PRACTICE MANAGEMENT

Clear Your Digital Clutter!

By Allison C. Shields

Technology can be extremely useful for improving your productivity, but it can also result in digital clutter that can distract you, slow you (and your computer) down and prevent you from getting the most important tasks done. Digital clutter is often invisible and digital storage is inexpensive and easily available, making digital clutter easy to accumulate.

Since it's spring cleaning time, let's look at some of the most common forms of digital clutter and how to combat them. And remember that once you've cleared your digital clutter, you'll want to be more aware of what you save and create a system for periodic review of all of these digital clutter types to eliminate unwanted or unnecessary digital files regularly.

Email clutter

Some digital clutter comes to you, such as email, one of the biggest digital clutter offenders. Email management is a task that must be undertaken regularly. Deleting unneeded messages, unsubscribing from distracting email lists and moving email out of your inbox and into a client file are just a few of the many tips discussed in this column in the September and December 2015 issues of *The Suffolk Lawyer*. But not all digital clutter arrives in your email inbox.

Clutter from the internet

The internet is another source of digital clutter. Your browser probably contains clutter in the form of cookies, browsing history and cached pages, which can be easily deleted. Browser bookmarks also tend to accumulate; eliminate those that you no longer need or do not use regularly. Delete temporary internet files on your computer.

Allison M. Shields

Social media can be a useful business development tool, but it can also be a distraction. Clean up your social streams by de-friending or unfollowing those who don't provide value. Limit your social media time and resist the urge to check streams throughout the day. Create lists or groups of people you are most interested in so that you can see their posts quickly and easily.

Outdated or duplicate digital documents

Some digital clutter is created by us, and the more we use our devices, the more digital clutter we create. Run a disc cleanup and disc defrag to make your computer run faster. Your documents folders on your computers, phones and other devices likely contain documents that are old, outdated or no longer needed. Review these folders regularly for items that can be archived, or even better, deleted. When you close a client's file and move it to storage, archive the digital file as well to keep your workflow clear for open matters. Use a tool like Duplicate Cleaner or Tidy Up to search for and eliminate duplicate documents.

Desktop and home screen clutter

Physical clutter in your office or on your desk is distracting and pulls your focus from the task at hand. Digital clutter on your computer desktop or device home screen is just as distracting. Take stock of the icons and shortcuts on your desktop or home screen. Get rid of old icons, shortcuts and apps that you no longer use or need. You may be surprised to find apps or programs that you downloaded but have never used. Uninstall programs that you do not use. To avoid these problems in the future, don't save work to your desktop; instead save it where it belongs in your digital storage system.

Digital storage systems

If you're saving work or files to your desktop, it is an indication that you aren't confident that you'll be able to find the document if you place it into your regular workflow or filing system. This is the equivalent of keeping files in your office or paperwork on your desk so you remember to do something. Instead, take the time to create a file and folder system and a document naming system that works and that you can rely on so that you can always find the documents and digital files you need.

Your digital documents folder should mirror the way you would store physical documents and folders. Within each client or topic, create subfolders. For example, client folders might include "pleadings" and "correspondence" subfolders. The goal is to have every file in a folder rather than having a list of orphan files.

File names should be logical, specific and consistent. It's easier to read file names when they look more like normal words than strings of numbers and letters. Keep file and document names as short and simple as possible. The longer the file name, the more confusing it is and the less likely it is that you'll be able to see the entire name on your screen in some formats.

If you file documents in client subfolders, it is not necessary to include the name of the client in the file name, because the document is already stored in that client's folder. Name documents in a way that allows you to tell at a glance what the document contains. This saves time by eliminating the need to open multiple documents to find the document you are looking for. Use plain language to name your folders so you do not have to decipher abbreviations. This is particularly important if you share files and folders with others; they should not have to guess what your file names mean.

Finally, recycle old or outdated tech devices — don't let that digital clutter become physical clutter by keeping previous generations of devices.

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

Should Nonlawyers Provide Legal Services Within New York State?

By Cory Morris

What is the fate of the legal profession? Will the profession soon be dominated by LegalZooms and AVVO ratings? Apparently prompted by the lack of legal services available to indigent clients, the American Bar Association ("ABA") is exploring the option of allowing nonlegal entities to dole out simple legal services. Will this option address the "justice gap" or will this option expand the '"business" of law? What about New York law students, law graduates and attorneys?

New York lawyers acknowledge "[t]he opportunity to participate in the legal process is often meaningless without access to assistance from a legal professional." Indeed, "[l]ike no other professionals, lawyers are charged with the responsibility for systemic improvement of not only their own profession, but of the law and society itself." The American Bar Association's Model Rules of Professional Conduct Rule 6.1 on "Voluntary Pro Bono Public Service" states that it is the "professional responsibility [of every lawyer] to provide legal services to those unable to pay." New York embraced this Model Rule of Professional Conduct with the New York Bar pro bono requirement.

Cory Morris

Fighting to tackle this problem, former Chief Judge Jonathan Lippman enacted the pro bono requirement for admission to practice law within New York State, provided funding to non-for-profit legal service providers and encouraged new attorneys to help low to moderate income New Yorkers. Indeed, "[i]n a state with a population of nearly twenty million, over 600,000 people in poverty find themselves with civil legal problems that go unmet because they cannot afford a lawyer." From the chief judge down to the volunteer attorney with Nassau/Suffolk Law Services, members of the New York State Bar are working to address these problems. Rather than encourage or assist the glut of new attorneys in providing legal services, the ABA seems to be moving toward deregulating the practice of law. In doing so, the ABA may be discarding the opportunity to utilize the mass of newly minted attorneys who are unemployed[1] or seeking work in exchange for nonlawyer legal service providers.

"The resolution, dubbed Resolution 105, aims to address the justice gap by taking the modest step of acknowledging that some states may want to let nonlawyers provide legal services." This will likely take the form of large-scale online legal servicer providers answering questions as well as providing legal advice, forms and basic legal representation remotely. The idea is not unique and this is not the first time that lawyers and nonlawyers are attempting to change the restrictions placed on the practice of law. This resolution, however, moves us one step closer to allowing nonlawyer provided legal services.

The ABA, the same entity that stresses that pro bono service is a "'professional responsibility' and an "individual ethical commitment" of all lawyers," seems to be promoting law as a business model as opposed to enforcing these responsibilities within the profession. New York Attorneys currently oversee nonlawyer work product and are ultimately responsible for the low-income or pro bono client. Nonlawyers will

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ELDER

The Winds of Change Will Impact Elderly Veterans

By Melissa Negrin-Wiener

The Department of Veterans Affairs ("VA") Aid and Attendance pension benefit is available to veterans, the surviving spouse of a veteran or both a veteran and spouse. This valuable benefit has helped scores of veterans/spouses afford necessary care in the community. However, proposed regulations will have a drastic effect on a veteran and/or spouse's ability to access this pension benefit.

By way of background, the veteran must meet certain qualifications, as follows:

- The veteran must have been in service for at least 90 days, one of which was during wartime.
- The veteran or the veteran and his/her spouse cannot have more than $80,000 in assets (including retirement accounts). There is currently *no* penalty for asset transfers.
- The veteran must need assistance with activities of daily living.

The current monthly benefit amounts are:

- Veteran — up to $1,789
- Surviving spouse – up to $1,149
- Veteran and spouse — up to $2,121

The veteran/spouse is entitled to a certain monthly pension benefit amount based on income versus monthly medical expenses (which currently includes the total cost of assisted living).

Take for example, Mr. Johnson. Mr. Johnson is an 83-year-old veteran who lives in an assisted living community. He has a $50,000 checking account, a $30,000 IRA and investments of $139,220. His total assets equal $219,220. Mr. Johnson receives monthly income in the amount of $3,000 but the assisted living costs $5,500 per month. He transfers his investment account of $139,220 to his son bringing his total assets to $80,000. He applies for and receives the full monthly Aid and Attendance benefit of $1,789 per month. Plans such as this have allowed many veterans and spouses to afford assisted living and avoid institutionalization. Unfortunately, that may be about to change.

Melissa Negrin-Wiener

Via Proposed Rule A073, the VA is seeking to amend the regulations governing Aid and Attendance benefits. The proposed regulations will severely limit a veteran and/or spouse's ability to access this pension benefit. The following are the most notable of the proposed amendments:

Net worth (Proposed § 3.274)

Currently, the net worth limit is $80,000, although this is presently an unwritten rule. The proposed regulations would make the net worth limit $119,220, the same as the Medicaid Community Spouse Resource Allowance ("CSRA"). Unlike the Medicaid rules, however, the veteran/spouse's annual income will be added to their net worth.

Asset transfers and penalty periods (Proposed § 3.276)

The proposed regulations provide that any asset belonging to the claimant in excess of the allowable resource limit, if transferred for less than fair market value, will cause a penalty period. This includes transfers to a trust and purchase of an annuity or any other instrument that reduces net worth.

The amendments propose a look-back period of 36 months. Any amount transferred during the 36-month look-back will be divided by the monthly pension amount, to which the claimant would have been entitled. The result of that calculation will be the penalty period or the amount of time the claimant will not be eligible to receive the Aid and Attendance pension. The proposed changes limit any penalty imposed to 10 years.

Let's consider Mr. Johnson again. You will recall that Mr. Johnson transferred his investment account to his son. Under the proposed regulations, Mr. Johnson would only transfer $100,000, leaving him with $119,200 (the proposed resource limit). Mr. Johnson will be subject to a penalty period based on the amount of assets transferred during the 36 months prior to the date of application divided by the pension benefit to which he would have been entitled. Assuming Mr. Johnson was entitled to the maximum pension benefit of $1,789, Mr. Johnson's asset transfer of $100,000 to his son will result in a penalty period of 55.9 months, or 4.7 *years* during

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FUTURE LAWYER'S FORUM

The Times They Are A Changin'

By George Pammer

Come senators, congressmen
Please heed the call
Don't stand in the doorway
Don't block up the hall
For he that gets hurt
Will be he who has stalled
There's a battle outside ragin'
It'll soon shake your windows
And rattle your walls
For the times they are a-changin'[1]
- Bob Dylan

Never has the above lyrics rang more true in our society than they do right now. Iconic singer and songwriter Bob Dylan, composed these lyrics at a time when our country was at a great crossroads in our history. The Vietnam War was raging, Civil Rights were being fought for and against, there was civil unrest, protests, and a clash of political ideologies.

Just a little background on 1964, the year Bob Dylan released this song. Jack Ruby was convicted of murder in slaying of Lee Harvey Oswald and sentenced to death by a Dallas jury on March 14, 1964. The conviction was reversed Oct. 5, 1966 and Ruby died Jan. 3, 1967, before a second trial could be held. Three civil rights workers were murdered in Mississippi, which resulted in 21 arrests and a trial and conviction of seven by a federal jury. Nelson Mandela was sentenced to life imprisonment in apartheid ruled South Africa. The President's Commission on the Assassination of President Kennedy issued Warren Report concluding that Lee Harvey Oswald acted alone. The following year, 1965, Dr. Martin Luther King, along with 2,600 others, were arrested for protests during a three-day demonstration against voter-registration rules in Selma, Alabama and this was the same year that Malcolm X was assassinated.


George Pammer

The purpose of sharing all of that is not to impart a history lesson. It is instead to point out that now the times we are living in are a changin' once again. We face many of the same societal issues even though the names have changed. Congress is faced with making a determination on a Supreme Court nominee, or maybe not. The presidential election is one that is clearly history in the making. The worldwide terror threat continues to grow; we now have diplomatic relations with a Communist country. New York State will administer a new bar exam this July known as the UBE, and Dean Salkin is leaving her position at Dean of Touro Law School.

Yes, for those of you that have not heard, the Dean of Touro Law School, Patricia Salkin, is indeed leaving. The Touro College system has offered her the position of provost for the entire college, and Dean Salkin has accepted. The tentative schedule is for her to assume her new position on August 1, 2016. Her new position will still provide her the ability to be involved with the law school as well as remain on faculty where she plans to continue teaching.

