Nassau Lawyer

THE JOURNAL OF THE NASSAU COUNTY BAR ASSOCIATION

January 2011 www.nassaubar.org Vol. 60, No. 5

Follow us on facebook

OF NOTE

NCBA Member Benefit – I.D. Card Photo
Obtain your photo for court identification cards at NCBA Tech Center. Cost $10.
February 1, 2, & 3 • 9 a.m.-4 p.m.

EVENTS

Suddenly Solo-What do I need?
Information Service Fair
Feb. 1, 2011
See insert

WE CARE Children's Holiday Party
Feb. 23, 2011 at Domus

Moot Court Competition
March 22 & 23 at Domus

Law Day
Thursday Evening, April 28, 2011
at Domus

WHAT'S INSIDE

Robert Nigro Named Administrator for Nassau County Assigned Counsel Defender Plan (18B)

By Valerie Zurblis

Robert M. Nigro, former chief of the Civil Forfeiture Bureau of the Nassau County District Attorney's Office, has been named the new administrator of the Nassau County Assigned Counsel Defender Plan (18B). The Administrator oversees more than 260 attorneys who are assigned by the courts to represent clients in criminal cases when they cannot afford an attorney.

The office oversees more than 6,000 cases a year and is based at the Nassau County Bar Association headquarters in Mineola.

Last year, Robert Nigro retired from the position of Chief of the Civil Forfeiture Bureau, of the Nassau County District Attorney's Office. He had been a Co-chair of the Forfeiture Law Advisory Group (FLAG) of the NYS District Attorney's Association from 1997 until 2007, and is presently the Association's outgoing Treasurer. Nigro was an Assistant in the Nassau County District Attorney's Office from 1976 to 1982 and worked in the Rackets Bureau, the District Court Bureau and the Appeals Bureau. From 1982 to 1987, he was Principal Law Clerk to the Honorable Abbey L. Boklan, Nassau County Court Judge. After a short sojourn in private practice, Nigro returned to the Nassau County District Attorney's Office in 1989 to work in the County Court Trial Bureau, and later to head the Civil Forfeiture Bureau.

Robert Nigro lectures on forfeiture at numerous state and

Robert M. Nigro

local bar association programs in Nassau and Suffolk Counties, has participated as both a lecturer and panelist in numerous FLAG and the New York State Prosecutors' Training Institute (NYPTI) seminars from 1993 to the present, and has lectured to both local and state police agencies and the State Division of Criminal Justice Services. He was invited as a speaker and panelist at the Ontario Attorney General's Conference on Organized Crime in Toronto and appeared before the Provincial Legislature to speak in support of proposed forfeiture legislation in Canada.

Nigro received his BA from Fordham College and his JD degree from Fordham Law School. He has taught at Hofstra Law School as a Special Professor of Law and in the Criminal Justice Program at Nassau Community College. The Bayville resident replaces Patrick McCloskey, who retired in December.

NCBA's BOLD Initiative Wins 2010 Innovation Award

By Valerie Zurblis

For the second year in a row, the Nassau County Bar Association has won statewide recognition for its leadership and foresight, this time for its creative BOLD Initiative, which incorporates foreign languages into NCBA's community outreach to better serve the increasingly diverse Nassau County population whose primary language is not English.

"This year we received a large number of nominations," said Earamichia Brown, Executive Council Chair of the New York State Conference of Bar Leaders, NYS Bar Association, in her letter announcing the news. "Your nomination was one that stood apart from the others."

The NYS Conference of Bar Leaders Innovation Award, formerly known as the Award of Merit, was renamed to recognize how bar associations adapt to the needs of their members and the community at large by introducing new programs, ideas and methodologies that benefit everyone involved. The award program also serves to provide information to all bar leaders on new activities and projects that promote the public good, public understanding of the law and the professional responsibilities of attorneys. Judging is based on ingenuity and creativity in planning the project, overall quality of the execution, and the effect of the project on the bar and/or the public. The Nassau County Bar Association won in the Large Association category, 2,000-plus members.

NCBA's BOLD Initiative, launched in August 2009, evolved into several distinct projects, including installing a telephone Language Line, demonstrations for the public of U.S. Citizenship interviews, incorporating attorneys fluent in foreign languages into the monthly Mortgage Foreclosure and Senior Citizen legal consultation clinics, and hosting for the first time, foreign consuls at a CLE seminar at Domus relating to the arrest of foreign nationals. In addition, BOLD was able to quickly mobilize after the devastating earthquake in Haiti last year to offer seminars in Haitian Creole on Temporary Protected Status.

"The BOLD Initiative has created an awareness of the untapped resources at the Bar and underscored all the Bar offers for our members and the community," said NCBA President Marc Gann. "Through BOLD, the NCBA is strengthening its reputation as a place where all citizens can gain an understanding of legal issues that are often complicated but that affect their lives – now in their native tongue."

