Series:	$0	Full series:	Yes	Yes	Full series:				
Matrimonial Mondays: Advanced Custody Trial	$90	$0	$120	Yes	Yes	3 cpns	3 cpns	$115	$115	$25
Matrimonial Mondays: Understanding Tax Returns in Matrimonial Actions	$90	$0	$120	Yes	Yes	3 cpns	3 cpns	$115	$115	$25
Matrimonial Mondays: Electronic Evidence	$90	$0	$120	Yes	Yes	3 cpns	3 cpns	$115	$115	$25
Annual Matrimonial Update	$90	$0	$120	Yes	Yes	3 cpns	3 cps	$115	$115	$25
Estate Planning and Administration, "Cradle To Grave" Elder Law: *Full Day Program*	Full Day: $159; a.m. OR p.m. only: $90	$0	Full Day: $199; a.m. OR p.m. only: $120	Yes	Yes	6 cpns	6 cpns	$184	$184	TBA
Bridge The Gap CLE Weekend	Full Weekend: $195; 2014 attendees:$170 Day 1 OR Day 2 only: $125	$0	Full Weekend: $195; 2014 attendees:$170 Day 1 OR Day 2 only: $125	Yes	Yes	12 cpns full weekend; 7 cpns per day	12 cpns full weekend; 7 cpns per day	N/A	N/A	TBA

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

FINANCIAL AID: Call 631-234-5588 for information.

Name: _____

Address: _____

Phone: _____ Email: _____

TOTAL TUITION $_____ **+ optional tax-deductible donation** $_____= $_____**TOTAL ENCLOSED**

METHOD OF PAYMENT _____Check *(check payable to Suffolk Academy of Law)* ____ Cash
Credit Card: __American Express __MasterCard __VISA __Discover

Account #_____ Exp. Date:_____ Signature: _____

Parents Getting Good Kids in Trouble *(Continued from page 16)*

company checkbook. She did not write checks or file tax returns on behalf of Business without Dad's permission. Additionally, she had no office at Business and was away from Business for substantial periods of time during the time frame in question. Thus, while in the government argued that Daughter was "given responsibility for calculating the company's payroll, issuing payroll checks, and preparing and signing payroll tax returns," Daughter countered that performing payroll calculations at Dad's direction and acting as bookkeeper were insufficient facts to establish that she had control of the Business's payroll.

Again, while Daughter prepared the company's payroll and signed payroll checks, these actions were taken at Dad's request and direction, often while Daughter was working full-time out-of-state. Dad determined the employee salary, and he was in charge of making sure payroll taxes were paid. Daughter's lack of control over the payroll was supported by her testimony that she did not learn that Business had failed to remit trust fund taxes until 2006.

The government argued that Daughter "had the ability to determine which creditors to pay because she had access to the company's checkbook and had full check-signing authority on the company's account." She contended that because she "was only allowed to write checks for bills that were [pre-authorized] by her father," she had no authority to determine which creditors to pay.

Though Daughter possessed full check-signing authority, as no co-signor was required, and thus her signature alone would be sufficient for the bank to cash a check, whether she had access to the checkbook was in dispute. Nevertheless, even assuming Daughter had access to the checkbook, that fact combined with her full check-signing authority was insufficient to show there was no dispute as to whether she determined which creditors to pay and when to pay them. Her actual authority was circumscribed by Dad's control over the process; she was only allowed to write company checks with the permission and at the direction of Dad. She testified that Dad would tell her what specific bills to pay and that she never questioned his decision or offered advice on the issue. Daughter testified that Dad "was the only person that could authorize anything at [the Business]."

While the power to sign checks is an important factor in the "responsible person" inquiry, the court said, the power "can exist in circumstances where the individual in reality does not possess significant control over corporate finances." The court here found that Dad exerted such control over the process as to divest Daughter of any meaningful authority.

The government also argued that, based on Mom's testimony, there was no dispute that Daughter had authority to hire and fire employees. (Mom?!) Daughter maintained that she had no such authority. In outlining Dad's duties, Daughter testified that "[h]e hired all of the employees . . . [and] fired any employees." She stated that she had no role in hiring and firing at Business at any point. Although Daughter did not testify explicitly that she lacked ability to make hiring and firing decisions, her testimony gave rise to a reasonable inference that she lacked such ability.

The government did not contend that Daughter participated in the daily management of Business. She testified that she was working full-time out-of-state during most of the time period in question. She never had an office or even a designated workspace at Business. While Daughter performed several tasks for Business between 2004 and 2008, the record showed no evidence that she was involved in the company's day-to-day management, and therefore, this factor favored a finding that she was not a responsible person.

Based on the foregoing, the court found that the record presented genuine questions as to the amount of actual, substantive authority that Daughter possessed over the control of Business finances and the scope of her decision-making authority, and thus, whether she was a responsible person.

Escaping Liability

Daughter was fortunate. She had a full-time job that kept her away from Business and she had no office at Business. Had these facts differed even slightly, the court may not have assigned as much weight to Daughter's testimony regarding Dad's control over check writing and hiring. In other words, the result could have been very different.

The lesson: although a child's involvement in the family business can be a starting point for succeeding to control over, and ownership of, the business, the responsibility and economic benefits bestowed upon a child come with a great deal of responsibility, much of which – as in the case of trust fund taxes – may not be readily apparent to many. It will behoove a child who finds him - or herself in a position of authority in the family business to understand the attendant legal responsibilities and to ensure that the business remains compliant with its own.

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.

President's Message *(Continued from page 1)*

prepared a power point presentation, which I reviewed. I also reviewed several articles critical of the present bar exam, and attended a focus group at the invitation of former Suffolk County Bar Association President John Gross and James M. Wicks at Touro Law School. I have advised our Board of Directors of the issues.

DISCUSSION

Both exams are given over two days. The present bar exam requires candidate to answer five essay questions presenting multiple issues and generally emphasize New York law, answer 50 New York State specific multiple choice questions, complete a Multistate Performance Test and answer 200 Multiple Choice Questions for the Multistate Bar Exam.