Dean Salkin has made great strides in her tenure. In her email to the student body informing them of her decision to accept the position she stated: "I am grateful for the support each of you have given to me from the day I joined the Jacob D. Fuchsberg Law Center family. I am proud that together we have accomplished a lot. We have more than doubled our endowment, added an endowed chair in health law & policy, and we have raised nearly $1.5 million in direct student scholarship support and with the help of many friends we have raised close to $16 million in support for our school. Equally as important, we have introduced a culture of philanthropy with our future alumni through the new tradition of the graduating class gift." Dean Salkin continued: "On a personal note, I have been truly honored to serve as Dean of Touro Law Center for the past four years. Everyone in our community welcomed and continuously demonstrated support and friendship for me and for my family. I have learned from everyone in this community, and I appreciate the culture that makes us unique and special. I recently heard someone say that 'People Make the Place,' and I could not think of a better example of how true this is than here at Touro Law."

I could not agree more. Dean Salkin is one of the people that make the place. She would arrive before the students in the morning and go home after the evening students at night. She would return phone calls and emails at two in the morning, always making herself available to the students at Touro. As Provost of Touro College she will still be involved with the law school but assuredly it will not be the same. She will be involved with the selection process of her replacement, but it is in this writer's opinion that she is irreplaceable. The Times They Are A Changin'.

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

1 Bob Dylan - The Times They Are A-changin' Lyrics | MetroLyrics http://www.metrolyrics.com/the-times-they-are-achangin-lyrics-bob-dylan.html

REAL ESTATE/BANKING

Is Dodd-Frank Working?

By James C. Ricca and Lindsay E. Mesh

The regulatory history of banking in the United States is marked by our government's response to economic events. When we look at our country's economic history, as demonstrated by the attached graph depicting U.S. recessions and gross domestic product, we see that major bank reforms were passed in response to depressions, recessions and catastrophic economic events.

The attached chart of U.S. Gross Domestic Product and Recessions illustrates legislative action and reaction:

- In response to numerous bank failures in 1863, Congress passed the National Banking Act, which took local "Wildcat Bank" notes out of circulation, introduced a uniform national currency, set up a system of federally chartered banks and created the office of the Comptroller of Currency.
- In response to the Panic of 1907, when the New York Stock Exchange fell almost 50 percent and there was a massive nationwide bank run, Congress passed the Federal Reserve Act of 1913.
- In response to the stock market crash of 1929 Congress passed the Banking Act of 1933, which established the Federal Deposit Insurance Corporation ("FDIC"), The Securities and Exchange Act of 1934, creating the SEC and the Glass Steagall Act which separated banks into two types — commercial banks and investment banks.
- In response to the 2008 Financial Crises, our lawmakers passed the Dodd-Frank Wall Street Reform Act ("Dodd-Frank"), the most sweeping rewrite of our country's financial laws since the New Deal.


James C. Ricca


Lindsay E. Mesh

The 2008 Financial Crises was a result of a number of events: the U. S. housing bubble collapsed, securities tied to subprime mortgages tanked, high risk investments called derivatives backfired and regulators and credit rating agencies failed to recognize the danger. This resulted in a sudden decline in the stock market (DJI fell 700 points), a liquidity shortfall in the U.S. banking system, the collapse of financial institutions (WAMU, Lehman Brothers), lack of credit availability, business failures, a decline in consumer wealth, a sharp increase in residential foreclosures, evictions and prolonged vacancies, and unemployment (2.6 million jobs lost).

At the time it was signed into law, President Obama told the country that Dodd-Frank would "lift our economy." The statute itself declared that it would "end too big to fail" institutions and "promote financial stability." Dodd-Frank has implemented many "reforms" by creating new and strengthening existing regulatory agencies and giving greater oversight powers. However, too-big-to-fail institutions have not disappeared. In fact, big banks have over-all grown bigger. On the other hand, small community banks have struggled with Dodd-Frank's new compliance and reporting regulations, which they have found costly, time consuming and burdensome. In 2008 the top 10 U.S. banks held $9.75 trillion in assets; they now hold $10.1 trillion. But "small banks" (defined as having $10 Billion in assets or less) have shrunk in numbers. The U.S. has lost over 1,000 small Banks over the last decade.

Most glaringly, Dodd-Frank has not eliminated the practice of "Shadow Banking," which was responsible for

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COMMERCIAL LITIGATION

Removing A Mechanic's Lien From Your Property

By Jarrett Behar

Owners of real property that is being improved sometimes get into disputes with the contractors performing the improvements. Sometimes, general contractors even get into disputes with their subcontractors. Those situations quite often lead to the filing of a mechanics' lien against the real property. If the owner either cannot tolerate a lien against the property — because of a financing, leasing or other contractual requirement or for other reasons — the owner will need to discharge the lien. Discharging the lien entails a myriad of issues, including whether the lien is valid on its face, the amount of the lien and whether the lienor is content to sit on its lien without commencing related foreclosure litigation. As described in detail below, all of these factors will influence the owner's conduct moving forward.

Bonding the lien

In a circumstance where it is imperative that the lien be removed as soon as possible, for example, where it creates a breach of a financing and security agreement with a lender that has a security interest in the owner's real property, there are two methods for discharging the lien quickly: by filing a bond or undertaking in accordance with section 19(4) of the Lien Law; and by paying the money into court in accordance with section 20 of the Lien Law.

Jarrett Behar

Pursuant to section 19(4) of the Lien Law, a bond or undertaking in an amount equal to 110 percent of the lien "conditioned for the payment of any judgment which may be rendered against the property for enforcement of the lien" must be filed with the clerk of the county in which the notice of lien is filed subject to the fidelity or surety company requirements of section 19(4)(a). If the bonding or surety company does not meet the requirements of subsection (a), then subsection (b) requires an undertaking executed by two or more sufficient sureties that "must together justify in at least double the sum named in the undertaking," which must then be approved by the court.

Sometimes due to the creditworthiness of the owner, the amount of the lien or other facts, securing a bond or undertaking is not feasible. As a result, in a situation where it is imperative that the lien be removed, section 20 of the Lien Law allows a party to deposit the amount claimed in the lien with interest to the time of the deposit with the clerk of the county in which the lien is filed. Such a deposit shall cause the clerk to mark the lien "discharged by deposit." The lienor would still need to commence an action to collect on the lien against the funds held by the clerk, subject to the owner's ability to defend the underlying merits of the claim.

Defending against the recalcitrant lienor

Section 17 of the Lien Law provides that a mechanic's lien endures for one year. If the lien is one filed other than on "real property improved or to be improved with a single family dwelling," then the lien can be extended for a single additional year without requiring a court order. Thus, except in the instance of a single family dwelling, owners of all other real property can be subject to a mechanic's lien for up to two years absent a discharge, for example in the case of a bond or payment to the clerk as noted above. Moreover, except in a circumstance where the lien is defective on its face, for example if the lien states that the last date of work performed or furnishing of materials was more than eight months prior to the filing of the lien (or four months in the case of a single family dwelling), an owner has no ability to have the lien removed for substantive reasons if the lienor has not affirmatively commenced litigation to foreclose. As a result, if the lien appears valid on its face, the owner can only assert defenses relating to the merits of the underlying claim if the lienor commences an action to foreclose on the lien.

The solution that the Lien Law provides to an owner in this circumstance is found in section 59 of the Lien Law. Section 59 allows an owner to serve a notice requiring the lienor to commence an action to enforce the lien within 30

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PRO BONO

Attorney of the Month Joy E. Jorgensen

By Ellen Krakow

The Suffolk Pro Bono Project is very pleased to honor Joy E. Jorgensen as its Pro Bono Attorney of the Month for her continuing commitment to our matrimonial and family law clients. This is Ms. Jorgensen's second time that she is receiving this well deserved honor, having first been awarded this recognition in 2003.

Ms. Jorgensen is a graduate of Smith College and Hofstra Law School. Upon graduating from Hofstra in 1984, she began her legal career in Houston, working for a general practice law firm. There, she immediately began doing matrimonial work. This was a new area of practice for the Houston firm. Due to her early success with divorce cases, referrals began pouring in, eventually making matrimonial/family law a major practice area of the firm.

In 1987, Ms. Jorgensen returned to New York and began working at Capetola and Doddato. She joined Lynne Adair Kramer's matrimonial practice in 1989. Ms. Jorgensen went out on her own in 1998, setting up a solo matrimonial/family law practice in Babylon, where she remains today. Given her many years of experience and reputation as a skilled and respected advocate, nearly all of her clients come from referrals.

In addition to representing spouses in divorce matters, Ms. Jorgensen has served on the Attorneys for the Child panel for 18 years. With one law guardian client in particular, Ms. Jorgensen's influence has extended well beyond the court case. The client was 12 years old at the time she represented him. The two formed a special connection and they've stayed in touch over the years with her role evolving from law guardian to mentor. He interned with Ms. Jorgensen during a summer where he was able to see behind the scenes of matrimonial and custody cases. Inspired by the experience and supported by Ms. Jorgensen's reference letters, the client, now 22, is a first year law student, with plans of becoming a matrimonial attorney. The client's success is very gratifying to Ms. Jorgensen, who fondly refers to him as "a really great kid!"

Joy Jorgensen

Ms. Jorgensen has seen many changes in divorce practice since she first started. She believes that the codification of the rules governing child support and maintenance requires that attorneys be especially careful to counsel and advise their clients properly. She also feels that the downturn in the national and local economy has impacted divorce proceedings. With divorce litigants' financial stress leading to deepened anger and frustration, proceedings have become more complicated and acrimonious. "You have to be more creative now than ever in finding resolutions, and you must be cost-effective in your strategies," she said.

Ms. Jorgensen has seen another environmental factor impact the practice — the ever-increasing popularity of social media. She believes that social media has distorted society's expectations and increased the sense that marriages are disposable. But she also believes that it has had an even more direct impact on marriages, by offering an easy and accessible outlet for acts of indiscretions to occur. She noted, "From what I see, this type of conduct occurring on social media is playing a more prominent role in the break-up of marriages."

Ms. Jorgensen has been a forceful and highly successful advocate for the Pro Bono Project's matrimonial clients, whom she has represented since the early 1990's. A good example of her valuable contributions is the representation she recently provided to a domestic violence victim. Her husband had abused the client for several years. Her abusive and financially exploitive spouse, who was represented by a high profile matrimonial law firm, was seeking custody of their two young children, both of whom had been traumatized by the husband's violence. Quickly after accepting the referral, Ms. Jorgensen obtained Orders of Protection for the client and the children. Her excellent advocacy for this client ultimately resulted in an award of custody to the mother and an order that the husband's visitation with children be supervised and conditional upon his participating in mandated therapy. The husband was also ordered to buy out the client's interest in the marital residence (which the husband had placed solely in his name) and turn over a deferred income account to her. This important case was an outstanding example of Ms. Jorgensen's expertise and dedication to her clients.

In the past five years, Ms. Jorgensen has contributed over 200 hours to her Pro Bono Project work. For several years, she also served on the Suffolk County Bar Pro Bono Foundation's Board of Managers.

When asked why she has devoted so much time to pro bono over the years, she explained, "I come from a family of civic-minded people. So doing pro bono comes naturally to me. Being a matrimonial attorney has its own value, because you aid people to move on with their lives. When you're able to do that for a pro bono client, who otherwise wouldn't have an attorney, that value is doubled."

A Long Island native, Joy Jorgensen has a 21-year-old daughter, Jayne Guarino, who is attending Roger Williams University and who plans on taking the LSAT's this summer.

The Pro Bono Project greatly appreciates all that Joy Jorgensen has contributed over the years to the Project. We look forward to working together with her for many years to come. It is with great pleasure that we honor Ms. Jorgensen as Pro Bono Attorney of the Month.