This is the fifth time NCBA has been recognized by the NYS Bar Association with its top award. Last year, NCBA was recognized for its groundbreaking Mortgage Foreclosure Pro Bono Project, and in previous years for its innovative public education program, "Murder in the Library"; the extensive attorney-student mentoring program for at-risk middle school students, and the creation of the WE CARE Fund, which allows Bar Association members to raise funds for the community's

See BOLD, Page 6

UPCOMING PUBLICATIONS COMMITTEE MEETINGS

Tues., Feb. 15, 2011 • Thurs., March 10, 2011 – 12:45 at Domus

The Lawyer Assistance Program provides confidential help to lawyers and judges for alcoholism, drug abuse and mental health problems. Call 1-888-408-6222. Calls are completely confidential.

2010 Holiday Staff Fund

A special thank you to the following individuals and firms for generously donating to the NCBA's Annual Holiday Staff Fund this year.

Hon. Merik R. Aaron
Bruce W. Albert
Albert W. Chianese & Associates
Joy Alessi
Gary Alpert
Hon. Leonard B. Austin
Richard Bakalor
Hon. Ruth C. Balkin
Liora Ben-Sorek
Eugene J. Brannigan
Daniel T. Campbell
Catalano Gallardo & Petropoulos LLP
Collins, McDonald & Gann
Jane K. Cristal
Dilimetin & Dilimetin PC
Steven J. Eisman
Joanne Fanizza
Samuel J. Ferrara
George P. Frooks
Lawrence Gaissert
Gassman, Baiamonte, Betts & Tannenbaum PC
Genoa & Associates PC
Gervase & Vallone
Eugene S. Ginsberg
Douglas Good
Hon. Frank A. Gulotta Jr.
Jeffrey Halbreich
H. William Hodges III
Law Offices of Alan B. Hodish
Lawyer Assistance Program
Howard R. Brill PC
Jamar Printing Inc.
Diane Kadlec
Evelyn Kalenscher-Kirschenfeld
Kantor & Kopman
George M. Kaplan
Ellen Kessler
Hon. Susan Kluewer
Donna-Marie Korth
Mary LaManna-Ulrich
Patricia Latzman
Richard G. Lawless
Law Offices of Lauren A. Baum PC
A. Thomas Levin
Victor Levin
Linda G. Nanos PC
David Lira
Lisa LoCurto
John P. Mahon
Markotsis & Lieberman
Patrick J. McCormack
John McEntee
Grace Moran
Naness, Chaiet & Naness
Dorothy Oehler Nese
New York Family Law American Inn of Court
Oberlander & Oberlander
Lorraine Paceleo
Barbara L. Paltrow
Hon. Anthony Paradiso
James M. Pedowitz
Richard V. Rappaport
Alan J. Reardon
Susan Katz Richman
Marc W. Roberts
Kenneth L. Robinson
Hon. Marie Santagata
Santemma & Deutsch
Elliot S. Schlissel
Sidney Segall
Hon. Denise L. Sher
Andrew J. Simons
William Sparks
Hon. Robert Spergel
Hon. Elaine Jackson Stack
Peter J. Tomao
Hon. A. Kathleen Tomlinson
Seymour Trager
Vessa & Wilensky PC
Owen & Dorothy Walsh
Hon. Ira Warshawsky
Dent & Witschieben
Alan B. Wolfer
Kathleen Wright
Patricia Wright
Hon. Frank E. Yannelli
John Zenir

VIEW from the BENCH

– Part One –

A Comparison of the Rules of Evidence and Trial Procedures In Federal and State Courts

By Hon. Arthur D. Spatt

The rules of evidence used in the Federal courts are codified in a single statute known as the Federal Rules of Evidence (the "FRE"). Enacted by Congress, with great input from the Federal Judicial Conference, they took effect on January 2, 1975. Many States have adopted the Federal Rules of Evidence. New York State (the "State") has declined to do so as yet, a mistake in my view.

The State's rules of evidence are found partly in statues, such as the CPLR, the Criminal Penal Law, the General Business Law, the Estate Power and Trust Laws, and the Family Court Act. That said, the State's evidentiary law has developed principally though the "Common Law," meaning by court decisions.

This two-part View from the Bench column will give an overview of some of the differences between State and Federal evidentiary rules, with an emphasis on practice in the United States District Courts. In addition, the article will cover some distinctions between the two jurisdictions' procedures. The ultimate goal is to help those who navigate both forums to understand the differences and sharpen their litigation skills.

The Rules of Evidence

What is Hearsay?

By far the most important and widely used rules of evidence involve the Hearsay doctrine. Often misunderstood, a review of the essential principles is worthwhile. Broadly stated, as the readers of this paper are well aware, the State hearsay rule excludes as evidence any extra-judicial declaration offered to prove the truth of the matter asserted. The definition of the various terms and exceptions involved in the hearsay rule's application in State court is found by and large in case law.

In the Federal courts, by way of contrast, the definition of hearsay is expressly stated in Rule 801(C) of the Federal Rules of Evidence. It is short and to the point: "Hearsay is a statement, other than one made by the declarant while testifying at trial … offered in evidence to prove the truth of the matter asserted." Rule 802 bars the admission of hearsay evidence unless an exception applies. Most exceptions to the Hearsay Rule are found in Rules 803, 804 and 807. In my view, together with the rule on admissions, these hearsay exceptions are among the most important evidentiary rules in Federal practice.