The UBE also presents the same 200 multiple choice questions, but then requires candidates to answer six essay questions, which are generally single issues of general principles of uniform laws (not New York law) and a separate section of 50 New York specific multiple choice questions. The UBE also changes the weight accorded each of the sections from the weight presently accorded the current bar exam.

Currently, 14 states administer the UBE and all but two are west of the Mississippi and does not include California.

Some of the arguments in favor of the UBE include New York participating in a national licensing exam, and greater portability. Diane Bosse explained in an article she wrote for the New York Bar Association in September 2013, that the score achieved on the bar exam in one jurisdiction can be transported to another, allowing a new lawyer to gain admission in another jurisdiction without taking another bar exam. According to Ms. Bosse, portability is a worthy goal, especially in the current job market.

In my opinion, the arguments do not relate to the large majority of lawyers practicing in New York, especially practitioners in the counties and towns outside of New York City. New York has a rich history of common law and laws and rules that impact on New York practice. Including New York in a national licensing exam does little to ensure that the lawyers who practice in New York courts will be familiar with New York laws and rules. Lowering our standards to become part of a national bar licensing board is difficult to justify.

Further, portability allows not only candidates for admission in New York to seek employment in other states utilizing the UBE, but also allows candidates from other states access to practice in New York. Since it appears that the UBE exam is not as rigorous as the present exam, the potential expansion of lawyers in New York from other states and from other countries would only create more lawyers in New York looking for employment. Anecdotally, New York State has a fairly large population of attorneys, which undermines the rationale for greater portability.

Attorneys in New York should be proud of our high standards. The present arguments in favor of the UBE do not justify reducing those standards. Further, relaxing our standards to test candidates for admission could also negatively impact our clients and the residents of New York that we serve. Maintaining a knowledgeable, professional bar is a major element in the effective representation of our clients and the public. Implementing the UBE could adversely affect the quality of lawyers, and therefore impact the quality of service we should provide to our clients and the public.

DONATION

Thank you to SCBA member Nicholas Gabriele who made a donation in memory of Dorothy Paine Ceparano to JDRF Improving Lives Curing Type 1 Diabetes.

Bench Briefs (Continued from page 4)

defaults as against the non-answering, non-appearing defendants and to amend the caption. In denying the application, the court noted that the application did not include legible copies of the affidavits of service as to defendants Jose Colon as heir at law and next of kin of Felix Colon and Norma Colon as heir at law and next of kin of Felix Colon.

Honorable Paul J. Baisley, Jr.

Motion for summary judgment granted; when an actor is faced with an unexpected emergency circumstance that leaves him with limited opportunity to consider alternative courses of action, the actor may not be negligent if were reasonably prudent.

In *Richard Martin v. Tri-Mac Enterprises of Centereach, Inc., Tri-Mac Enterprises of Centereach, Inc. v. Richard T. Foley, III, Jody A. Juliano and Thomas J. Juliano,* Index No.: 31375/2013, decided on July 23, 2014, the court granted the motion by third-party defendants, Jodi A. Juliano and Thomas J. Juliano, for an order pursuant to CPLR §3212, granting summary judgment dismissing the third-party complaint and the "cross complaint" by the third-party defendant Richard T. Foley, III for contribution and common-law indemnity against them. In support of the application, the movant argued that Thomas Juliano was confronted with an emergency situation caused by the other parties in which he was without fault. Under the emergency doctrine, when an actor is faced with an unexpected emergency circumstance that leaves him with limited opportunity to consider alternative courses of action, the actor may not be negligent if his or her actions during the emergency were reasonably prudent. However, merely encountering an emergency does not completely absolve one from liability; it simply requires that one's conduct be measured against that of a reasonable person confronted with similar circumstances in a similar time frame to react. Here, the court found that the movants established their prima facie entitlement to summary judgment. Mr. Juliano testified that only 1 to 1 ½ seconds elapsed between the time he first saw the plaintiff's vehicle and when they collided. He further testified that the collision happened entirely within the westbound lane. In opposition, plaintiff did not dispute these facts, nor did it present any evidence of discrepancies pertaining to the circumstances of the accident that would make this motion premature. Although the defendants suggested that there were questions regarding the comparative negligence of Mr. Juliano, the court noted that speculation that the driver in the opposing lane of traffic could have done something to avoid a vehicle crossing over a double yellow line is insufficient to defeat a motion for summary judgment.

Summary judgment granted; defendant Cohn averred that his motor vehicle was not involved in a motor vehicle accident, that defendant Rosen was not operating his automobile, that he did not know a Joyce Rosen, and that his vehicle was parked at the time of collision.

In *Henry Mendoza v. Joyce Rosen and Peter F. Cohn,* Index No.: 131/2014, decided on June 17, 2014, the court granted defendant's summary judgment motion pursuant to CPLR §3212. In rendering its decision, the court noted that in the complaint plaintiff alleged that the defendant Rosen was the operator of a motor vehicle owned by the defendant Cohn, which was driven directly into the path of his automobile on Round Swamp Road, Town of Huntington, New York, causing him to sustain severe and serious personal injured.

Plaintiff's complaint did not allege that the vehicles collided or were in contact with each other. In support of the application, the defendant, Cohn, claimed that the defendant Rosen did not operate his motor vehicle, and that his vehicle was parked in a garage at the time of plaintiff's collision and could not have caused plaintiff's accident. Here, in granting the motion, the court found that the defendant, Cohn who averred that his motor vehicle was not involved in a motor vehicle accident, that defendant Rosen was not operating his automobile, that he did not know a Joyce Rosen, and that his vehicle was parked at the time of plaintiff's collision in the hospital garage at Stony Brook University Hospital where he worked, had shown that he was entitled to summary judgment dismissing the complaint. Plaintiff failed to come forward with evidence to establish the existence of a material fact.

Honorable Arthur G. Pitts

Motion to dismiss fraud cause of action denied; plaintiffs adequately set forth sufficient facts to support the necessary elements of fraud.