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

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.

ADR

ADR Developments in the Construction Context

By Lisa Renee Pomerantz

The construction field has a well-established history of using alternative dispute resolution methods to resolve disputes. Construction projects involve a multitude of different parties, including owners, contractors, lenders, suppliers, sureties, architects and engineers, providing a variety of interdependent products and services in a context where time is of the essence and delays and disputes cost money.

Many construction projects utilize form agreements provided by the American Institute of Architects. Until recently, those agreements designated arbitration under the AAA Construction rules as the method of dispute resolution. Now, the agreements provide a choice between AAA arbitration and litigation. Mediation under AAA rules also may be included as a first step. Recent innovations include the potential designation of an "Initial Decision-Maker" in an expedited, informal, non-binding process requiring a written, reasoned decision. Such a decision becomes final and binding if the parties do not request mediation within 30 days of the initial decision.

Lisa Pomerantz

Naturally, these agreements tend to be written from the architect's perspective. The architect may be empowered to resolve issues as to conformity of performance with the project documents and/or designated as the "Initial Decision-Maker." There is, however, concern that the architect could have a conflict of interest where project issues might arise from problems or mistakes in the original plans.

As a result of these concerns, various contractor associations joined forces to develop an alternative set of contracting documents, known as ConsensusDOCS. Under these agreements, escalation of disputes to senior party representatives is the first step in dispute resolution. They also provide for the appointment of a project neutral or Dispute Resolution Board, paid by all parties, to participate in the project management process and assist in the resolution of disputes as they arise. Disputes that cannot be resolved through the project neutral can then be referred to mediation or arbitration. While AAA is designated as the default provider, construction dispute resolution services are also available through JAMS.

Note: Lisa Renee Pomerantz is a business and employment attorney in Suffolk County, New York. She is a mediator and arbitrator on the AAA Commercial Panel, represents clients in settlement discussions, mediations and arbitrations, and serves on the Advisory Council of the Commercial Section of the Association for Conflict Resolution. She can be reached at lisa@lisapom.com or (631) 244-1482.

TAX

Tax Departments Authority to Regulate Inspections and the Fourth Amendment

By Gary Alpert

Note: This article is re-printed with the permission by the Nassau County Bar Association

In New York, sales of cigarettes are big business. Supermarkets, chain stores, drugstores, delicatessens, bodegas, and list goes on, sell cigarettes. Competition is fierce. And, when the Tax Department steps in to stop the dealer from engaging in this business, the consequences can be devastating. Issues concerning statutory authority of Tax Department Investigators to conduct regulatory inspections that evolve into criminal enforcement actions, Fourth Amendment limitations and suppression of evidence, consequences to vendors of cigarettes found in possession of untaxed product and the legal recourse available to these vendors are discussed below.

The U.S. Constitution, Fourth Amendment and New York State Constitution, Article One, Section Twelve guarantee to citizens the right to be protected against unreasonable searches and seizures. In New York when police officers have information sufficient to show that evidence of a crime may be found at a certain property, in order to enter such property and secure the evidence they must present the information in a search warrant application to a Criminal Court judge. If the judge finds that there is probable cause to believe that the crime has been committed and that evidence of the crime may be found in a particular premises, the judge will issue a search warrant directing that a police officer search the premises and seize evidence. (New York Criminal Procedure Law, Article 690.)

Gary Alpert

Courts have carved out various exceptions to the requirement for a search warrant. One in particular, *the regulatory inspection exception* enables government agents and investigators to conduct unannounced inspections of businesses that are regulated by agencies with whom such agents and investigators are employed. In fact, the United States Supreme Court has upheld such inspections with regards to strictly or "pervasively" regulated industries.[1,2]

The New York State Department of Taxation and Finance (hereafter "Tax Department") is an administrative agency that in addition to the administration of taxes has authority to regulate businesses and individuals that engage in various commercial activities. This includes exclusive regulatory authority over businesses and individuals that deal in the wholesale and retail distribution of cigarettes and tobacco products, New York Tax Law, Article 20 and regulatory oversight over the importation, transportation and sale of petroleum products, ie., motor fuel (gasoline) and diesel motor fuel, and alcoholic beverages. (Tax Law Articles 12-A and 18, respectively.)

As regards cigarettes and tobacco products Tax Department Investigators have authority,

> "…to examine the books, papers, invoices and … records of any person in possession, control or occupancy of any premises where cigarettes or tobacco products are placed, stored, sold or offered for sale … as well as the stock of cigarettes or tobacco products in any such premises … (And), (t)o verify the accuracy of the tax imposed and assessed by this article, each such person is hereby directed and required to give to the commissioner of taxation and finance or his duly authorized representatives, the means, facilities and opportunity for such examinations…" (New York Tax Law Article 20, Section 474(4).)

The Tax Department also has criminal enforcement authority with respect to certain of the taxes that the agency administers. And, in fact Department Investigators are also police officers as defined under the New York Criminal Procedure Law, Section 1.20(34)(q) with respect to enforcement of such taxes. Under New York Tax Law Article 37, Section 1814 the crimes of *Possession for the Purpose of Sale, or Sale of Unstamped or Illegally Stamped Cigarettes* range from Class D felony to Class A misdemeanor. Unstamped, counterfeit–stamped or out-of-state stamped cigarettes will be seized whenever or wherever they are discovered (Tax Law Article 37, Section 1846), and vehicles, if any, that were used to trans-

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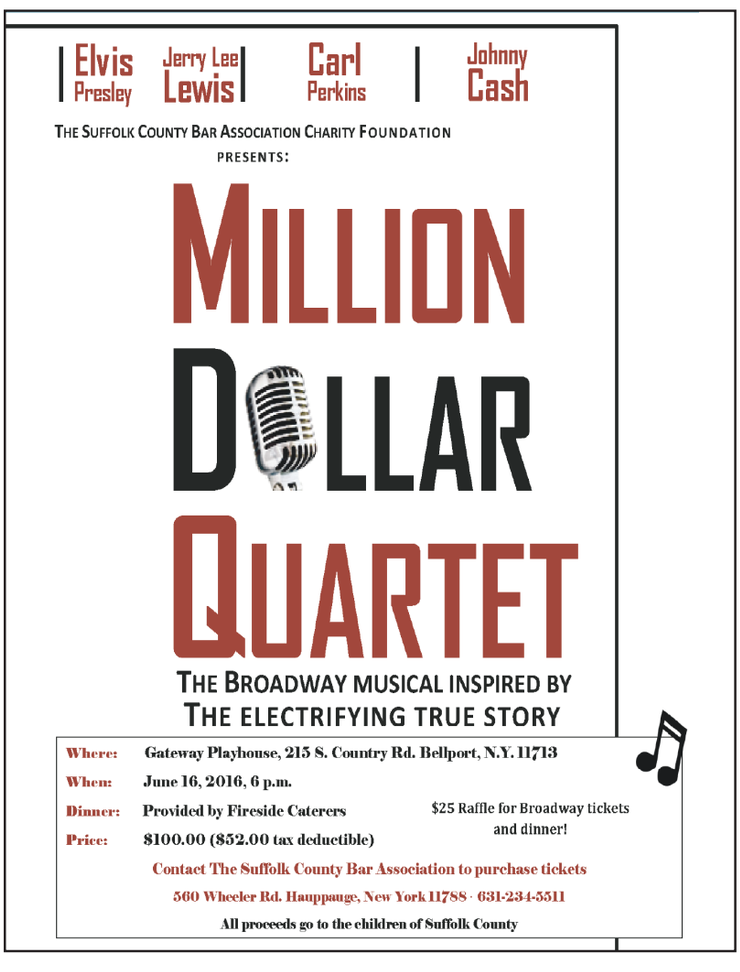
Suffolk County Bar Association Accolades and more

Charity Foundation Recognized

The SCBA Charity Foundation received the Jury System Professional Award for 2016 from the Child Abuse & Neglect/Family Violence Volunteer and Professional Recognition Day on April 15, sponsored by the Suffolk County Advisory Board on Child Protection and the Task Force to Prevent Family Violence. The SCBA Charity Foundation members provides gift cards so that foster children and their parents can experience enhanced visits; they provide these children with duffel bags to carry their belongings and they have provided infants pack and plays so they can sleep safely when they are turned over to foster care. The concern for children and families as demonstrated by our Charity Foundation is truly amazing and all of the members of this foundation should be congratulated. They are planning a fund-raiser on June 16, 2016 at the Gateway Playhouse in Bellport. The play is Million Dollar Quartet (a Broadway musical inspired by an electrifying true story). Your donations will go a long way to helping Long Island children in need. Please see flyer in this edition.



President Elect in Chicago at Leadership Institute

President Elect John R. Calcagni participated in the ABA Bar Leadership Institute with SCBA Executive Director Sarah Jane LaCova, joining emerging leaders of lawyer organizations that occurred on March 16 to 18. The annual event in Chicago is offered to incoming officials of local and state bar leader colleagues, executive staff and other experts on the operation of such associations. At the event were, John R. Calcagni, ABA President Paulette Brown, Jane LaCova and ABA President Elect Linda Klein.

Touro Law Students Meet, Greet & Mingle at the SCBA

SCBA members were invited to meet Touro Law students on April 18 at the social event, Meet, Greet & Mingle at the bar center.

Congrats to Jeremy M. Miller!

President Donna England joined Touro Dean Patricia Salkin in presenting and congratulating Jeremy M. Miller with an award at Touro's Graduation on April 17. The SCBA's Board of Directors sponsors the annual award for a graduating student who combines academic achievement, leadership skills and a commitment to the integrity and growth of the legal profession.

HEALTH AND HOSPITAL

ERISA Precludes State Class Action for Massive Health Data Breach

By James G. Fouassier

We all remember the announcement a year ago that Anthem Health suffered one of the largest data breaches in history. The personal health information of millions of Anthem members – including names, addresses, dates of birth and social security numbers — potentially was accessed and compromised; how much of that information already may have been put to nefarious purposes cannot even be imagined.

A putative class action was filed in Supreme Court on April 2, 2015.

Kings County, entitled, "*Y. Michael Smilow and Jessica Katz v. Anthem Life & Disability Insurance Company, et al*." Obviously, the size of the putative class was enormous and dozens of attorneys from everywhere in the country are recited in the header of the decision I discuss here. Ten separate common law and statutory causes of action were asserted: negligence, negligence *per se*, breach of implied contract, breach of the covenant of good faith and fair dealing, unjust enrichment, invasion of privacy, bailment, conversion, violation of New York's data breach statute, and violation of New York's consumer protection statute.

James G. Fouassier

The named defendants removed the action to the Eastern District. The plaintiffs moved to remand. Subsequently, however, (and in view of all the other litigation pending everywhere else in the country on this issue) the matter was referred to the federal Judicial Panel on Multidistrict Litigation and eventually landed in the Northern District of California. That court issued a decision on the plaintiffs' remand application on November 24, 2015.

In opposing remand the defendants argued that there were two independent bases for subject matter jurisdiction in the federal court. First, ERISA afforded complete preemption, precluding the application of any state common law or statutory remedies, and second, federal question jurisdiction under HIPAA. (I presume that the reader has a passing familiarity with both ERISA and HIPAA and will not delve into their respective backgrounds and policies.) ERISA provides that a civil action may be instituted by a participant or beneficiary to recover benefits due under the terms of the plan, to enforce rights under the terms of the plan, or to clarify rights to future benefits under the terms of the plan. The authority of the seminal case of *Aetna Health Inc. v. Davila*, 542 U.S. 200, 208, 124 S. Ct. 2488, 159 L. Ed. 2d 312 (2004), holds that any state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy is preempted because it conflicts with the clear congressional intent to make the ERISA remedy exclusive. *Davila* instructs in the manner in which this determination is to be made, a "two pronged" test: a state law cause of action is completely preempted and therefore removable to federal court if an individual, at some point in time, could have brought the claim under ERISA (specifically, section 502(a)(1)(B)), *and* where there is no other independent legal duty (*e.g.*, a duty arising under state law) that is implicated by a defendant's actions.