The Rule 803 Exceptions

Federal Rule 803 begins with the following language: "The following are not excluded by the hearsay rule even though the declarant is available as a witness." The Rule then list 23 categories of exceptions to the hearsay rule that apply regardless of the availability of the declarant. Five additional exceptions that apply when the declarant is unavailable are contained in Rule 804, and Rule 807 provides for a residual exception.

Taking just one of the exceptions under FRE 803, entitled "Statements in Ancient Documents," much can be gleaned about the Federal approach. FRE 803(16) permits the admission of every statement in an authentic document at least 20 years in age as an exception to the hearsay rule. Such documents may include newspaper articles, deeds and letters, among others.

The rule exemplifies the inclusionary orientation of the Federal courts. In addition, the Court of Appeals for the Second Circuit favors the admissibility of relevant, probative and reliable evidence. Of course, the most important hearsay exception is the business record rule set forth in Rule 803(6). It is substantially similar to the State rule, except the more inclusive approach of the FRE's makes any given writing more likely to be admitted in Federal court.

The far-ranging exceptions to the hearsay rule set forth in Rule 803 are:

• Present sense impression (*e.g.*, "Look at the blue truck right now. It's running the red light." Those words are admissible as a present sense impression, but not as an exited utterance.);

• Excited utterance (An example would be a statement by a highly distraught, tearful 10-year-old girl to her grandmother, saying the defendant had sexually assaulted her within the hour.);

• Then existing mental, emotional or physical condition (*e.g.*, "My knee hurts" or "I intend to do so.");

• Statements for purposes of medical diagnosis or treatment (but only those statements pertinent to diagnosis or treatment);

• Recorded recollection (If the witness knew the facts at one time, recorded them when fresh, and presently has no recollection, the writing may be read in the record, but it does not become an exhibit unless offered by an adverse party.);

• Business records and other records of regularly conducted activity. This is introduced through the testimony of a custodian, other qualified witness, or by certified copy, if the record is made and kept in the ordinary course of the enterprise;

• Absence of entry in business or other regularly kept records;

• Public records and reports (Federal, State, Municipal or other agency activity, observations, evaluations);

• Absence of public record entry;

• Records of vital statistics recorded by religious organizations or documented in family-created records or municipal certificates;

• Documents relating to property interests and statements contained therein;

• Statements in ancient documents;

• Market reports and commercial publications, (of the type relied upon by the public or professionals in the field);

• Learned treatises (if relied on during direct examination or called to an expert's attention on cross). If the statements in the text are recognized as reliable authority through judicial notice or testimony, they may be read into the record, but do not become exhibits;

• Reputation concerning personal or family history;

• Reputation concerning boundaries or general history;

• Reputation as to character;

• Judgment of previous convictions;

• Judgment as to personal, family or general history of boundaries.

Be advised, the FRE's are amended from time to time, generally to include more categories of evidence. For example, in 2001, Rule 803(6), the Business Record hearsay exception was further liberalized to provide for the admissibility of such records without the testimony of a custodian, namely, "by certification that complies with Rule 902(11), 902(12) or a statute permitting certification" (certified domestic and foreign records of regularly conducted activity).

Party Admissions

Another extremely important evidentiary rule that varies significantly in Federal practice from the State norm is the admissibility of party admissions.

The New York State Rule. In State practice, an admission is an act or oral or written statement made by a party prior to trial that is inconsistent with one of the relevant or material facts the party seeks to establish. Significantly, the statement must be against the interest of the person making the statement. In the State courts, an admission is an exception to the hearsay rule and is admitted against the declarant for the truth of the matter asserted.

See VIEW FROM THE BENCH, Page 15

'... IN WITH THE NEW'

From the President

Marc C. Gann

It's that time of year again ... making New Year's resolutions, to lose weight, stop smoking or be more charitable. It is a time filled with good feelings and intentions, and a desire to get off to a fresh start. At Domus, we are actively involved in this process; the New Year will bring some new focus but it is also bittersweet in that we will be saying farewell to a Domus fixture for the past quarter century or so. Nancy Fennell will be leaving us for the greener pastures of retirement.

For those of you who don't know Nancy, she has been one of the sunny, smiling faces of the Bar Association who helps to make our home so warm and welcoming. If you have ever attended a committee meeting, you have received notice of the meeting from Nancy. If you have served as a committee chair, you most certainly appreciated all of Nancy's hard work. And if you have had any involvement in the Judicial Screening process, you know how much effort and how invaluable Nancy has been in that endeavor. She is the staff member with the longest active service to the Association and its members. By the way, if you are a joke or story teller, as I am, she is the best audience you could ask for.

On behalf of the entire Association and its staff, I want to wish Nancy a long and happy retirement and thank her for her dedicated, enthusiastic and wonderful service to our profession. Job well done, Nancy! We will miss you greatly!