In *Nicholas Giove and Melissa Giove v. IPA Asset Management II, LLC, IPA Asset management, LLC Island Properties & Associates, LLC, Steven Macchia and David Derosa,* Index No.: 63575/2013, decided on June 27, 2014, the court denied the motion to dismiss the cause of action sounding in fraud. The court noted that to establish their cause of action for fraud, plaintiffs must demonstrate that defendants knowingly misrepresented a material fact upon which plaintiffs justifiably relied, causing their damages.

Although New York traditionally adheres to the doctrine of caveat emptor in an arm's length real property transfer, a seller may be liable for failing to disclose information if the conduct constitutes concealment. In opposition to the instant motion, plaintiffs proffered their own affidavits as well as the home inspection report prepared by Safe Harbors Inspections. Plaintiff, in his affidavit stated that he was present at the inspection together with his father and defendant Macchia. During the inspection, Macchia was specifically asked about a stain on the base molding, a wet spot on the floor and a faint odor in the basement. A Berber rug concealed the floor. He stated that the previous residents had a cat that may have urinated on the floor; the stain was due to a pipe that had burst during renovations and that there were no other sources of water. The inspectors had no access to the walls because they were concealed by finishing materials, which is acknowledged in the report. Macchia said that he supervised the renovation of the house, however, the plaintiffs averred that he did not disclose the defects in the foundation, foundation wall or basement flooring.

In denying the motion to dismiss the pleadings, the court noted that the material allegations of the complaint are deemed true and the pleader is given the benefit of every possible inference. The nature of the inquiry is whether a cause of action exists and not whether it has been properly stated. Upon review of the complaint, the court found that the plaintiffs adequately set forth sufficient facts to support the necessary elements of the cause of action for fraud, and accordingly the motion was denied.

Honorable William B. Rebolini

Application pursuant to Article 78 denied; summary judgment denied; triable question of fact on the issue of whether there was an improper delay in the review of petitioner's application by the respondent town.

In *In the Matter of the Application of Calverton Manor, LLC, for a judgment pursuant to Article 78 of the Civil Practice Law & Rules, v. Town of Riverhead and Town Board of the Town of Riverhead,* Index No.: 25551/2004, the court noted that this was a hybrid Article 78 proceeding/declaratory judgment action, wherein the petitioner/plaintiff Calverton Manor, LLC (petitioner) sought a judgment annulling Resolutions #491A and #522 of the Town Board of the Town of Riverhead (Town Board) adopted on June 22, 2004, enacting Local Law No. 13 of 2004, which established an Agricultural Protective Zoning (APZ) district in the Town of Riverhead and reclassified a substantial portion of the petitioner's property located on the northwesterly corner of Manor Lane and Route 25 in the hamlet of Calverton. As a first cause of action, petitioner seeks a judgment declaring that it is entitled to develop property in according with the zoning classifications that existed prior to the June 22, 2004 zoning enactments. Issue having been joined, petitioner also sought partial summary judgment. In rendering its decision, the court noted that a town's zooming determination is entitled to a strong presumption of validity. One who challenges such a determination bears the heavy burden of demonstrating, beyond a reasonable doubt that the determination was arbitrary and unreasonable or otherwise unlawful. Here, the court found that the petitioner failed to meet its burden of proof. Accordingly, the petitioner's application pursuant to Article 78 for a judgment annulling the Town Board's resolutions, which amended the Town Code and established an APZ district in the Town of Riverhead was denied. With regard to the summary judgment, the court found that the evidence before the court revealed that there existed a triable question of fact on the issue of whether there was an improper delay in the review of petitioner's application by the respondent town. Consequently, the court directed that the entry of judgment on the first cause of action be held in abeyance pending the determination of the remaining causes of action.

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.

Computer Age Search and Seizure Law *(Continued from page 3)*

Crucially, all nine justices agreed that this prospect is sufficient to require that search warrant protections should generally apply.

Because digital data and computing devices are so pervasive, *Jones* and *Riley* may have planted the seeds for a significantly revamped Fourth Amendment that is better suited to technological advancement. The implications are staggering. Governmental search practices that could be implicated include not only searches of arrestee's computing devices but also the government's ability to track movement technologically, such as through cell tower location or with GPS data; searches of computing devices at airports and at the border; many types of governmental electronic surveillance, such as of cellular and wi-fi networks; and governmental search demands aimed at third party content holders, such as Facebook, Google, Amazon, Verizon, and cloud service providers.

Jones and *Riley* are important for endorsing the notion that privacy interests must be measured in part by the degree of information that is likely to be obtained from the search. Exactly how that would occur in the numerous contexts that the Fourth Amendment regulates is unclear. In her *Jones* concurrence, Justice Sotomayor indicated a willingness to completely reconsider Fourth Amendment jurisprudence given the complications that have come with technological advances, but she was the only justice to do so. However, she was part of the five justices in *Jones* who implied an interest in mosaic theory, the notion that lines can be drawn for privacy purposes based upon the amount of information obtained. *Riley*'s focus upon the quantity of information that mobile phones make available also seems to echo the mosaic theory (though other parts arguably seek to abstain from the mosaic debate). If enough justices of the Supreme Court are interested in pursuing some form of mosaic theory, how it could be applied in a predictable and rational manner is a great challenge. Perhaps the legislature could become involved to provide guidance. This, indeed, is a suggestion that Justice Alito went out of his way to emphasize in *Riley*.

How all this plays out remains quite uncertain, but the court should maintain a strong role in overseeing Fourth Amendment law and the contours of governmental search power. *Jones* and *Riley* provide reason for optimism that the justices are well aware of the need to account for technological advances, as well as of the court's role as a coordinate branch of government in identifying the scope of Fourth Amendment protections. In both *Jones* and *Riley*, there were numerous Fourth Amendment doctrines that supported the governments' positions, and which the court could have accepted to rule the opposite way. Yet in each case the court not only ruled against the government, but also dramatically did so *unanimously*. Regardless of how things play out, that in itself sends an important message not only to us, but also to the government we empower to serve us.