As to the first "prong," the court found that the plaintiffs could have brought their claims under ERISA. Smilow and Katz received health benefits as "beneficiaries" of their employer-sponsored ERISA plans. Since section 502(a) establishes a cause of action for an ERISA "beneficiary" to enforce his or her rights under the terms of an ERISA plan, and what the plaintiffs are doing is precisely that — seeking to enforce such rights through their breach of contract and unjust enrichment claims — then ERISA afforded them an appropriate remedy.

The plaintiffs also argued that the defendants had an independent legal duty to protect the plaintiffs' privacy rights pursuant to state law. Pointing to the plan documents themselves, the plaintiffs claimed that ERISA plan coverage and benefits did not include any privacy rights, including those created by operation of both state statutory and common law. Consequently, there are legal duties implicated by the defendants' actions or breaches that are derived independently of ERISA, sustaining the availability of state law claims.

Wrong again. The court pointed out that the health plan benefits handbook that the plaintiffs received when they joined the plans contained the section,

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WHO'S YOUR EXPERT

What's New in the Federal Courts

By Hillary Frommer

In March, the federal courts led the charge in rendering a number of decisions impacting the use of expert witnesses. In one decision, Eastern District Magistrate Judge Tomlinson allowed a defendant to reopen discovery under the "Spencer Rule" to conduct expert discovery. The Spencer Rule? Don't be alarmed. That is merely the colloquial name of the six factor test set forth in *Thiertio v Jaspan Schlesinger Hoffman, LLP*, used to determine whether discovery, in general, can be reopened. The court applied this test in *Torres v Dematteo Salvage Co., Inc*.,[i] and granted the defendants' motion to reopen discovery and conduct discovery of an expert witness who the defendants listed on their joint pretrial order, but had never previously identified nor provided the required disclosure under Rule 26(a)(1).

Reopening discovery is certainly less drastic than precluding expert testimony, which is often the sanction imposed when a party fails to adhere to the strict expert disclosure requirement of the FRCP. The courts consider the following: "(1) whether trial is imminent; (2) whether the request is opposed; (3) whether the non-moving party would be prejudiced; (4) whether the moving party was diligent in obtaining discovery within the guidelines established by the court; (5) the foreseeability of the need for additional discovery in light of the time allowed for discovery by the district court; and (6) the likelihood that discovery will lead to relevant evidence."[ii]


Hillary A. Frommer

In *Torres*, the court found that the "Spencer" factors weighed both for and against the defendants. For example, it found that the trial was not imminent, since no date had been set; the plaintiff would not be prejudiced because the defendants agreed to produce the witness for a deposition and pay the court reporting fees associated therewith, and there would be time for the plaintiff to obtain a rebuttal expert if he so desired; and the expert discovery would likely lead to relevant evidence because the expert's opinion directly related to the plaintiff's theory of liability. The court also found that the defendants could be prejudiced if precluded from presenting the expert testimony. However, the court concluded that the defendants did not act diligently in obtaining that expert. Although the defendants claim that they acted diligently when the expert provided an opinion based on a particular photograph, the court disagreed, finding that the defendants' counsel had been in possession of that photograph for more than a year prior to the disclosure and, thus, had the opportunity to timely identify their expert, but failed to do so.

Balancing those factors, the court determined that the drastic sanction of preclusion was not warranted, and discovery could be reopened for the limited purpose of conducting expert discovery.

In contrast, the courts in *Wrubel v John Hancock Life Ins. Co*.[iii] and *Auto-Kaps, LLC v Clorox Co*.,[iv] precluded expert testimony, but for substantive rather than procedural reasons. In *Wrubel*, the plaintiff brought suit to collect the proceeds of certain life insurance policies issued by the defendant, and sought to admit the testimony of an expert who would testify as to the "materiality of alleged misrepresentations made in the insurance applications." The defendant opposed that testimony on the grounds that the proposed expert lacked the qualifications necessary to testify about underwriting insurance policies, and did not use a reliable methodology in reaching his opinion. The court agreed with the defendant. It found that the plaintiff's proposed expert merely compared the defendant's underwriting policies with the steps that were taking in underwriting the policies at issue, which was not "specialized knowledge" that would assist the trier of fact – the court. The court further found that it did not need the expert's help in understanding "industry standards," as the subject matter was "not so complicated that an expert is necessary." Finally, the court found that part of the proposed testimony went to the ultimate issue of fact in the case, which was for the trier of fact to decide.

In *Auto-Kaps*, a patent infringement action, the defendant moved to disqualify the plaintiff's expert and strike his affidavit from the plaintiff's summary judgment motion on the grounds that the defendant had a prior relationship with the expert. To determine whether the plaintiff's expert should be disqualified based on that prior association, the court applied the well-settled two-factor test: was there a confidential relationship or a reasonable expectation thereof between the expert and the defendant; and did the defendant disclose confidential information to the

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TOURO

The Plight of US-Affiliated Iraqis and Afghans

By Eileen Kaufman

The year 2015 saw an unprecedented number of refugees worldwide. According to the Office of the United Nations High Commissioner for Refugees, the number of persons displaced nationwide is a record 60 million, including 20.2 million refugees.[1] A UNHCR report concluded that "1 in every 122 humans is today someone who has been forced to flee their homes."[2] Although the largest surge in 2015 was due to more than 4 million Syrians fleeing a protracted civil war, the refugee population today also contains waves of refugees from such countries as Yemen, Somalia, Afghanistan, Ukraine, Burundi, the Central African Republic, the Democratic Republic of Congo, and Iraq.[3] This article will explore the special dangers facing Iraqi and Afghan individuals who worked for the United States during those conflicts and the special procedures adopted by Congress to facilitate their immigration to the United States. It will also describe how volunteer lawyers, working with the International Refugee Assistance Project at the Urban Justice Center, can make a huge difference.


Eileen Kaufman

The plight of Iraqis and Afghans who worked for the United States has been well documented.[4] One Afghan is reportedly killed every 36 hours due to his or her involvement with the United States.[5] Afghan interpreters have faced constant persecution:

> Some of them have had their houses burned down, others have had their houses and property stolen by the Taliban. Some have had their vehicles get ambushed, their houses get attacked by AK-47s, and their family members kidnapped and ransomed. Some of them have had family members killed. For others, the Taliban have delivered threatening letters to their children, to their parents, and to their doorsteps.[6]

Iraqi interpreters have faced similar persecution. For example, Human Rights First interviewed an Iraqi interpreter who described an "announcement in the newspaper from a Sunni insurgent group that declared the group's intention to kill any Iraqis collaborating with the United States, 'including translators, drivers, technicians, and engineers.'"[7]

Beginning in 2006, Congress enacted a series of measures designed to help Iraqi and Afghan nationals whose lives were at risk because of their work for the United States.[8] This legislation authorized eligible Iraqis and Afghans to receive Special Immigrant Visas (SIVs) that expedite their safe resettlement in the United States.[9] Eligibility criteria require the applicant to prove that he or she is an Iraqi or Afghan citizen, that the applicant has worked with or on behalf of the U.S. government for at least 24 months,[10] has provided faithful and valuable service to the U.S. during that work, and has experienced an ongoing serious threat as a consequence of the applicant's work for the U.S. government.

Establishing eligibility begins with obtaining Chief of Mission (COM) approval. The Chief of Mission is typically the designee of the Ambassador in the U.S. Embassy in Kabul or Baghdad. In order to obtain COM approval, the applicant must submit verification of employment, a letter of recommendation from a supervisor, evidence of Iraqi or Afghan nationality, various biographic data, an employee identification badge, and a statement describing the ongoing threat the applicant faces as a result of having worked with or on behalf of the U.S. government. Once COM approval is obtained, the applicant must submit a petition to USCIS. When granted, the applicant begins the formal visa application and processing procedure, which culminates in an in-person visa interview at a U.S. Embassy or consulate. If the visa is approved, the last step facing the applicant is security screening conducted by several government agencies.

While the process described above is time consuming and requires meticulous attention to detail, the legal work involved is not difficult and the results can be truly lifesaving. And, the International Refugee Assistance Project (IRAP) is available to provide training materials and backup. IRAP is a national organization with chapters at 27 law schools. IRAP works with students and volunteer supervising attorneys to assist individual refugees

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TAX

A Story of Law Firm Compensation

By Louis Vlahos

This is part one of a two part series.

The employee-owner of a corporate business will sometimes ask his or her tax adviser, "How much can I pay myself out of my corporation?"

The astute tax adviser may respond, "First of all, you are not paying yourself. The corporation is a separate entity from you, its shareholder. That being said, the corporation can pay you as much as it can reasonably afford in light of its business needs and other relevant facts and circumstances, and subject to state corporate law requirements, depending on the nature of the payment. For example, . . ."

The client will then typically interrupt, "C'mon wise guy. You know what I mean."

The offended tax adviser will then say, "From a tax perspective, the corporation can pay you — and deduct against its income — a reasonable amount of compensation for the personal services you have actually rendered to the corporation. Anything in excess of that amount will be treated as a dividend distribution, to the extent of the corporation's earnings and profits. Of course, . . ."

"I know, I know," says the client, "and a dividend is not deductible by the corporation in calculating its own taxes. Give me some credit here."

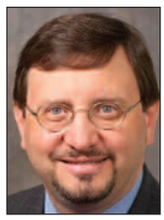
"OK. Except in the case of a start-up, or any other situation in which the corporation cannot 'afford' to pay its shareholder-employees, the corporate employer will — in fact, should — pay an amount of compensation that is reasonable for the services rendered — an exchange of value-for-value, or cash for services. In the case of an S corporation —"

Another interruption.

"Does the amount depend on the nature of the business?" asks the client.

"In general, yes. In a capital-intensive business, it may be more difficult to justify a certain level of compensation than in a business that involves only personal services.

"But," continues the adviser, let me tell you about a recent decision involving a professional corporation." *Brinks Gilson & Lione v. Commr.* T.C. Memo. 2016-20



Louis Vlahos

And as the adviser began, the client sunk deeper into the chair, recognizing the didactic look on the adviser's face (the one that would broach no further interruptions), wishing that she had never raised the subject, willing for her phone to ring with some emergency, to extract her from her predicament.

Oblivious to his client's plight, the tax adviser went on, encouraged by the thought that this client really cared about what he had to share.

Once upon a time . . .

"Taxpayer was a law firm organized as a corporation. During the years at issue, it employed about 150 attorneys, of which about 65 were shareholders. It also employed a non-attorney staff of about 270.

"Taxpayer's shareholders held their shares in the corporation in connection with their employment by the corporation as attorneys. Each shareholder-attorney acquired her shares at a price equal to their book value and was required to sell her shares back to Taxpayer at a price determined under the same formula upon terminating her employment.

"Taxpayer's shareholder attorneys were entitled to dividends as and when declared by the board. For at least 10 years before and including the years in issue, however, Taxpayer had not paid a dividend. Upon a liquidation of Taxpayer, its shareholder-attorneys would share in the proceeds.

"For the years in issue, the board met to set compensation and ownership-percentages in late November or early December of the year preceding the compensation year. Before those meetings, the board settled on a budget for the compensation year. On the basis of that budget, the board determined the amount available for all shareholder-attorney compensation for that year. With that amount in mind, it set each shareholder-attorney's expected compensation using a number of criteria, then determined the adjustments in their ownership-percentages necessary to reflect changes in proportionate compensation. Adjustments in actual share ownership were made by share redemptions and reissuances.