2011 also brings changes to the Nassau County Bar Association Assigned Counsel Defender Plan. We have been blessed to have had the services of Patrick McCloskey, Esq. as our administrator for the last ten years. Pat was my mentor in the Nassau County District Attorney's Office and a man who I credit for creating the foundation of my skills as a criminal attorney. Likewise, there are hundreds of lawyers throughout this county and beyond who were hired and trained in the District Attorney's Office by Pat. He brought those skills and talents to his role as Administrator of the 18B Plan, providing guidance, advice and training to a myriad of defense attorneys and family court practitioners. He was also one of the best MCs of special events that you could find. We wish Pat and his wife, Susan, much happiness in their retirement in Florida.

When Pat announced that he was retiring, our 18B Advisory Committee began an exhaustive search for his replacement. The list of truly exemplary candidates was overwhelming; we interviewed twenty-two of the finest practitioners around. Any one of them would have been a credit to the position and our Association but, Robert Nigro, Esq. was selected as our next administrator. Bob is someone that I have personally known for approximately 23 years. I met him when he was a law secretary to the Hon. Abbey Boklan and I was a young Assistant DA assigned to her part. He subsequently returned to the District Attorney's Office and retired as chief of their Civil Forfeiture Unit several months ago. Bob's experience as a defense attorney, law secretary, Assistant District Attorney and teacher ensure that the 18B Plan and its attorneys will have the experience and resources at their disposal to prosper in the 21st century. He is an outstanding, principled lawyer who will be an asset to our members and Association and whose door is always open. I welcome you, Bob, and look forward to working with you.

I wish you all the best for 2011.

Are you Suddenly Solo?

Attorneys who may be having difficulty finding full-time employment or find themselves unemployed following long careers are exploring the option of hanging out their own shingles and becoming solo practitioners. To help our members who may be looking to run their own solo firms, the Nassau County Bar Association along with the Long Island Council of Bar Leaders is presenting a special free program, "Suddenly Solo – What Do I Need?" on Tuesday, February 1, 4-8 p.m. at NCBA's headquarters in Mineola.

The program will feature a marketplace of hands-on help from more than a dozen service professionals in every area needed to set up a business, from accounting and banking to office supplies and real estate. Advisors will be available all afternoon, from 4 to 8 p.m. for anyone interested in looking at the newest products and services geared to solo practices.

In addition, two free CLE courses will be presented. The first, at 4 p.m., "UnGrievance – Do NOT Go There" is one CLE credit in ethics and will explain how to avoid the grievance process. A second session at 6 p.m. on "How to Run a Law Office" is one CLE credit in Law Practice Management and will provide the basics of running your own business, including how to form partnerships.

"We wanted to provide a full-service opportunity, everything an attorney may need to know and do to successfully open his or her own office," noted NCBA President Marc Gann.

"Suddenly Solo" is the second of a three-part series, entitled "Creating Opportunities for Success" presented by the Long Island Council of Bar Leaders. The third program in the series, "Rainmaking – How Do I Bring In The Clients?" will be held May 16, 2011. The first program, "Getting the Job – What Do You Want From Me?" was held last November.

In addition to NCBA, the Long Island Council of Bar Leaders is composed of the presidents of the Amistad Black Bar Association of LI, The Catholic Lawyers' Guild, Columbian Lawyers' Association, Criminal Courts Bar Association, Federalist Society, Fellowship of Christian Attorneys, Former Asst. District Attorneys Association, Great Neck Lawyers' Association, Jewish Lawyers' Association, Long Beach Lawyers' Association, Long Island Hispanic Bar Association, Nassau County Magistrates' Association, Nassau County Women's Bar Association, The Nassau Lawyers' Association, Nassau/Suffolk Trial Lawyers, New York Family Law Inn of Court, Theodore Roosevelt American Inn of Court, and Yashar.

The February 1 program "Suddenly Solo – What do I Need?" is free for NCBA members and for all members of the LI Council organizations, but registration is required. If you plan to attend, please send your name, address, phone, and the CLE courses you plan to attend, to events@nassaubar.org, or download a form at www.nassaubar.org.

Nassau Lawyer

The Official Publication of the Nassau County Bar Association
15th & West Streets
Mineola, N.Y. 11501
Phone: (516) 747-4070
Fax: (516) 747-4147
www.nassaubar.org
E-mail: info@nassaubar.org

Published by Long Island Business News
(631) 737-1700; Fax: (631) 737-1890
Publisher
John L. Kominicki
Associate Publisher
Kathleen Gobos
Graphic Artist
Nancy Wright

Nassau Lawyer (USPS No. 007-505) is published monthly, except combined issue of July and August, by Long Island Commercial Review, 2150 Smithtown Ave., Suite 7, Ronkonkoma, NY 11779-7348, under the auspices of the Nassau County Bar Association. Periodicals postage paid at Mineola, NY 11501 and at additional entries. Postmaster: Send address changes to the Nassau County Bar Association, 15th and West Streets, Mineola, NY 11501.

Personal Injury & Workers' Compensation Focus

Adding insult to injury

When the product that allegedly injured the plaintiff has been destroyed before trial

The best evidence in a products liability case is almost always the product itself. The plaintiff uses it to prove that the defective product caused plaintiff's injuries, and that it was manufactured by the defendant. The defendant uses the actual product to prove that it had not manufactured the product, or that the product was not defective. But what happens when the product has been destroyed before trial? Can the case proceed to trial without the most critical piece of evidence? As discussed below, court opinions vary widely based upon a variety of factors. This article will discuss cases involving a party's intentional or negligent destruction of evidence, known as spoliation, as well as cases in which evidence was innocently destroyed, and suggest public policy reasons for allowing a case to proceed to trial despite the innocent destruction of the product in question.