Note: Fabio Arcila, Jr. is a Professor of Law and Associate Dean for Research & Scholarship at Touro Law Center. His scholarship, which has appeared in publications such as the William & Mary Law Review, the Boston College Law Review, the University of Pennsylvania Journal of Constitutional Law, and the Administrative Law Review, focuses upon Fourth Amendment search and seizure law, and he has drawn upon his litigation background to participate as pro bono counsel in the United States Supreme Court in several Fourth Amendment cases, including Jones.

Donate Your Old Computer

Retired volunteers refurbish computers for families in need – The Retired Senior Volunteer Program (RSVP) under the Community Computer Connections Program, a group of retired volunteers refurbish computers for families in need. They accept donations of computers five years old or newer. A group of retired software engineers then restore the computers to donate to people who would not be able to afford them. To donate, contact Joel Becker, 811 West Jericho Turnpike, Suite 103W, Smithtown, NY at (631) 979-9490.

Social Media and Bullying *(Continued from page 6)*

updates must include adding procedures by which local law enforcement agencies will be notified of behavior such as bullying, harassment and/or discrimination that constitutes a crime.[6] Accordingly, school districts need to be aware of local laws, such as the Suffolk County Law[7] and New York State Penal Law,[8] which make cyberbullying a crime.

Bullying that takes place on school grounds, school property or at school functions is what school administrators are familiar with and would clearly fall under the umbrella of DASA. School administration and personnel must be made aware that DASA also imposes a duty on school districts to address incidents of bullying and harassment, which occur *off* school premises and outside of the school day. Prior to the implementation of DASA, students could only be disciplined for off campus speech if such speech was not constitutionally protected. In the seminal case *Tinker v. Des Moines Independent Community School District*, the court adopted the legal standard that speech which, "would substantially interfere with the work of the school or impinge upon the rights of other students,"[9] would not be constitutionally protected. Thus, school districts may impose discipline on students for speech that occurred off school grounds and outside of the school day, if such speech substantially disrupted or materially interfered with school activities. This continues to be the standard and DASA envelops other non-constitutionally protected activities that occur off-campus but affect school life.

Since DASA is in its infancy, there is limited case law addressing cyberbullying under DASA. Recently, in a case of first impression, the Nassau County Supreme Court issued a decision in *J.G.S., et al. v. Bellmore-Merrick Central High School District, et al.*, which addressed whether a public school district had the responsibility to regulate the alleged cyberbullying of a private school student by district students. In *J.G.S.*, public school students allegedly circulated a video of an unidentifiable girl engaged in a lewd act and falsely represented it was a minor student from the private school.[10] The plaintiffs claimed that the acts of cyberbullying were perpetrated on and off school premises and affected the minor plaintiff's studies.[11] The plaintiffs alleged the defendant school district was aware of the incidents.[12] Although the primary focus of the court was whether the private school student would be covered by DASA in this instance, the court opined that the cyberbullying incidents allegedly perpetrated by the district's students were acts the statute was intended to prevent and the district had the duty to regulate the actions.[13]

The nature of cyberbullying can make it difficult to investigate. With internet access, students can be bullied or harassed 24 hours a day, 365 days a year and perpetrators can remain anonymous. Moreover, with social media, the ability to widely spread the harassing and bullying information is virtually infinite. Coupled with the prevalence of smart phones and electronic devices, victims can be bombarded with negative messages, leaving them to feel helpless, subjected to harassment and bullying at school and at home.

As mentioned above, because of its nature, finding the perpetrator of the cyberbullying often poses difficult challenges. Nevertheless, school districts have the onerous duty to address incidents that "foreseeably create a risk of substantial disruption within the school environment, where it is foreseeable that the conduct, threats, intimidation or abuse might reach school property"[14] even when such incidents occur off-campus. Thus, school district administrators must use their best judgment and consider the spirit of the law when informed of incidents of cyberbullying. Therefore, it is best practice for school districts to promptly investigate any alleged incidents of cyberbullying involving district students.

Note: Kristi DiPaolo is an associate at Ingerman Smith LLP, a law firm with offices in Hauppauge and Harrison, New York, which specializes in the representation of school district clients. Ms. DiPaolo concentrates in the areas of contract law and education law. She is admitted to practice law in the State of New York, and is member of the New York State Bar Association and the Suffolk County Bar Association.

1. Simone Robers, Jana Kemp, Amy Rathburn, Rachel Morgan, U.S Department of Education National Center for Education Statistics, *Indicators of School Crime and Safety Report: 2013* (June 10, 2014), *available at* http://nces.ed.gov/programs/crimeindicators/crimeindicators2013/key.asp.
2. Centers for Disease Control and Prevention, *Youth Risk Behavior Surveillance — United States, 2013*, 63 Morbidity and Mortality Weekly Report, Surveillance Summaries 9-10 (June 13, 2014), *available at* http://www.cdc.gov/mmwr/pdf/ss/ss6304.pdf
3. N.Y. Education Law §11(7)(emphasis added).
4 N.Y. Education Law §11(8).
5 8 NYCRR §100.2(jj).
6 8 NYCRR §100.2(l).
7 Suffolk County Law §§538-1-538-12.
8 N.Y. Penal Law §240.30(1).
9 *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).
10 *J.G.S., et al. v, Bellmore-Merrick Cen. High Sch. Dist., et al.*, 13901-13 (N.Y. Sup. Ct. Nassau Cnty. May 14, 2014).
11 *Id.* at 2-3.
12 *Id.* at 2.
13 *Id.* at 6.
14 N.Y. Education Law §11(7).

Conduct at Independent Medical Examinations (Continued from page 14)

interview a plaintiff's treating physician ex parte, it does not compel the physician to cooperate. Given this not-so-level playing field, it is imperative that defense counsel pay particular attention to attempts by plaintiffs' attorneys to overstep the bounds of permissible conduct at these examinations.