"The board intended the sum of the shareholder-attorneys' year-end bonuses to exhaust Taxpayer's book income. Shareholder-attorneys shared in the bonus pool in proportion to their ownership-percentages. Specifically, Taxpayer calculated the year-end bonus pool to equal its book income for the year after subtracting all expenses other than the bonuses. Thus, Taxpayer's book income was zero for each year: its income statements showed revenues exactly equal to expenses."

The client carefully placed the second toothpick at the corner of her right eye. "Great," she exhaled, "that should do it. Sure hope he's near-sighted."

At that point the adviser glanced over at the client, who seemed to be listening intently, her eyes wide open. Pleased with himself, he continued.

Compensation, or something else?

"Taxpayer treated as employee compensation the amounts it paid to its shareholder-attorneys, including the year-end bonuses. In each of its tax returns for the years at issue, Taxpayer included the year-end bonuses it paid to its shareholder-attorneys in the amount it claimed as a deduction for officer compensation.

"Taxpayer's returns reflected a relatively small amount of taxable income. Because Taxpayer's book income was zero for each year, the taxable income Taxpayer reported was attributable entirely to items that were treated differently for book and tax purposes."

The IRS disagrees

"Now comes the good part," said the adviser, his voice rising slightly.

The client hadn't moved, yet her eyes were fixed on him, like some Byzantine icon.

"When the IRS examined Taxpayer's returns, it disallowed the deductions for the year-end bonuses paid to Taxpayer's shareholder-attorneys. After negotiations, the parties entered into a closing agreement that disallowed portions of Taxpayer's officer compensation deductions for the years in issue, which portions it re-characterized as non-deductible dividends."

The client bent forward slightly, then rocked back, as though nodding in agreement.

Encouraged by this sign of assent, the adviser continued.

"The sole issue remaining for the court was whether Taxpayer was liable for accuracy-related penalties on the underpayments of tax relating to its deduction of those portions of the year-end bonuses that it agreed were nondeductible dividends.

"The court began by stating the general rule that the code allows a deduction for ordinary and necessary busi-

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Lawyers Helping Lawyers Committee Hosts Annual Peter Sweisgood Dinner

By Sarah Jane LaCova

The Lawyers Helping Lawyers Committee hosted its 27th annual Peter Sweisgood dinner on Thursday, April 7, 2016 honoring Eileen Travis, Director of the Lawyer Assistance Program at the New York City Bar Association. Bill Porter, who was a founding member of the Lawyers' Committee on Alcohol & Drug Abuse, regaled the attendees with the story of Father Peter Sweisgood, who was a very active person of our fledgling committee back in the '80's.

Rev. Peter Sweisgood, a member of the Benedictine Order, was a young man who had a history of alcohol and drug problems, and upon his recovery, became an advocate for the habitual drug and alcohol abuser. During his lifetime he served as the executive director of the Long Island Council on Alcoholism and as chaplain to the Nassau Police Department. He was a member of the Clergy Committee of the National Council on Alcoholism and received their Silver Key Award in 1986. He was appointed a delegate to the first American Soviet Conference on Alcoholism in 1989 held in the Soviet Union, but he passed away before the scheduled date of the conference. The conference was dedicated in memory of Father Peter Sweisgood.

Our first dinner in 1988 honored Father Sweisgood and the following year, upon his passing, the annual Peter Sweisgood dinner was established in his honor. That year, we honored Eugene O'Brien (past president 2000-2001) who along with a handful of SCBA members founded the committee.

Note: Sarah Jane LaCova is the Executive Director of the SCBA.

CONSUMER BANKRUPTCY

Trustee Not Permitted to Pursue Pre-Petition "Asset"

By Craig D. Robins

Here's an unusual situation. Ten years after a routine Chapter 7 case was closed, the trustee sought to re-open it to pursue an undisclosed "asset" worth over a hundred thousand dollars.

The undisclosed asset, however, was rather atypical as it consisted of a products liability claim the debtor did not even know existed when she filed her case.

Central Islip Bankruptcy Judge Robert E. Grossman just issued a decision preventing the trustee from re-opening the case to pursue this asset. *In re: Ross* (E.D.N.Y. Case No. 04-87445-reg, April 14, 2016).

The debtor in that case, in 1998 and 1999, underwent several surgical procedures in which a medical device was implanted and removed. A number of years later in 2004 the debtor filed for Chapter 7 relief and received a discharge shortly thereafter. Presumably, her medical situation was unrelated to her need to file bankruptcy. Also, she did not schedule any claims regarding the medical procedure as assets.

In 2012 while watching TV, the debtor saw one of those attorney solicitation commercials we often see, from a mass tort law firm looking to sign up injured consumers to a class action suit. This commercial just happened to refer to the medical device that had been implanted.

Upon learning that the device might be "defective," even though it had been removed in 1999, she retained the law firm to seek recovery. Although it turned out that the debtor was not eligible to join the class action suit she was nevertheless offered a settlement of $105,000 in exchange for her release of all present or future claims in connection with the device.

Craig Robins

The panel trustee, Alan Mendelsohn, upon learning of the settlement offer, filed a motion in October 2015 seeking to reopen the case to administer the settlement proceeds for the benefit of those creditors the debtor had scheduled 10 years earlier. The debtor, who was represented by Melville attorney, Michael G. McAuliffe, opposed this relief.

Thus, the issue before the court was whether the settlement proceeds were pre-petition assets that the trustee was entitled to administer, or whether they belonged to the debtor.

What really made this case unusual is that the parties agreed that neither the debtor nor the medical community had knowledge that the device could cause the debtor harm as of the date the petition was filed, and in fact, the debtor had not suffered any physical harm from the device.

However, the trustee argued that because the device was implanted pre-petition, any cause of action that may ultimately accrue based upon possible harm from the device, including the settlement proceeds, constituted property of the estate.

Under Bankruptcy Code § 541(a)(1), property of the estate includes "all legal or equitable interests of the debtor" that exist "as of the commencement of the case." As the judge put it, "the question is generally temporal: when did the debtor acquire a legal interest in the settlement proceeds?"

In this case, the only events that took place pre-petition were the implant and removal of the device. Did implanting the device, standing alone, vest rights in the debtor to receive the settlement proceeds as of the date she filed her bankruptcy?

Thus, resolving this issue required Judge Grossman to analyze whether the settlement was property of the estate. He stated, "What standard should the court adopt in determining whether a cause of action, based upon an unrecognized injury to a debtor, is property of the bankruptcy estate?"

The judge observed that if the trustee's position were taken to its logical conclusion, the court would be adopting a standard that would permit a trustee to capture any proceeds recovered by a debtor in his or her lifetime, so long as the right to recover the proceeds can be traced to a pre-petition event.

He also noted that determining whether this debtor's settlement proceeds are property of the estate is complicated by the fact that the debtor suffered no injury pre-petition or post-petition. The settlement payment was being made in exchange for the debtor's agreement not to bring a suit in the future.

Judge Grossman determined that in cases such as this, which involve potential tort claims, the proper focus is on whether there was a viable cause of action the debtor could bring under applicable law on the date the petition was filed.

If an action existed, regardless of what the debtor knew, then that cause of action and all its proceeds would constitute property of the estate. If, however, as is true in this case, no cause of action had matured, it is irrelevant whether the debtor ultimately develops an injury; the cause of action resulting from that injury would not be property of the estate under Bankruptcy Code § 541.

Here, as of the date she filed the petition, the debtor had no expectation that a device implanted in her and removed pre-petition, for which no warning had ever been issued, would create a right to receive the settlement proceeds several years later.

Judge Grossman commented that had the medical community been aware of any danger inherent in using the device pre-petition, and had the debtor suffered an injury, the answer would be different.

Thus, because the elements necessary to commence an action under state law were not present as of the date the debtor filed her petition, the right to receive the settlement proceeds were not sufficiently rooted in the debtor's pre-petition past to warrant inclusion of the settlement proceeds in the debtor's bankruptcy estate.

Judge Grossman expressed serious concern as to what could happen if he had adopted the trustee's position. "Opportunistic trustees would be scrambling to latch onto every possible claim that may someday arise, however attenuated," he stated.

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

Cyberlaw Primer: Part II — Cybersecurity *(Continued from page 1)*

neys and small law firms to outsource at least some aspects of their cybersecurity to managed security service providers (MSSPs).

Do not even consider outsourcing, however, unless you can clearly articulate your cyber security goals; have clearly identified the assets, data, and information you need to secure; and have someone ready to manage and become responsible for the outsourcing relationship. The worst thing you can say to a managed cybersecurity service provider is, "I don't know where to start."

Outsourcing due diligence

The due diligence you must complete before contracting with a managed security service provider (MSSP) includes:

- Determining whether the MSSP has worked with comparable attorneys and firms, and then checking their references.
- Reviewing the stated standards, policies, and procedures of the vendor.
- Assuring that all performance and service requirements and responsibilities are documented in service level agreements and/or statements of work.
- Identifying your personal account representative and agreeing upon just how accessible that individual will be.
- Establishing clear performance milestones to checkpoint progress.
- Understanding what access the vendor requires to the internal resources of the firm and making sure those resources are available when the vendor arrives for their first day of work.
- Requiring full disclosure of any reseller agreements that the vendor is a party to or beneficiary of. Read them carefully.

Check out the vendor financials and have a well-considered, well-defined exit strategy for moving on from that vendor to another vendor or simply terminating their services.

To succeed with cybersecurity outsourcing requires a considerable amount of planning, discussion, and building trust.

You are ultimately responsible for your own cybersecurity and the cybersecurity of your firm. This is a non-delegable responsibility. If a data breach occurs, it will be your name in the news, not your service provider. You must define your goals and understand what you are doing before you start writing checks.

Cybersecurity options

The most popular cybersecurity solutions are antivirus software; security incident and event management systems (SIEM); identity and access management systems; encryption or tokenization of data at rest; encryption of data in motion; and web application firewalls.

Following is a list of common, generally accepted cyber security solutions and how effective they actually tend to be in practice, their relative cost, and some simple pros and cons.

Anti-Virus (A/V) keeps dangerous software off your systems; is relatively inexpensive; easy to use; works well on known viruses; and can be operated with little security experience. A/V, however, provides limited protection due to its reliance on signatures of known attacks, and it is frequently criticized for slowing down user systems.

Encryption keeps your data obscured from everyone who lacks the authority to see it. It is relatively inexpensive and keeps information obscured from unauthorized viewers at rest and in transit. However, encryption is only as strong as the user authenticating information and the integrity of the systems on which it runs. When either the user information or user system is compromised, encryption is effectively disabled on that system.

Firewalls create a gateway to separate internal networks from external traffic, and to block threatening network actions. They are moderately expensive but assure good baseline security to create a logical perimeter for monitoring and access control. They provide a good information source about inbound attacks and outbound data theft. Firewall logs, however, become "noisier" as traffic flows increase, and increasing encrypted traffic flows can impede the ability of firewalls to "see" inbound attacks. Firewalls are also less useful against custom-crafted and browser-based attacks, which deliver fragmented attacks or use of a "dropper" or "downloader." Firewalls also cannot protect mobile or remote user systems when they are used outside the firewalled network.

Security Information & Event Management (SIEM) identifies unauthorized or destructive behavior across your network. It is expensive but provides a broad view of security across an enterprise and stronger breach detection capability across multiple systems. SIEM tooling is costly to purchase and more costly to staff. The volume of data and complexity of the information provided requires experienced analysts and there are multiple examples of attacks going undetected.

Identity & Access Management (IAM) enables only authorized access to systems and services, and ties the identity of individuals to those accesses. It is expensive, but provides strong access protection and audit with the knowledge of who touched what and when. While single user sign-on is relatively user friendly, it is difficult to maintain IAM integration across new apps and among the changing roles of users. IAM also requires logging, as user authenticating information is under threat from credential theft attacks and keystroke loggers.

Remember that these technologies are all simply tools. Used incorrectly or without integration they can create only an illusion of security.

Defending cyberlitigation

Every lawyer and law firm should understand that their computer systems will inevitably be breached and they must be prepared to defend their security practices in the ensuing litigation.