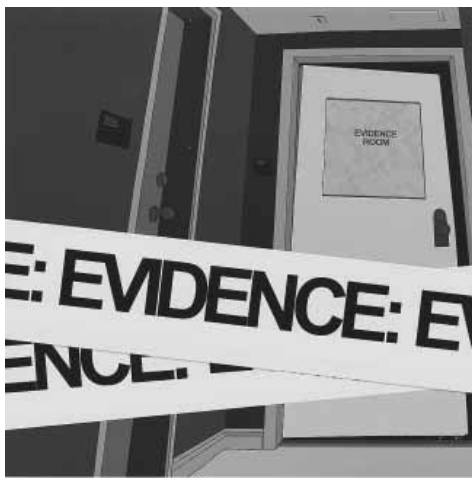
Madeline Klotz

The Status of the Law of Spoliation

When evidence is destroyed, it is usually destroyed by a party to the case. When this happens, the party who has not destroyed the evidence may seek sanctions against the destroyer. Sanctions for the destruction of evidence are provided under Section 3126 of the CPLR. They are also available under the common law doctrine of spoliation.

The CPLR: When a party has destroyed the product, it is unable to disclose the product as evidence. Section 3126 provides three possible remedies for the failure of a party to disclose evidence: first, that the issues will be resolved in favor of the party moving for sanctions; second, an order preventing the destroying party from supporting or defending claims or defenses, and from producing evidence; or, third, an order striking the pleadings, dismissing the action, or rendering a default judgment against the disobedient party. But, for a court to strike a party's pleading pursuant to the statute, the failure to produce the evidence must be "willful, contumacious or in bad faith." *Foncette v. LA Express*, 295 A.D.2d 471, 472 (2d Dept. 2002).

Common Law: Common law sanctions for spoliation of evidence allow striking the destroying party's pleading when the destroyed evidence is essential to the case and the non-destroying party is unable to defend itself with "incisive evidence." However, if the destroyed evidence is not essential or its destruction does not prejudice the other party, a lesser sanction of preclusion from proving the evidence's condition may be imposed. *See Mylonas v. Town of Brookhaven*, 305 A.D.2d 561, 562-63 (2d Dept. 2003); Foncette, 295 A.D.2d at 472; *Marro v. St. Vincent's Hosp.*, 294 A.D.2d 341, 341 (2d Dept. 2002).



While both the statute and common law allow the striking of a pleading, they have very different standards for imposing this drastic sanction. The distinctions are due to the different focuses of the two standards. The common law focuses its basis for sanctions on the prejudice to the party seeking sanctions, while the statute focuses on the intent or conduct of the party who caused the loss of evidence. *See Favish v. Tepler*, 294 A.D.2d 396 (2d Dept. 2002). Regrettably, many court decisions do not differentiate between them, resulting in conflicting opinions and confusing law.

For example, in *Kirschen v. Marino*, when the court considered whether to impose sanctions for spoliation, it stated:

> A party seeking a sanction pursuant to CPLR 3126 such as preclusion or dismissal is required to demonstrate that 'a litigant, intentionally or negligently, dispose[d] of crucial items of evidence ... before the adversary ha[d] an opportunity to inspect them', thus depriving the party seeking a sanction of the means of proving his claim or defense. The gravamen of this burden is a showing of prejudice.

16 A.D.3d 555, 555 (2005). While the court in *Kirschen* referred to the statute, its analysis was based on the common law standard of prejudice, rather than the statutory requirement of willful, contumacious or bad faith conduct. Because courts sometimes confuse these standards, a practitioner should clearly state the sanctions sought and the proper standard required for the imposition of sanctions.

The Rarer Case When Spoliation Is Not Involved

Most case law involves situations where one of the parties, usually the plaintiff, has either intentionally or inadvertently destroyed evidence. Under these circumstances, the court may apply either a common law spoliation analysis determining the prejudice to the party seeking sanctions or a statutory analysis determining whether a party willfully destroyed the evidence. However, there is a rare occasion when neither party is at

See EVIDENCE, Page 14

New workers' compensation medical treatment guidelines create serious issues for third party personal injury attorneys

Effective December 1, 2010, the New York State Workers' Compensation Board adopted new and comprehensive Medical Treatment Guidelines for injured workers applicable to cases both prior to and after December 1, 2010. *See* 12 NYCRR §324. How will these new Medical Treatment Guidelines impact personal injury attorneys with third party liability claims and an underlying workers' compensation case? In many cases, it may mean that current and future clients will lose medical treatment long before the liability claim reaches trial.

Background

The new Medical Treatment Guidelines are the result of a Task Force created during the 2007 Spitzer Workers' Compensation Reforms. The new guidelines can be found on the Workers' Compensation Board website at this link: http://www.wcb.state.ny.us/content/main/hcpp/MedicalTreatment Guidelines/2010TreatGuide.jsp

The guidelines can also be ordered in CD format from the Board.