The presence of a plaintiff's attorney, or representative, at the independent medical examination, particularly one who is recording or videotaping, is an interference and the practice should be vehemently opposed by defense counsel on that basis. This is because it not only introduces an adversarial element, turning the examining room into a hearing room (*see Mertz v. Bradford*, 152 Ad2d 962 (4th Dep't 1989), but also because it hinders the candid exchange of information between the allegedly injured plaintiff and the examiner. Further, in addition to interfering with the examination, documentation of the examination by the plaintiff's attorney may turn the plaintiff's attorney into a witness in contravention of Rule 3.7 of the Rules of Professional Conduct, which specifically prohibits lawyers from acting as advocates at a trial in which the lawyer is likely to be a necessary witness, with limited exceptions.

The independent medical examination is a defense counsel's opportunity to thoroughly evaluate those injuries that are in controversy in the action. At the very least, defense counsel should object to the presence of a plaintiff's attorney, or representative, at the examination. Defense counsel should, as a matter of course, always object to any audio and/or video recording of the examination. There is no statutory authority for the practice and there is a body of case law disfavoring or prohibiting it absent a showing of "special or unusual circumstances." *See Savarese v. Yonkers Motors,* 205 A.D.2d 463 (1st Dep't 1994); *Lamendola v. Slocum*, 148 A.D.2d 781 (3rd Dep't 1989); *Parsons v. Hytech Tool & Die,* 241 A.D.2d. 936 (4th Dep't 1997); *Mosel v. Brookhaven Mem. Hosp.,* 134 Misc.2d 73 (Sup. Ct. Suffolk County 1986). If footage has been taken by, or on behalf of, a plaintiff at an independent medical examination, defense counsel should immediately demand copies of all recordings, regardless of format. And if a plaintiff's attorney appears at an independent medical examination and then seeks to utilize his/her own observations to attack the credibility of the independent medical examiner, either in opposition to a motion or during cross examination, thereby turning himself/herself as a witness, defense counsel must consider the submission of a motion to disqualify that attorney. The disqualification of an attorney is addressed to the sound discretion of the court, and any doubts are to be resolved in favor of disqualification. *See Stober v. Gaba & Stober, P.C.,* 259 A.D.2d 554 (2nd Dep't 1999).

Note: Rebecca K. Devlin, Esq. is an associate at Lewis Johs Avallone Aviles, LLP. She represents clients in all facets of casualty defense litigation, including construction accidents, premises liability, products liability, municipal liability and vehicular negligence. She can be reached at 631-755-0101.

Pre-Objection Documentary Discovery in Probate Proceedings (Continued from page 11)

objectant preparing to take SCPA § 1404 examinations.

Just as the testator's prior testamentary instruments and the attorney-draftsperson's estate-planning files are discoverable in the SCPA § 1404 phase of a probate proceeding, so too are documents concerning communications to which the testator and beneficiaries under the propounded will were parties.[v] Such documentation speaks to a testator's capacity to make a will and the involvement that the beneficiaries of an alleged testamentary instrument had in the testator's affairs, as well as the undue influence and fraud that the beneficiaries may have practiced upon the testator.[vi] It should, therefore, be requested before SCPA § 1404 examinations commence.

Similarly, a potential objectant should demand production of the testator's financial records, including documentation concerning transfers, gifts, beneficiary designations, and conveyances from the testator to a beneficiary under the propounded will. The testator's financial records oftentimes speak to the testator's involvement in his or her own financial affairs and the participation of the beneficiaries therein, which are relevant to potential capacity and undue influence objections.[vii] Thus, a potential objectant would be well served to make a request for the testator's financial records in advance of the SCPA § 1404 examinations.

Finally, the Surrogate's Courts have recognized that a potential objectant is entitled to broad discovery concerning a testator's medical condition before conducting SCPA § 1404 examinations, as the testator's medical condition is relevant to potential capacity and undue influence objections. The underlying rationale is that, "under present law, where only one examination of full scope is allowed of the attesting witnesses, the potential objectant should be permitted to be informed of [the testator's] medical condition before [conducting the] examinations."[viii] As a result, a request should be made for the testator's medical records, as well as HIPAA-compliant authorizations to obtain the same directly from the testator's healthcare providers, before conducting SCPA § 1404 examinations.[ix]

While the categories of documents discussed above are not, by any means, exhaustive, they do provide a good starting point for discovery requests that should be made in the pre-objection phase of a probate proceeding. To the extent that such disclosure is available before commencing SCPA § 1404 examinations, potential objectants in SCPA § 1404 discovery should seek it in order to ensure that the 1404 examinations are as valuable as possible.

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.

[i] S.C.P.A. § 1404.
[ii] *Matter of Ettinger*, 7 Misc.3d 316 (Sur. Ct., Nassau County 2005).
[iii] *Matter of Manoogian*, N.Y.L.J., Mar. 7, 2014, at 36 (Sur. Ct., New York County).
[iv] *Matter of Soluri*, N.Y.L.J., Aug 23, 2013, at 39 (Sur. Ct., Nassau County).
[v] *Matter of Young*, N.Y.L.J., Oct. 27, 2014, at 27 (Sur. Ct., New York County); *Matter of Demetriou*, 2013 N.Y. Misc. LEXIS 4058 (Sur. Ct., Nassau County 2013).
[vi] *Matter of Delisle*, 149 A.D.2d 793 (3d Dep't 1989).
[vii] *Matter of Bernstein*, N.Y.L.J., May 3, 2000, at 32 (Sur. Ct., Nassau County); *Matter of Kortchmar*, N.Y.L.J., Jan. 31, 1992, at 29 (Sur. Ct., Westchester County).
[viii] *Ettinger*, *supra.*
[ix] *Matter of Augustatos*, N.Y.L.J., June 12, 2009, at 43 (Sur. Ct., Queens County); *Matter of Riccardi*, N.Y.L.J., June 28, 2010, at 26 (Sur. Ct., Bronx County).

Secord Department Website (Continued from page 8)

Motions" from the home page. From the home page, I can also follow up the date of oral argument of the appeal under "Calendars" and later the decision under "HTML Format Appeals."