Assessing "reasonable" security measures in court

Since there is no escaping the "reasonableness" standard for cybersecurity, it is "reasonable" to argue that the accepted definition of "secret" under the *Uniform Trade Secrets Act*[i] (UTSA) will apply to "confidential" in the case of cyberlitigation.

According to the UTSA, data is "secret" if it (A) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (B) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

The established concepts of "reasonableness" in securing electronic data relating to trade secrets provide a useful perspective on what to expect in other cyberlitigation.

Password protection for sensitive data is an industry standard and certainly works in favor of finding reasonable efforts unless passwords are literally shouted across the office or written on *post-it* notes attached to office computers. Passwords themselves, however, must be secure.

Courts favorably considered firewalls, encryption, and effective network monitoring as "reasonable" and segregated data and segmented networks were particularly helpful in several cases.

In addition to technical measures, your personal and firm policies can often become critical measures of "reasonableness." Most compelling to the courts have been those restricting data access, both internally and externally, on a need-to-know basis. "Need-to-know" access should be of particular concern to those attorneys who represent banks, mortgage companies, and health care providers as well as attorneys whose practice includes matrimonials, debt collections, bankruptcy and claims involving access to medical and employment records such as personal injury, workers compensation, social security disability, veterans benefits and employment/human resources related matters.

Courts favored policies on remote access and use of personal devices that included controlling setup of any remote access; training on removing confidential information from laptops, tablets and other mobile computers; annual reviews of confidentiality policies; requiring acknowledgement of confidentiality with each access to the computer system; and requiring that data be encrypted before copying to laptops, mobile devices or transportable storage devices such as memory sticks.

Evaluating potential solutions to limit your risk

Improving Anti-Virus (A/V) programs and services, change management, and endpoint protection are ways to improve cyber defenses at a low cost.

Encryption is the heart of authentication, secure transmission, and secure storage of data, and also provides protected channels through which confidential or high-integrity data will be fed to the SIEM. Firewalls also gain additional value when used as a point of terminus for encrypted connections and VPNs (Virtual Private Networks) from trusted external sources.

Firewalls offer increased efficiency for local security by stripping attachment file types, and doing A/V scanning at the gateway . . . Firewalls keep external connections from forging internal access credentials and can be configured to increase privacy by only allowing encrypted traffic to leave the network to certain destinations. By limiting traffic flows, they can also decrease the glut of traffic monitored by the SIEM

Security Information & Event Management (SIEM) software provides a "bird's-eye" view of system security and when attacks are discovered, automatically limits inbound access through the creation of firewall rules. An SIEM can associate expected behaviors with individual users and identify offending user accounts when it encounters malicious or even unexpected behavior. SIEMs can also be used to identify unexpected traffic or requests from infected systems.

Identity & Access Management (IAM) software integrates firewall-based perimeter access control and auditing inbound and outbound traffic, essential for understanding the behavior on your network.

Can anything be done?

Confidential information must be restricted to protected accounts on protected devices. Millions of smartphones and tablets are lost or stolen each year. Any data on them must be encrypted and otherwise protected from unauthorized access. The best protection, however, is to never store sensitive data on personal devices!

No attorney can afford to put their non-delegable duty of client confidentiality at risk just for personal convenience!

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

[1] Uniform Trade Secrets Act, 14 U.L.A. 437

Authority to Regulate Inspections and the Fourth Amendment (Continued from page 15)

port such cigarettes may also be seized for forfeiture, (Section 1847). As regards sentencing, imposition of sentences, ie., incarceration, probation, conditional discharge, etc. are based upon Penal Law criteria. However, under Tax Law Section 1800(c) courts may impose fines substantially higher than those provided for in the Penal Law: for a felony, a fine not to exceed the greater of double the amount of the underpaid tax liability resulting from the commission of the crime or $50,000, or, in the case of a corporation, the fine may not exceed the greater of double the amount of the underpaid tax liability resulting from the commission of the crime or $250,000 and for a misdemeanor the court may impose a fine not to exceed $10,000, except that in the case of a corporation the fine may not exceed $20,000. In addition to the criminal fines it should also be noted that the Department also has the authority to levy civil fines varying in severity, depending upon quantities of unstamped or counterfeit stamped cigarettes or counterfeit stamps found in possession of the defendant[3] (even if the defendant is not convicted of the above-mentioned crimes.)

The lead case in New York that addressed the department's authority to do regulatory inspections involving cigarettes and tobacco products, and which had Fourth Amendment ramifications was *People v. Rizzo, 40 NY2d 428(1976)* The underlying facts are summarized as follows: The Tax Department received a complaint that indicated that a Ronald Rizzo had been arrested in New Jersey in possession of approximately 400 cartons of untaxed cigarettes and it listed two New York addresses connected with this individual. During surveillance at his Suffolk County residence an investigator observed the defendant in the garage in possession of 30 cartons of various brands of cigarettes. The investigator entered the garage without Rizzo's consent seized about 90 cartons of cigarettes in the garage and about 54 cartons from the trunk of his car and arrested the defendant for the crime of *Possession of Untaxed Cigarettes*. During the trial the seizure of cigarettes was admitted in evidence and the defendant was convicted.

On appeal the Appellate Division, Second Department reversed the conviction holding, "…that the cigarettes had been seized in violation of … (defendant's) fourth amendment rights and reversed the judgment…" *People v. Rizzo, 47 A.D.2d 468 @470* (1975) and the Court of Appeals followed suit. In its decision *(40 N.Y.2d 425 @428 and 429)* the court outlined three situations that could be considered guidelines for Tax Investigators, while conducting regulatory inspections involving cigarettes and tobacco products. And, these are summarized as follows:

- Where the dealer is open and notorious either by license or holding himself out to the public Tax Department Investigators are authorized to inspect records and inventory of that dealer.
- Where a party is engaging in regulated activity out of premises, which are not publicly recognized as those of a dealer in that commodity *and* investigators have probable cause to believe that regulated activity is taking place they may lawfully enter the premises and inspect records and inventory pursuant to their statutory power.
- However, where the regulated activity is in fact occurring but the investigators have nothing more than a suspicion (as opposed to probable cause) to believe that such activity is taking place, statutory authority *will not suffice* as the basis upon which to enter the premises under investigation.

Notwithstanding inspections of unlicensed individuals and businesses, such as the Rizzo case the majority of the department's regulatory inspections involve businesses to which it has issued licenses and permits: cigarette stamping agents, wholesale and retail distributors. And, the department is very proactive in its efforts to enforce the law. For example, as of the April 1, 2014, (…for calendar year 2014) the department had seized 2,017 cartons of cigarettes, 254,723 cigars, 2,059 pounds of loose tobacco, 14,738 counterfeit cigarette tax stamps and $35,658 cash.[4]

Consider the following example of a store that was found in violation of the law during an inspection: On June 25, 2015 … Tax Department Cigarette Strike Force Investigators conducted a cigarette inspection at Stop & Go Friend Corp., 730 South St., also in Peekskill. In total, the investigators seized 159 packages of cigarettes with counterfeit tax stamps. Sultan Ahmed Mosleh Ali, 28, was charged with criminal tax fraud and felony possession of counterfeit tax stamps. The defendant was processed at the Peekskill Police Department and remanded to the Westchester County Jail.[5]

As in the above case generally,

- The store owner is either arrested or issued summonses,
- Untaxed cigarettes are seized, and
- The store's permit (license) to do business, its' Certificate of Registration[6] is also seized.

Confiscation of the Certificate of Registration translates into dire consequences for the business owner. Because investigators have seized the store's Certificate of Registration the store is prohibited from purchasing cigarettes from wholesale distributors or continuing to sell any such product (including existing inventory) to its customers. *Business is suspended!!*

- Loss of customers!
- Loss of income!
- Financial loss in money spent for inventory of legally stamped cigarettes that the proprietor cannot sell!
- And, in some cases finality, the shut down and discontinuance of business.

A defendant whose Certificate of Registration has been suspended because of unstamped or counterfeit-stamped cigarettes discovered on its' premises has recourse. The Tax Law offers to the business owner a procedure to apply for return of the store's Certificate of Registration and reinstatement of the store's authority to be back in business, ie., the purchase and sale of cigarettes. By filing a petition with the department, the storeowner has the right to have the seizure and suspension of the store's registration reviewed. The commissioner designates a Review Officer to hear the case. The review is conducted as hearing during which the petitioner may present oral and written evidence and witnesses in an effort to prove to the satisfaction of the review officer a basis for lifting the suspension.[7] Petitioner has the burden of proof, to prove by a preponderance of the evidence that the cigarettes were not unstamped or unlawfully stamped. However based upon this writer's experience as a review officer for the Department the Petitioner usually is not able to sustain this burden and the alternative is to present evidence of mitigating circumstances concerning the incident. Counsel's presentation of the case should include information such as:

Period during which the petitioner has been operating 'in good' standing with the Department.

Information identifying the distributors from whom the client regularly purchases product, with copies of invoices and receipts reflecting such purchases.

Explanation as to how the untaxed product came to be on the premises.

And, if available, information the client may have concerning incidents of illegal trafficking in cigarettes.

The review officer will make a decision concerning the period of suspension or revocation of the Petitioner's Registration and will submit findings to the Department's Commissioner. Thereafter, the commissioner will issue a decision as regards the petitioner's suspension. In the event the decision is to continue the suspension or revoke the Certificate of Registration the petitioner may appeal the commissioner's decision by commencing an Article 78 against the Tax Department Commissioner, in state Supreme Court in Albany, NY.[8]

Note: Gary Alpert is in private practice. Formerly, as an attorney with Tax Department's Criminal Investigations Division he supervised investigations including case referrals, arrests and seizures and served as a Certificate of Registrations Review Officer.

[1] *Colonade Catering Corp. v. United States*, 397 US 722 (1970) The Supreme Court approved the statutory authorization of Internal Revenue Agents to conduct warrantless inspections of federally licensed dealers in alcoholic beverages.
[2] *United States v. Biswell*, 406 US 311 (1972). Dealer engaged in the pervasively regulated business of firearms sales accepts a license to do so with knowledge that his business records and inventory will be subject to effective inspection.
[3] New York Tax Law Section 481(1)(b)(i) et. seq.
[4] Press Release, New York State Department of Taxation and Finance (April 7, 2014)(on file with author)
[5] Press Release, New York State Department of Taxation and Finance (July 1, 2015)(on file with author)
[6] New York Tax Law Section 480-a(1)(a)
[7] New York Tax Law Section 480-a(4)(b)
[8] New York Tax Law Section 480-a(4)(c)

Removing a Mechanic's Lien (Continued from page 13)

days from the date of service of the notice or show cause, at a special term of the county in which the lien is filed, why the lien should not be vacated and cancelled. Section 59 can also be used to discharge a bond if the lien has been bonded pursuant to section 19(4) of the Lien Law, but no action has been commenced. The failure to then commence a foreclosure action can lead to a court issuing a decision vacating the lien. In the event that the lienor does timely commence an action to foreclose on the lien, the owner can then assert any and all defenses to the underlying claim, such as that the services were not performed or were performed in a faulty manner. It is only through this somewhat roundabout procedure requiring the lienor's commencement of an action that the owner can bring these defenses before the court.

Note: Jarrett M. Behar, a member of the firm Sinnreich Kosakoff & Messina LLP, practices in the areas of commercial litigation, construction law and professional liability defense, and has represented parties in the filing of mechanic's liens and prosecution of lien foreclosure and related contractual claims. For additional information concerning this article, please feel free to contact Mr. Behar at jbehar@skmlaw.net.

Juror Disqualification During Deliberations (Continued from page 4)

the court finds "the juror's knowledge will prevent that person from rendering an impartial verdict." [33] *People v. Anderson*, 70 NY2d 729 [1987].