All personal injury attorneys should know that the new workers' compensation Medical Treatment Guidelines only apply to low back, neck, shoulder and knee injuries for the time being. Thankfully, all other injuries, illnesses or body parts come under the old workers' compensation treatment standards for the time being. Therefore, if a client's injury involves a traumatic brain injury (TBI) as a result of a fall from a ladder, the new treatment guidelines do not apply. The stated goals of the new Medical Treatment Guidelines are to:

- Establish a set standard of medical care for certain injuries;
- Improve the quality of treatment/care to injured workers;
- Improve the speed of delivery of treatment;
- Reduce costs associated with treatment dispute resolution;
- Eliminate unnecessary medical treatments that do not contribute to a positive outcome;
- Speed return to work, whenever possible, for injured workers;
- Reduce overall medical costs within the workers' compensation system. (Currently, back, neck, shoulder and knee claims amount to approximately 60 percent of all medical costs, hence the initial application of the new treatment guidelines to these body parts.)

Troy G. Rosasco

The Guidelines

The only way to reduce medical costs is to reduce treatment In this respect, the new Medical Treatment Guidelines do just that. Prior to December 1, 2010, it would be common for an injured worker with a herniated lumbar disc to receive months (if not years) of conservative care such as physical therapy, chiropractic, epidural injections, narcotic pain relief (or a combination of all the above) if surgery was not warranted.

Under the new Medical Treatment Guidelines, however, physical therapy is limited to a maximum of 40 visits for the life of the case, absent a "variance" (to be discussed later in this article). Chiropractic care is similarly capped for the life of the claim, absent a variance. Narcotic pain medication is limited to just two weeks. No longer will it be possible for workers' compensation attorneys to petition the Workers' Compensation Board for ongoing treatment ad infinitum while a claimant's third party lawsuit is pending trial.

In contrast to no-fault claims (in

See GUIDELINES, Page 16

Write for Nassau Lawyer, earn CLE credit

NCBA members can earn up to half their required CLE credits by contributing articles to Nassau Lawyer.

The CLE board is authorized to award credit for "legal research-based writing" for publication that "contributed substantially to the continuing legal education of the applicant and other attorneys." 22 NYCRR 1500.22(i).

Christopher J. DelliCarpini

The CLE Board Regulations define "legal research-based writing" as "writing that has as its primary purpose to increase the professional legal competency of attorneys in ethics and professionalism, skills, law practice management and/or areas of professional practice." This does not include editing another's writing, publishing decisions, writing for general circulation publications, and writing published by the applicant or the applicant's firm.

Once your article is published or has been accepted for publication, complete the Application for Publication Credit and submit it to the CLE Board along with a copy of the writing (and English translation, if necessary) and proof of publication or acceptance for publication.

Attorneys can earn one CLE credit hour for each 50 minutes of research and writing, up to 12 credit hours in any two-year reporting cycle. Credit is awarded as of the date of publication or acceptance for publication.

The CLE Board Regulations and the Application for Publication Credit are available online at www.nycourts.gov; click on Attorneys, then CLE.

For the Nassau Lawyer submission guidelines e-mail Editor/Production Manager Mindy SantaMaria at msantamaria@nassaubar.org.

BOLD ...

Continued From Page 1

neediest residents.

BOLD representatives will receive the award at a special Bar Leaders Breakfast during the NYS Bar Association Annual Meeting in New York City at the end of January.

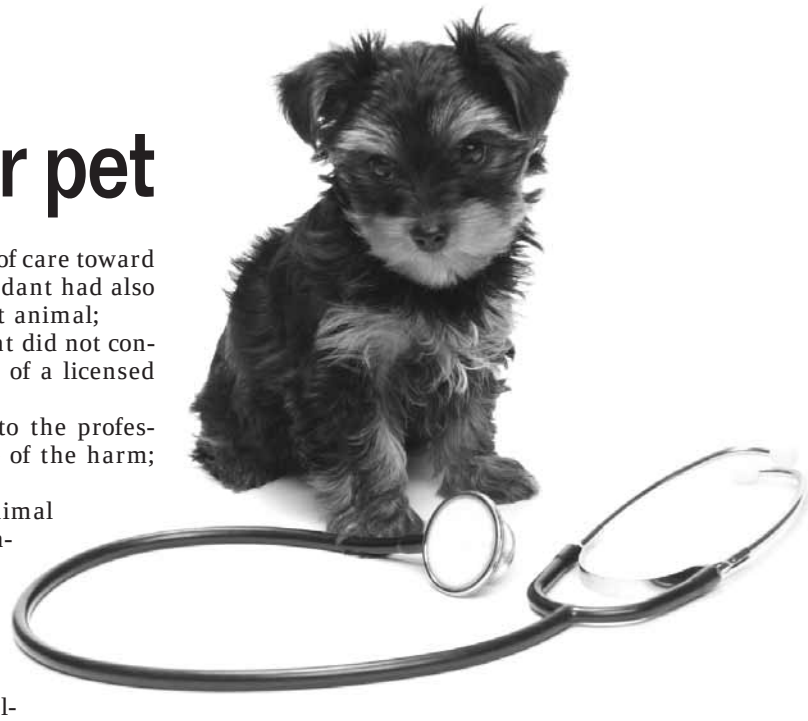
NCBA BOLD Task Force Members and Fluent Languages