The Appellate Division used to have a link to old appellate briefs, which could be accessed from the home page. It was a legal publisher, not the court, which was updating that site. The legal publisher at some point stopped updating and the link was taken down. However, if you Google the Appellate Division, you can still get the "Briefs" link which may provide you with some research material. The briefs are text-searchable.

Another great resource is the "Legal Research Portal" accessed from the Archive page links. From there, you get links to various comprehensive, federal, state, agency, legislative, local, ethics and miscellaneous sites. Examples of links are bill jackets and NYC local laws.

On the home page, there is a "contact us" link. There are addresses, phone numbers, fax numbers and email addresses for various department in the Second Department. I have had very quick responses to my emails. The home page also has a "Links" link which brings you to various sites including the new Appellate Term, Second Judicial Department, website which has calendars, decisions, forms and rules.

In conclusion, the Appellate Division, Second Department website is a wealth of information. I have not even touched on the FAQ's, forms, rules and Official Reports Style Manual. The next time you have an appeal, check with the website before calling the Court. Your answer may be there.

Note: Paula J. Warmuth is a partner at Stim & Warmuth, P.C. The firm engages primarily in commercial litigation and appeals. She is a graduate of St. John's University School of Law with a degree of Juris Doctor - cum laude. She is co-chair of the Appellate Practice Committee.

1 76 AD3d 144 (2nd Dept. 2010).
2 *In the Matter of MICHAEL O.F. ADMINISTRATION FOR CHILDREN'S SERVICES v Fausat O.,* 101 AD3d 1121 (2nd Dept. 2012).
3 *Matter of Michael O.F. (Fausat O.).*

Common Law Standards of Patient Privacy (Continued from page 16)

applicable in any given circumstance of PHI disclosure:

> " . . . to the extent that it has become the common practice for Connecticut health care providers to follow the procedures required under HIPAA in rendering services to their patients, HIPAA and its implementing regulations may be utilized to inform the standard of care applicable to such claims arising from allegations of negligence in the disclosure of patients' medical records pursuant to a subpoena."

A corollary issue treated by the court in a summary manner is at least as important to practitioners as the main holding of this decision. One of the arguments raised by the defendants was that it was under no duty to notify its patient of its receipt of process because its privacy policy, made available to the patient, specifically stated that it would disclose PHI in response to any subpoena without patient authorization or an opportunity to object. The defendant argued that the responsibility for the breach rested on the staff of the Probate Court, who did not seal the records subject to a further court order. Since the court found the appellate record to be factually deficient on this issue it declined to address the claim. It did, however, note that state court pretrial practices must be HIPAA compliant (presumably meaning all states, not just Connecticut, since it cites to New York's well-known case of *Arons v. Jutkowitz*, 9 NY3d 393, 415; 850 NYS2d 345). This causes a potential conflict: Connecticut law requires that a hospital record that is the subject of a subpoena be delivered to the clerk of the court, yet under HIPAA (45 CFR 164.512[e][1][11]) a hospital cannot transfer PHI without receiving either "satisfactory assurances" of privacy and disclosure protection or securing a "qualified protective order" to the same effect. Consequently, "a covered entity would find it impossible to comply" with state law without running afoul of HIPAA.

The takeaway, I submit, is that a health provider should not simply comply with a subpoena without notifying its patient of its receipt of the process and without receiving either "reasonable assurances" or a "qualified protective order" (or, [perhaps, securing it at its own expense). Pay particular attention also to the provision of CPLR 3122(a)(2) holding that a medical provider served with a subpoena *duces tecum*, other than a trial subpoena issued by a court, [3] need not respond or even object if the subpoena is not accompanied by a written authorization by the patient (although the communication of some expression of intent probably will avoid the inevitable motion to compel). [4]

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

1. Connecticut General Statutes 52-146o
2. 45 CFR 164.512(e)(1)(ii): failure to provide proof that reasonable efforts were made to give sufficient notice of the request to the subject . . . or seek a 'qualified protective order' from a court . . ."
3. The legislature apparently presumed that a court issuing a subpoena will be cognizant of the requirements of HIPAA.
4. Note that the subpoena, on its face, must state as much: "Any subpoena served upon a medical provider requesting the medical records of a patient shall state in conspicuous bold-faced type that the records shall not be provided unless the subpoena is accompanied by a written authorization by the patient, or the court has issued the subpoena or otherwise directed the production of the documents." CPLR 3122-a(2)

Speed & Efficiency – Part Two (Continued from page 14)

and delay associated with plenary motion practice.

An expanded Model Compliance Conference Order

To ensure that compliance conferences result in the most efficient and cost-effective outcome, a new, 18-page Model Compliance Conference Order Form has been created, which greatly expands the nature and scope of information provided to the Court. The new model form is a comprehensive checklist of all aspects of the litigation and serves to ensure that the assigned justice is updated about all relevant events in the case since the Preliminary Conference. In that regard, the form mandates that parties inform the Court about: changes in counsel; an updated description of the plaintiff's case (including any amendments to the complaint or if causes of action were dismissed by the court); an updated description of the defendant's defenses, counterclaims, and third-party claims; the progress of document discovery and party/non-party depositions; other issues that have surfaced in the discovery process; whether ADR has been considered and if not, the reason for declining to engage in that process; whether e-discovery issues have been resolved; the end date for fact and expert disclosures; and deadlines for filing a Note of Issue and dispositive motion(s). See Administrative Order of the Chief Administrative Judge of the Courts, AO-35-15 (January 15, 2015).

New preamble reiterating the availability of sanctions to deter misconduct

Finally, a new Preamble to the Commercial Division's Rules confirms that counsel or litigants "who engage in dilatory tactics, fail to appear for hearings or depositions, unduly delay in producing relevant documents, or otherwise cause the other parties in a case to incur unnecessary costs" will be subject to available sanctions pursuant to Commercial Division Rules 12, 13(a), 24(d), CPLR 3126 and Part 130 Rules. Administrative Order of the Chief Administrative Judge of the Courts, AO-05-15 (January 6, 2015).