In *Spencer*, during the fourth day of jury deliberations, and after the alternate jurors were excused, the jury foreperson sought to be excused because she was unable to "separate [her] emotions from the case" (*Spencer*, *supra*, 135 AD3d at 608). Following a lengthy probing inquiry by the trial judge in the presence of counsel, the trial court denied the foreperson's request concluding that she was not "grossly unqualified" to serve (CPL 270.35(1)). The Appellate Division deferred to the trial court opining that the lower court was in the best position to assess whether the foreperson could continue to serve in a fair and impartial manner. Factors considered by the court included the foreperson's failure to express concern regarding her personal safety or well-being or that she had been coerced or unduly pressured by her fellow jurors to render a particular verdict. The foreperson further acknowledged that she was able to render a verdict and remain impartial.

Within hours of denying the foreperson's request, the jury unanimously found the defendant guilty. In a scathing dissent, it was argued that the aforementioned factors were not determinative and that it appeared the trial court was more concerned with avoiding a mistrial "at all costs" than assessing whether disqualification was warranted (*Spencer*, *supra*, 135 AD3d at 608). The dissent noted that the trial judge interrupted the juror on multiple occasions, and, as a result, opined the record was incomplete and insufficient to adequately assess whether the juror could render a fair and impartial verdict. Compounding the issue was the judge's statement during the inquiry that "[w]e've all put a lot of time, a lot of effort, and there's no way we can go forward without you." When the juror stated she felt as though she was being given "no choice," the trial judge responded "that's true" (*id*.).

The majority rejected these arguments and concluded the inquiry was sufficient, and reasonably resulted in the trial court's determination that the foreperson was fit to continue to serve. The majority also refuted the dissent's argument that the trial judge's failure to emphasize the significance of the juror rendering a verdict without surrendering her "conscientious belief" following the probing inquiry was fatal. In the opinion, the majority noted that the trial judge had previously given such a charge and defense counsel objected to the judge's offer to give an Allen charge (the jury Deadlock Charge) following the inquiry.

This case provides useful tools for addressing juror concerns and demonstrates that counsel may wish to consider whether it is in a client's best interests to excuse alternate jurors prior to a verdict.

Note: The Honorable Stephen L. Ukeiley is a Suffolk County District Court Judge. Judge Ukeiley is also an adjunct professor at the Touro College Jacob D. Fuchsberg Law Center and New York Institute of Technology, and the author of numerous legal publications, including his most recent book, The Bench Guide to Landlord & Tenant Disputes in New York (Second Edition)©.

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Ghouls, Wolves and Mummies (Continued from page 3)

for over 5,000 years stood as a figurative and literal monument to man's ability to achieve collectively that which would be impossible to achieve individually. In contrast, the Great Sphinx of Giza, the adjacent enigmatic sculpture that bears neither inscription nor insight as to who built it, when it was built, or why, summons images of insoluble (by human hands, that is) mystery. What better a twin invocation, therefore, than these sights, for Justice Scalia to criticize what he has often referred to as a collectively (i.e., by a group of judges) invented, and logically impenetrable, rule of *Miranda v. Arizona*[3]? Justice Scalia dissents from the affirmation of *Miranda*, in *Dickerson v. United States*[4]: "Today's judgment converts *Miranda* from a milestone of judicial overreaching into the very Cheops' Pyramid (or perhaps the Sphinx would be a better analogue) of judicial arrogance." Here, Justice Scalia's invocation of familiar historical symbols gives the reader an easily understood reference point, thus enhancing the basic clarity of the critique of *Miranda*.

As the above three examples illustrate, lawyers can use the Scalia style — visual imagery, metaphor and simile, and shared points of cultural reference — to produce work product that effectively appeals to the reader's imagination and need for brevity and clarity.

Note: Daniel Lebovic is a sole practitioner in Commack who provides freelance legal research and writing services for other attorneys, primarily sole practitioners and small law firms, in a wide range of litigation and appellate matters. For more information please visit www.legalsquireforhire.com.

[1] 508 U.S. 384, 398-99 (1993).
[2] 487 U.S. 654 (1988).
[3] 384 U.S. 436 (1966).
[4] 530 U.S. 428, 463 (2000).

Fair Housing Inititatives Launched on the Federal and State Levels (Continued from page 3)

diverse racial, gender, and economic backgrounds, who also represent parents, and persons with disabilities."[vi] Testers "are individuals who, without an intent to rent or purchase a home or apartment, pose as renters or purchasers for the purpose of collecting evidence of unlawful [discrimination] practices."[vii] The United States Supreme Court, in Havens Realty Corp. v. Coleman, has held that such testers have standing to sue in enforcing discrimination laws regardless that they were not seeking to rent or purchase in actuality. In fact, the governor's press release makes reference to the Fair Housing Enforcement Program's aim at prosecuting discriminatory "real estate agents, owners and landlords" who are caught by testers.[viii] The Fair Housing Enforcement Program's investigatory and enforcement components are only the first half of the governor's strong undertaking to affirmatively further fair housing.

Governor Cuomo announced two other components of the Fair Housing Enforcement Program on February 25, 2016, including a proposed regulation for the real estate brokerage industry and another proposed regulation to again expand who is included in the definitions of our statutory protected classes under the New York State Human Rights Law. With respect to the brokerage regulation, "the New York Department of State will seek sanctions, including license revocation and fines, against real estate brokers and salespeople who are found to have engaged in any discriminatory practices in the course of their licensed real estate activities." With respect to the expanded protected classes, the New York State Human Rights Law will preclude "discriminat[ion] against individuals because of their relationship or association with members of a protected class."[ix] In fact, the regulation makes clear that those accompanying individuals who are denied rights because of discrimination will also have experienced discrimination and have standing to sue for recourse. Public comment for both proposed regulations ended on April 23, 2016 as the regulations make their way through the rule making process into becoming law.

On both the federal and state levels the legal tides are certainly bringing fair housing into the forefront of issues faced by our real estate clients. Landlords, property managers, real estate brokers, loan originators, and other such clients are not only expected to pay attention to these important developments, but they are, in fact, legally charged with the duty to immediately and affirmatively change their business practices in order to make housing become "free from barriers that restrict access to opportunity based on protected characteristics."[x] As competent attorneys it is our job to have solutions ready for these clients before they even realize that they have a need.

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 is a past 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.

[1] http://portal.hud.gov/hudportal/HUD?src=/press/press_releases_media_advisories/2016/HUDNo_16-041
[2] https://www.huduser.gov/portal/sites/default/files/pdf/AFFH_Final_Rule_Executive_Summary.pdf
[3] 80 FR 42271
[4] https://www.governor.ny.gov/news/governor-cuomo-announces-new-regulations-protecting-transgender-new-yorkers-discrimination-take
[5] https://www.governor.ny.gov/news/governor-cuomo-announces-initiative-strengthen-states-anti-discrimination-efforts
[6] Id.
[7] Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982)
[8] https://www.governor.ny.gov/news/governor-cuomo-announces-initiative-strengthen-states-anti-discrimination-efforts
[9] https://www.governor.ny.gov/news/governor-cuomo-announces-new-york-state-real-estate-board-approval-regulations-strengthen-fair; See also http://blog.liebatlaw.com/2016/03/real-estate-brokerage-regulatory.html
[10] 80 FR 42271

Bench Briefs (Continued from page 4)

policy called for an annual premium, but Ms. Corless selected an alternate payment plan providing for monthly premium payments to be withdrawn electronically. The electronic payment agreement provided that the agreement may be ended automatically by Allstate if any debit entry has been refused by the bank and further provided that Allstate would not send premium notices. In August of 2013, when Ms. Corless was terminally ill with cancer, she closed the bank account and the bank refused the August premium. This action was commenced by the beneficiary of the plan to recover the proceeds of the policy on the grounds that defendant failed to give proper notice of the premium due and the risk of policy lapse pursuant to Insurance Law §3211; breach of contract; and equitable principals of Insurance Law. In granting the motion for summary judgment in favor of the plaintiff, the court found that as a matter of law that Allstate failed to provide its insured with proper notice pursuant to Insurance Law §3211(a). Accordingly, the policy was still in effect when the insured died on September 28, 2013 and plaintiff was entitled to summary judgment on his claim of entitlement to the policy proceeds, less any premiums due.

Honorable Peter H. Mayer

Petition which sought an order pursuant to RPAPL §1931 discharging the subject mortgage of record or alternatively pursuant to RPAPL §1921 discharging the subject mortgage after payment of record principal amount of $89,372.00 denied; without a copy of the subject mortgage, the court was unable to ascertain whether or not the mortgage, or any provisions therein, survived any alleged payment in full; no assertion that mortgage paid in full.

In *Clifford James Distler, Jr. and Diane Distler v. Home Credit Corporation, Home Loan & Investment Association, Provident Savings Bank, Fidelity National Title Insurance Services, LLC and Suffolk County Clerk,* Index No.: 13095/2014, decided on April 8, 2015, the court denied the petition which sought an order pursuant to RPAPL §1931 discharging the subject mortgage of record or alternatively pursuant to RPAPL §1921 discharging the subject mortgage after payment of record principal amount of $89,372.00.

Initially, the court noted that the petition did not include a copy of the mortgage, which the petitioners sought to have discharged. It was well settled that a mortgage may be kept alive, even after payment in full, if such was the intention of the parties, provided innocent third persons are not prejudiced thereby. Here, without a copy of the subject mortgage, the court was unable to ascertain whether or not the mortgage, or any provisions therein, survived any alleged payment in full. Consequently, the petition had to be denied. Further, the court noted that in relevant part, RPAPL §1921 authorizes any person having an interest in a mortgage to apply for an order discharging the mortgage where the mortgagee, after payment of all outstanding principal and interest has been made, refuses to execute a satisfaction of mortgage. Where there was no proper evidentiary proof to corroborate the petitioner's assertion that he or she tendered full payment of the mortgage obligation to the mortgagee, the petition for discharge of the mortgage under RPAPL §1921 must be denied. In addition, the court cited that RPAPL §1931 sets forth the requirements for a petition seeking discharge of mortgage on the grounds that it is an ancient mortgage presumed paid. In this regard, RPAPL §1931(2) states, "such petition shall be verified…and shall allege that such mortgage is paid.

Here, although the petition was verified, neither the petition nor the affidavit in support alleged that the subject mortgage had been paid. Based upon the above, the petition was denied.

Motion to serve a late notice of claim granted; overall circumstances warranted excusing the delay in the interests of justice.

In *Maya Khalil, an infant, by Nawal Ibrahim, the person having legal custody, and Nawal Ibrahim, individually v. The Sheriff of Suffolk County, Suffolk County, and Sheriff Deputy R. David Diem,* Index No.: 14671/2014, decided on June 17, 2015, the court granted plaintiffs' motion which sought an order for permission to serve a late notice of claim upon the defendants.

In determining whether to grant an application for leave to serve a late notice of claim, a court should consider whether a public corporation acquired actual knowledge of the essential facts constituting the claim within 90 days from its accrual or a reasonable time thereafter; whether the claimant demonstrated a reasonable excuse for the delay in filing a notice of claim; and whether the delay would substantially prejudice the public corporation in maintaining its defense on the merits.

Here, the court found that the overall circumstances warranted excusing the delay in the interests of justice. Therefore, plaintiffs' motion was granted.

Motion for default judgment denied; insufficient submission.

Matthew Kwas v. Christopher J. Marr, Linda Marr, Jane and John Doe #1-10, Index No.: 15241/2014, decided on October 16, 2015, the court denied plaintiff's motion for a default judgment pursuant to CPLR §3215.

In denying the application, the court noted that the application was denied for failure to include a copy of the summons and complaint, failure to establish a basis for venue of the action in Suffolk County, failure to submit proof of proper service of the summons and complaint, as required by CPLR §308, sufficient to establish jurisdiction over the defendants; and failure to submit an affidavit stating whether or not the defendants are in military service and showing necessary facts to support the affidavit.