Co-Chairs
Howard Brill
Linda Nanos

Miguel Alvarado	Spanish
Jasleen Anand	Punjabi, Hindi
Ali Assad Bhatti	Hindi, Urdu
Isaac Blachor	Hebrew
Matthew Blum	Hofstra Law School student
Rina Capicotta	Italian
Alice Jakyung Choi	Korean
Anna Demidchik	Russian
Matin Emouna	Farsi, Spanish
David Gabor	NCBA Membership Committee
Annilus Gilot	Haitian Creole
Amy Hsu	Cantonese, Mandarin
Sarika Kapoor	Hindi, Urdu
Evgeny Krasnov	Russian
Martha Krisel	Nassau County Deputy Attorney for Special Projects
Arshad Majid	Hindi, Urdu
Mili Makhijani	Punjabi, Hindi, Urdu
Thomas Maligno	Touro Law School
Sakine Oezcan	Turkish
Lawrence O. Ogbutor	Ibo, Nigerian dialects
Yvette Pacheco	Spanish
Elizabeth Pessala	Indian languages
Constanza Pinilla	Spanish
Susan Katz Richman	Supreme Court
Joan Robert	French, Spanish
Eleuterio Rolon	Spanish
Olga Ruh	Russian
Sabeti, Sean	Farsi
Sherli S. Saed	Farsi, Persian
Carrie Solages	Haitian Creole
Andrij Szul	Ukrainian, Polish
Peter Tomao	Deceptive Practices
Yuh Tyng Tsuei	Mandarin Chinese
Helen Voutsinas	Greek
Maurice Williams	Spanish
Hon. Michele Woodard	Supreme Court
Mitra Zervos	Farsi
Lisa Zheng	Cantonese, Mandarin dialects

Personal Injury & Workers' Compensation Focus

Professional malpractice and your pet



In today's world, it is not uncommon to hear of someone seeking legal recourse for an injury he or she believes is the result of medical malpractice. But when the injured party is the family pet rather than Uncle Joe or Aunt Deanne, what are the options with regard to a professional malpractice claim? Although we don't hear about them very often, under the proper circumstances, a pet-owner can bring an action in malpractice against a veterinarian and/or veterinary practice.

Laura M. Schaefer

Similar to a medical doctor or lawyer, a veterinarian is a member of a learned profession and, as such, he or she is capable of committing professional malpractice. For an action to be legitimately based in malpractice, the issue, or issues involved, must deal with matters that require special skills or scientific knowledge beyond the understanding of the average layperson. When injury occurs to an animal while under the care and treatment of one who holds himself or herself out as a veterinarian, the legal cause of action against that person will be classified as malpractice and he or she may be judged by malpractice standards. The New York State licensing laws for a Doctor of Veterinary Medicine list the actions in treating an animal that require a veterinary license. As such, malpractice law gives some guidance as to the actions, or omissions, on which one may base such a claim. Of course, the veterinarian only has a professional duty to his or her animal patients. Therefore, if injury to a human being occurs in the veterinarian's office, the general negligence standards will apply.

So what are the professional malpractice standards and what must be proven to recover damages for the pet-owner of the injured animal? The elements include the following:

• That the defendant was under a duty of care toward the animal who was injured and the defendant had also accepted the responsibility of treating that animal;

• The acts or omissions of the defendant did not conform to the professional standard of care of a licensed veterinarian;

• The defendant's failure to conform to the professional standard was the proximate cause of the harm; and

• The injury or harm to the animal resulted in damages to the plaintiff in addition to the animal.

Since a veterinarian does not have a duty to provide treatment, his or her unwillingness to do so would not result in a cause of action for malpractice. However, once the decision to treat the animal is made, the veterinarian is under a duty to continue such treatment, or to at least inform the owner or caretaker if he or she decides otherwise.

Standard of Care

In any professional malpractice action, the standard of care and treatment is an important aspect of the plaintiff's burden of proof. While the legal standard for veterinary malpractice varies by jurisdiction, the New York courts have established that the "reasonableness standard" applied to medical malpractice actions also applies to cases of veterinary malpractice. Therefore, at the very least, a New York veterinarian is expected to use reasonable and ordinary care and diligence in the care and treatment of his or her animal patients and the outcome of plaintiff's case will rely on his or her expert's ability to prove a deviation from that standard.[1]

Res Ipsa Alternative

In addition, the New York courts have allowed a plaintiff to forego using an expert to show that the veterinarian's actions were the proximate cause of harm to the animal. Under a theory of *res ipsa loquitor*, defined in Latin as, "the thing speaks for itself," New York courts have allowed cases to proceed without the testimony of an expert when the court finds the actions of the veterinarian were so evidently wrong that the use of an expert would prove unnecessary. Specifically, in *Mathew v. Klinger*, the Second Department held that "no expert testimony was required regarding the standard of care." In that case, the plaintiff took her seven-year-old Pekinese to defendant's office soon after she had found the dog chewing on a bone it had taken out of the garbage. Once there, the dog began making noises and crying. Although plaintiff told defendant of the dog's prior actions, the defendant did not perform an x-

See PET, Page 19

ATTENTION MEMBERS!