While the Preamble does not add or amend the sanctions or remedies available (all of which existed heretofore), the Preamble demonstrates the Commercial Division's recognition "that the businesses, individuals and attorneys who use this Court have expressed their frustration with adversaries who engage in dilatory tactics" and affirmatively states that "The Commercial Division will not tolerate such practices ... and is mindful of the need to conserve client resources, promote efficient resolution of matters, and increase respect for the integrity of the judicial process."

Each of the foregoing changes has been enacted to ensure that, despite the ever-increasing quantity and complexity of cases that the Commercial Division Justices resolve, the Commercial Division will continue to strive to enhance cost-efficient and streamlined practice.

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

Housing Discrimination (Continued from page 15)

and Community Affairs v. The Inclusive Communities Project, Inc. The result of this United States Supreme Court ruling should shed light on whether disparate impact discrimination is intended to be protected by the SCHRL regardless of whether such protection is expressly set forth within the code.

Another dimension of exposure realized by asking employment related questions on rental applications is that of real estate brokers who ask about employment status on behalf of their clients. Specifically the SCHRL, at §528-9(B), expressly prohibits real estate brokers from utilizing rental applications that "directly or indirectly" discriminate based upon the "lawful source of income" of the applicant. Still further, the SCHRL prohibits aiding and abetting, at §528-12 of its Code. As a result, and assuming, *in arguendo*, that questions about employment status are somehow permitted under the SCHRL, the practice nonetheless creates exposure to real estate brokers because they do not know and they do not control how the landlord will use the information that they obtain on behalf of such landlord. Consequently, by marshaling the information about employment, real estate brokers may be aiding and abetting their landlord clients in a discriminatory practice that is prohibited at §528-9(A)(1) of the code; namely, refusing to rent, refusing to negotiate or otherwise making the housing unavailable to the tenant because of the tenant's lawful source of income.

In all, asking employment questions on rental applications is very dangerous and should be avoided in order to mitigate exposure to claims of housing discrimination in Suffolk County.

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

Technology in the Courthouse (Continued from page 1)

ings and discussions with their attorneys from jails and prisons without the expense and difficulty of being transported great distances for what may be a ten-minute discussion. In the Cohalan Court Complex on the fourth floor of District Court there are two video conference booths that allow attorneys to meet with and discuss issues with their clients in the Riverhead and Yaphank jails. Contact the Suffolk County Sheriff's department at (631) 852-3356/2267 to arrange for your client to be made available. Call the District Court Court Officers' operations center at (631) 853-4630) to gain access to the video booth room. Additionally, D44 uses video conferencing to allow parole violators to participate in their misdemeanor cases without leaving their jail. There are portable video conference units for County Court, Supreme Court, Family Court and the District Court. The District Court unit can be used to allow a prisoner who refuses to leave their jail cell to witness the proceedings and hear testimony in their case. In 2013 the Family Court used the unit for 151 cases from the Suffolk County Jail and 85 cases from state correctional facilities.

Email

Email has become ubiquitous. Most of us spend some time every day managing our mailboxes. Presently, attorneys can email individual District Court courtrooms (and their staff) with important information regarding appearances. The email addresses correspond to the individual courtrooms. They are:

SUFDCD11@nycourts.gov for arraignments (D11);
SUFDCD41@nycourts.gov for D41;
SUFDCD42@nycourts.gov for D42;
SUFDCD43@nycourts.gov for D43;
SUFDCD44@nycourts.gov for D44;
SUFDCD45@nycourts.gov for D45;
SUFDCD46@nycourts.gov for D46;
SUFDCD51@nycourts.gov for D51;
SUFDCD52@nycourts.gov for D52;
SUFDCD53@nycourts.gov for D53;
SUFDCD54@nycourts.gov for D54;
SUFDCD55@nycourts.gov for D55;
SUFDCD56@nycourts.gov for D56;
SUFDCDP1@nycourts.gov for DP1;
SUFDCDV1@nycourts.gov for DV1;
SUFDCDV2@nycourts.gov for DV2
SUFDCFP1@nycourts.gov for FP1.

The Supreme Court parts are in the process of being implemented and will be available within the next few months.

Security

All of our Suffolk county courthouses are monitored by an array of video cameras that are recorded 24 hours a day. Presently we have over 100 cameras in strategic locations. There are two operations centers that are staffed by officers who contact individual commands with real-time information. The Operation Centers also control the dozens of card-access doors in our courthouses. There are also hundreds of "emergency buttons" throughout our buildings. These activations are also monitored by our Operations Centers. Our Magnetometer and x-ray stations that screen our visitors have been totally computerized. Besides identifying metal objects such as guns and knives, they are able to help officers identify organic and explosive materials quickly and accurately. Scanned items are recorded for future analysis and training.

Identification in the modern era has revolved around fingerprinting. Our Suffolk County courts were the first in the state to migrate from "ink" fingerprint cards to the now standard LiveScan method. We implemented our first LiveScan unit for adoption and guardianship participants' identification almost 10 years ago.

Technology has changed the way we work. Our court system has kept pace with the advances that we all have witnessed. Of course, keeping up with technology is always a challenge. Imagine the daunting task that the District Administrative Judge's Information Technology team has, keeping all of these systems up and running while replacing obsolete equipment and software. Thankfully they have proven themselves up to the task.

Note: Major Len Badia is the Commanding Officer of the Cohalan West and Security Operations Commands of the New York State Court System's Tenth Judicial District. He is a Director on the Board of the Suffolk County Bar Association; Managing Director of the Board of Managers of the Suffolk County Bar Association's Charity Foundation; Co-Chair of the Law Students Committee and a member of the District Court Committee.

Sidney Siben's Among Us (Continued from page 7)

American Association of Attorney-Certified Public Accountants, New York Chapter, on "Updates and Developments in New York State Residency Audits."

Yvonne Cort recently published an article "There's No Place Like Home, Says the Taxman: A Residency Primer" in the Fall 2014 publication of the Senior Lawyers Section of the New York State Bar Association.