Further, to the extent that the plaintiff was claiming a breach of contract, the court denied the application for failure to submit evidentiary proof, including an affidavit of service from one with personal knowledge, of compliance with CPLR §3215(g)(3) regarding additional notice required when a default judgment is sought against an individual in an action based upon nonpayment of a contractual obligation; and for failure of the movant to present prima facie proof of a valid cause of action upon which the court may grant a judgment by default pursuant to CPLR §3215. As such, the motion for a default was denied.

Please send future decisions to appear in "Decisions of Interest" column to Elaine M. Colavito at elaine_colavito@live.com. There is no guarantee that decisions received will be published. Submissions are limited to decisions from Suffolk County trial courts. Submissions are accepted on a continual 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, PLLC in Uniondale, and concentrates her practice in matrimonial and family law, civil litigation and immigration matters.

The Winds of Change Will Impact Elderly Veterans (Continued from page 11)

which time Mr. Johnson will not be eligible to receive the Aid and Attendance benefit.

According to the National Center for Assisted Living, the average stay in an assisted living facility is approximately three years. In many if not most cases, veterans and/or their spouses will never realize the Aid and Attendance pension benefit.

Medical Expenses (Proposed § 3.278)

Currently, the cost of assisted living and the cost of in-home attendants are deducted in full from monthly income when calculating income eligibility for Aid and Attendance benefits. The proposed regulations would provide that generally, payments to facilities such as independent living facilities are not "medical expenses," nor are payments for assistance with Instrumental Activities of Daily Living ("IADLs"). However, there would be some exceptions for disabled individuals. The proposed amendment would place a limit on the hourly payment rate that the VA may deduct for in-home attendants.

Primary Residence (Proposed § 3.275)

The primary residence will continue to be excluded as a countable asset unless and until the property is sold. Once the property is sold, the proceeds will be added to the veteran/spouse's net worth unless the funds are used to purchase another property. The proposed regulations provide that the residential lot area cannot exceed two acres unless the additional acreage is not marketable.

If these proposed regulations are passed into law, it will be critical for Veterans and their spouses to plan ahead for eligibility, similar to current planning for Medicaid eligibility. As with Medicaid planning, if assets are transferred prior to the look-back period, the veteran and/or the surviving spouse will be eligible for benefits when the medical need arises in the future.

The Aid and Attendance benefit has made it financially possible for veterans and/or surviving spouses of veterans to move into assisted living or remain there after their funds have dwindled. It is critically important that access to appropriate housing and care for elderly veterans and surviving spouses of veterans remains in place, not to mention the moral obligation to take care of those who have fought for this country.

Note: Melissa Negrin-Wiener, Esq., is a partner in the Elder Law firm Genser Dubow Genser & Cona where she manages the Government Benefits Eligibility Department.

Should Nonlawyers Provide Legal Services? (Continued from page 10)

likely not have the professional responsibility, ethical oversight and rigorous licensing and testing requirements that lawyers have. Voicing these concerns, "David Miranda, the president of the New York State Bar Association, and Miles Winder III, the president of the New Jersey State Bar Association, led a visible fight against the change."

The integrity of the legal profession is currently vested with attorneys. "Pro bono work, which grants that access to the poor who would otherwise not be able to afford it, is … necessary in order to give the law legitimacy." What about the efforts and labor of practicing and retired attorneys? To delegate this right to a nonlawyer, likely to a for-profit business, may place us at the summit of a slippery slope. "Model Rule 6.1 is meant primarily to benefit persons of limited means and not intended to apply to situations where a fee is expected but ultimately not collected" How can the ABA allow a nonlawyer entity to lure a vulnerable population of clients who may become unwitting participants in a business concerned with profit and not people? What impression would this make upon the American public? Will this give the law legitimacy?

There are longstanding restrictions against nonlawyer practice and nonlawyer ownership of a law firm. "With the exception of the District of Columbia, no jurisdiction in the country permits non-lawyer ownership of law firms." Akin to emerging online fantasy leagues and betting parlors, "[c]ertain entrepreneurs, seeking to profit from the market for legal services while avoiding compliance with lawyers' rules of professional responsibility, argue the law is just a business, not a profession."[2] Others would go as far to say that the "notion that law isn't a commercial enterprise may come as a surprise, since some lawyers now charge more than $1,000 an hour." Not subject to regulation by the ABA, investors and entrepreneurs are not waiting for change or approval within the legal industry to set up shop.

A 2012 Article in the Wall Street Journal published the story about "Jacoby & Meyers Law Offices LLC, a well-known personal-injury firm, [which] filed federal lawsuits in New York, New Jersey and Connecticut challenging ethics rules that prohibit outside investment in law firms, claim[ing that] the restrictions hurt its ability to raise capital to cover technology and expansion costs, and hampered efforts to provide affordable legal services to working-class clients." Although the suit was dismissed, the sentiment is again reemerging. However, "nothing contained in [the current ABA] Resolution abrogates in any manner existing ABA policy prohibiting non lawyer ownership of law firms or the core values adopted by the House of Delegates."

Along with Jacoby & Meyers, other attorneys are embracing the idea of nonlawyer ownership and nonlawyers providing legal services. "Those who favor lifting the restriction say it would expand consumers' access to legal services, spur innovation and reduce the cost of legal help." This thought is not unique. Indeed, "new British rules intended to expand consumers' access to legal services and spur competition . . . [now] allow British lawyers to team up with insurers or other businesses, and even to solicit outside investments." Can this be the future legal field in America?

Appealing to some and appalling to others, the idea that one can circumvent the arduous licensing requirements to share in the profits received from legal industries may already be a reality when it comes to Internet legal service providers. "Giving people who don't have a law license the ability to share firm profits would undermine the profession's ethical obligations of client loyalty and confidentiality, critics argue." Perhaps the answer to the "justice gap" is not lifting regulations on the profession but bridging that gap with capable lawyers and in imposing restrictions on others who may target vulnerable Americans.

The problem with utilizing nonlawyers becomes, Miranda notes, that when "the unrepresented, while receiving some assistance, are not given the benefit and protections of having a lawyer responsible for their matters." Miranda suggests that while a nonlawyer may assist in preparation and advising the client, a "lawyer . . . remains responsible for the matter and, of course, is subject to all of the ethical obligations imposed on every lawyer." His rationale is clear and well reasoned: "This assures that each and every client has in the representation the skills and experience that may be needed . . . [o]ur proposal represents a solution that leaves each client with the assurance that there is a fully trained lawyer standing behind them."[3] One more thing — it helps ameliorates the incentive to put profits before people.

While the ABA conference recommended that its members consider the resolution's objectives "to help identify and implement regulations related to legal services beyond the traditional regulation of the legal profession[,]" the concern over lifting regulations should be carefully scrutinized. In addition to Miranda's comments, "New Jersey's [Miles] Winder expressed concern that the resolution could lead to a two-tier system where nonlawyers serve the poor, while the rich use lawyers."

As with attorney advertising, is the legal field regressing from an otherwise honorable profession? Do we want legal services and attorneys to be associated with 800 phone-line jingles, food-critique-like ratings and a wave of disenchanted recipients of canned-rhetoric marketed as legal advice, offered in real-time and sold with a television clock running down? Are there not compelling reasons to restrain the legal profession to licensed attorneys?

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[1] Lydia Chan, *New York's New Rule: A Novel Approach to Closing the Access to Justice Gap*, 26 Geo. J. Legal Ethics 597, 610 (2013)(citing Deborah L. Rhode, *Cultures of Commitment: Pro Bono for Lawyers and Law Students*, 67 Fordham L. Rev. 2415, 2419 (1999)).

[2] See *Sunday Dialogue: Public Service for Lawyers*, N.Y. Times (June 2, 2012), http://www.nytimes.com/2012/06/03/opinion/sunday/sunday-dialogue-public-service-for-lawyers.html?pagewanted=all.

[3] Joe Palazzolo, *Law Grads Face Brutal Job Market* (June 25, 2012 10:18AM), http://www.wsj.com/articles/SB10001424052702304586045774866234695814 2.

[4] Susan Beck, *Divided ABA Adopts Resolution on Nonlawyer Legal Services*, The Am Law Daily (Feb. 8, 2016), http://www.americanlawyer.com/id=1202749202171/Divided-ABA-Adopts-Resolution-on-Nonlawyer-Legal-Services#ixzz40QhTCz00.

[5] *Supra,* Chan note 1 (citing Model Rules R. 6.1 cmt. 9.).

[6] *Supra,* Beck note 4.

[7] *Supra,* Chan note 1 at 600.

[8] Jacob Gershman, *ABA Resolution Stirs Fears of Non-Lawyer Firm Ownership*, Wall Street Journal (Feb. 5, 2016), http://blogs.wsj.com/law/2016/02/05/aba-resolution-stirs-fears-of-non-lawyer-firm-ownership/

[9] David Miranda, *Letter to the Editor: The Law Remains a Noble Profession*, American Bar Association (GPSolo eReport, Vol. 5, No. 4), http://www.americanbar.org/publications/gpsolo_ereport/2015/november_2015/letter_law_remains_noble_profession.html (citing Dan Lear, *"I Hate to Break it to You Lawyers, But Law Is a Business,"* American Bar Association (GPSolo eReport Vol. 5, No. 3), http://www.americanbar.org/publications/gpsolo_ereport/2015/october_2015/lawyers_law_is_business.html.

[10] Jennifer Smith, *Law Firms Split Over Nonlawyer Investors*, Wall Street Journal (April 1, 2012), http://www.wsj.com/articles/SB10001424052702304750404577317761468323458?mg=id-wsj.

[11] American Bar Association ("ABA"), *ABA Model Regulatory Objectives for the Provision of Legal Services: ABA Regulation 105* (February 2016), available at http://www.americanbar.org/content/dam/aba/images/abanews/2016mymres/105.pdf.

[12] *Supra,* Gershman note 8.

[13] *Supra,* Smith note 10.

[14] Supra, Gershman note 8.

[15] New York State Bar Association (NYSBA) Correspondence by President David Miranda to Judy Perry Martinez, Chair of ABA Commission on the Future of Legal Services, NYSBA (Aug. 25, 2015), available at http://www.americanbar.org/content/dam/aba/images/office_president/lspcomments_new_york_state_bar_association.pdf.

[16] Supra, Beck note 4.

Law Firm Compensation (Continued from page 19)

ness expenses. However, in order for amounts paid as salary to be deductible, they must be paid for services actually rendered, and they must be reasonable. Ostensible salary payments to shareholder-employees that are actually dividends are thus nondeductible.

The parties' arguments

"In support of its deduction of year-end bonuses paid to its shareholder-attorneys that eliminated its book income for the years in issue, Taxpayer cited a number of authorities that purportedly established that capital was not a material income-producing factor in a professional services business.

"The IRS claimed that amounts paid to shareholder-employees of a corporation did not qualify as deductible compensation to the extent that the payments were funded by earnings attributable to the services of non-shareholder-employees or to the use of the corporation's intangible assets or other capital. The IRS said that amounts paid to shareholder-employees that are attributable to those sources must be nondeductible dividends.

"Taxpayer responded that any 'profit' made from the services of non-shareholder-attorneys could justifiably be paid to its shareholder-attorneys in consideration of their business generation and other non-billable services."

The adviser turned toward the window. "I hope he jumps," was the first thought that occurred to the client. No such luck — he only opened it a crack.

"It's a bit stuffy in here," he said, as if to himself, clearly not expecting a response.

"You have no idea," she whispered under her breath.

"What's that?"

"I said I have no idea where this is going."

"I appreciate your eagerness," said the adviser. "You can just imagine how I feel every morning when I read through the latest tax news. It takes a Herculean effort to contain myself."

"OMG," he's crazy, "what was my dad thinking when he retained this guy?!"

"I see the look in your eyes. Rest assured, your patience is about to be rewarded."

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