Karen J. Tenenbaum recently spoke at LIU Post Tax and Accounting Institute for the "Civil and Criminal Tax Controversy Updates for 2014" on the topic of "New York State Collections Update". This is an annual all-day event for private and government tax professionals to discuss current events and best practices in cases involving criminal and civil tax penalties and enforcement, money laundering, currency transactions, forfeitures and related issues.

Karen J. Tenenbaum, **Yvonne Cort**, and **Brad Polizzano** spoke on the topic of "State and Local Tax Issues" at a recent Small Firm Management of an Accounting Practice committee meeting of the New York State Society of Certified Public Accountants, Nassau Chapter. **Karen J. Tenenbaum** recently gave a presentation on the topic of secrets to success titled "How to Lead to Achieve" during the Long Island Center for Business and Professional Women new member breakfast held at Hofstra University.

Condolences…

To Supreme Court Justice **Carol MacKenzie** and her family upon the passing of her father, Robert W. MacKenzie.

Herald Price Fahringer, 87, died February 12, 2015 in New York City following a prolonged bout with cancer. Fahringer was a consummate appellate advocate and trial attorney who had made his niche as a First Amendment, Constitutional scholar.

To retired Suffolk County Court Judge **Louis J. Ohlig** and his family on the passing of long-time SCBA member **Barbara B. Ohlig** on January 26, 2015.

To the family and colleagues of SCBA **Joseph A. Dempsey, Jr.** who passed away recently.

To the family and colleagues of **John T. DiPalma** who passed on January 15, 2015.

To **Frank Ambrosino** on the loss of his mother.

New Members…

The Suffolk County Bar Association extends a warm welcome to its newest members: **Argyro Boyle, Michael A. Brandi, Robert Flink, Tracey A. Fogerty, Jennifer R. Miller, Victoria Gumbs Moore, Teresa M. C. Myers, John J. Ricciardi, Paul L. Scrom, Kristen N. Sinnott and Kim A. Smith.**

The SCBA also welcomes its newest student members and wishes them success in their progress towards a career in the law: **Matthew J. Arpino, Julia Capie, Maribel Gomez, Dennis McGrath, Lauren Nevidomsky, Teresa J. Raniere, Terrence P. Russell, Kyle Stefurak and Kevin Timson.**

Dignity for All Students Act *(Continued from page 17)*

any form – keep a paper trail. Educate yourself with the school code and policy. If an incident occurs, ask, in writing, that the school follow their school district policy. Be polite but firm in your position. Should the school fail to act, or act inappropriately, seek redress with the Commissioner of Education.

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

1 The notable exception to this law is "private, religious or denominational educational institutions." N.Y. Educ. Law § 17 (McKinney).
2 Erase Racism, *8 Key Facts about Long Island School Districts* (Erase, 2010), accessible at: http://www.eraseracismny.org/storage/documents/education/ERASE_Racism-long-island-district-facts.pdf.
3 The New York Civil Liberties Union (NYCLU) and the American Civil Liberties Union were staunch supporters of this legislation, advocating for its enactment and, once enacted, conducting several training courses on Long Island for educators and the School Districts themselves. *See*, *e.g.*, New York Civil Liberties Union: *Dignity Now: The Campaign to Stop Bullying and Bias-Based Harassment in New York City Schools* (NYCLU, 2009), *available at*: http://www.nyclu.org/files/DASA_finalwhitepaper.pdf; NYCLU Letter urging New York State's top education officials to adopt initiatives to combat school bullying (May 14, 2010), accessible at: http://www.nyclu.org/files/releases/NYCLULetteonRTTT_5.14.10.pdf. Additionally, the Long Island NYCLU Chapters helped train school officials and suggested how to implement school codes of conduct to comply with the mandate set forth by New York State.
4 A parent/advocate should also familiarize themselves with the Combating Autism Act of 2006, the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232(g), *et seq.*, Individuals with Disabilities Education Improvement Act ("IDEIA") of 2004, 20 U.S.C. § 1400, *et seq.*, IDEIA Regulations, 34 C.F.R. Part 300, Regulations of the Commissioner of Education, 8 N.Y.C.R.R. § 200, *et seq.*, New York Education Law, N.Y. Educ. Law § 4401, *et. seq.*
5 N.Y. Educ. Law § 12(1) (McKinney).
6 *See* New York Civil Liberties Union: *The Dignity for All Students Act* (NYCLU) available at: http://www.nyclu.org/files/OnePager_DASA.pdf.
7 *Id* (emphasis added).
8 N.Y. Educ. Law § 14 (McKinney).
9 *See* N.Y. Educ. Law § 16 (McKinney).
10 *See* N.Y. Educ. Law § 3202(1)("A person over five and under twenty-one years of age who has not received a high school diploma is entitled to attend the public schools maintained in the district in which such person resides without the payment of tuition."); *see also S.C. v. Monroe Woodbury Cent. Sch. Dist.*, 11-CV-1672 CS, 2012 WL 2940020 (S.D.N.Y. July 18, 2012), *Handberry v. Thompson,* 446 F.3d 335, 353 (2d Cir.2006).

VTL Case Checklist *(Continued from page 18)*

actual notice in hand is inadvisable for common sense reasons.

Should you dispose of the underlying criminal charges with a chemical test refusal by way of a plea prior to the rescheduling of a hearing, you should have your client execute an original Department of Motor Vehicles form waiver of hearing to allow the minimum one year revocation, which will run concurrent to the extent possible with the license or privilege sanction as a result of the disposition.

As a rule, the chances of prevailing at the hearing after a guilty plea are very slim.

Should you or your client wish to contest the chemical test refusal, the hearing should be held, rather than waived. Should you be consulted after a default conviction §1806-a at the Suffolk County Traffic and Parking Violations Agency, be aware that the agency follows a general 30-day rule from the date of default to seek to reopen without a motion. The policy after 30 days is that the agency will require a formal motion, which will be opposed, and must be submitted in person at the agency with 20 days notice for the return date.

Your client will not be able to obtain relief from the collateral consequences of the default conviction for a protracted period of time and the motion may be denied.

A systematic approach with checklists will allow defense counsel to deliver effective representation for the clients.

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