Your Bar Association Can Help you in Dozens of Ways!!

A Dozen FREE

- FREE membership in more than 50 committees
- FREE weekly e-bulletin
- FREE ethics hotline
- FREE confidential assistance for personal problems
- FREE advanced notice of job listings
- FREE real estate classifieds
- FREE monthly Nassau Lawyer
- FREE help on legal issues
- FREE special events
- FREE directory listing
- FREE networking at Domus
- FREE connections to form partnerships or find office space

A Bakers Dozen Services

- Domus Dining Charge Card
- Domus Meeting Facilities
- WE CARE Fund
- Veterans' Legal Advocacy Project
- Mortgage Foreclosure Pro bono Project
- Legal Career Center
- Speakers Bureau
- Lawyer Referral Information Services
- Membership Mailing Labels
- Pro Bono Opportunities
- Lawyer in the Classroom
- Student Mentoring Projects
- Mock Trial Competition

A Dozen + PRODUCTS & SERVICES

- NAL CLE Seminars & products
- 1-800-Flowers.com & 1-800-baskets.com
- AVIS, Budget, Hertz car rentals
- Bank of America Credit Cards
- Brooks Brothers
- Capital Payments– Electronic Payment Processing
- CBS Coverage Group– professional liability insurance
- Champion Office Suites– virtual office solutions
- Davis Optical
- Equinox Fitness
- Healthtrax Fitness Center
- Jamar Printing
- North Park Consultants– medical, income replacement and long term care insurance
- Nassau Educators Federal Credit Union
- Paragon Group– corporate real estate and tenant representation
- Realtime Reporting, Inc.
- Staples– online office supplies
- Thompson-West research
- UPS

Contact the Bar Association at 516-747-4070 or www.nassaubar.org for more information

IN BRIEF

Member Activities

Lewis Johs Avallone Aviles, LLP founding partner Frederick C. Johs was elected President of the Advancement for Commerce Industry & Technology, Inc. ("ACIT"). Mr. Johs previously served on the Board of Directors of ACIT, one of Long Island's largest business networking organizations founded in 1963. Mr. Johs, who is also the firm's senior trial counsel handling complex litigation including medical malpractice, product liability, construction, labor law and commercial matters, has been recognized as one of the ten (10) best trial lawyers on Long Island and was named to Best Lawyers for the seventh consecutive year and to Super Lawyers for the third consecutive year. In addition, he is a member of the Grievance Committee for the Tenth Judicial District as well as a member of the Board of Trustees of The John T. Mather Memorial Hospital, the Board of Governors of Touro Law School, the Board of Directors of Little Flower Children and Family Services of New York and served as the Village Attorney for the Village of Port Jefferson.

Hon. Stephen L. Ukeiley

Donna-Marie Korth, a partner in the Litigation Practice Group at Certilman Balin Adler & Hyman, LLP, has been appointed to the Bar Association's Judiciary Committee. Ms. Korth is the former Dean of the Nassau Academy of Law, the educational arm of the Bar Association, and has moderated and lectured at several CLE seminars. She was recently honored as one of the Long Island Business News' Who's Who in Women In Professional Services. In 2006, Ms. Korth, who earned her Juris Doctor, with honors, from St. John's Law School, was named Touro Law Center's Outstanding Pro Bono Attorney.

James D. Garbus and Thomas R. Slome have been named co-Chairs of the Corporate Finance Department of Meyer, Suozzi, English & Klein, P.C. Mr. Garbus, who represents both borrowers and lenders in lending transactions and provides day-to-day general corporate representation, is also a member of the firm's Corporate law practice. Mr. Slome concentrates his practice in the areas of bankruptcy, business reorganization and loan restructuring.

Richard G. Satin, of Counsel to Ruskin Moscou Faltischek, P.C. where he serves as a member of the Corporate & Securities Department and chair of the firm's Medical Device practice group, was recently sworn-in as a member of the 2011 Ronald McDonald House of Long Island Board of Directors. Mr. Satin, who earned his Juris Doctor from the Benjamin N. Cardozo School of Law, has previously served as Vice President, General Counsel and Secretary of Medical Action Industries Inc. in addition

See IN BRIEF, Page 19

COMMITTEE REPORTS

Young Lawyers

Meeting Date: 11/18/10

Brian P. Sullivan & Terrence Tarver, Co-Chairs

Past NCBA president Christopher T. McGrath, Esq., presented to a well-attended audience a CLE lecture entitled "How to Bring in Business Ethically." Mr. McGrath provided insight into obtaining and maintaining business, as well as the "do's and don'ts" based upon his many years of legal practice as well as his experience from being a member of the Grievance Committee of the Tenth Judicial District.

Construction Law

Meeting Date: 12/7/10

Adam L. Browser & Edmond D. Farrell, Co-Chairs

The committee continued its discussion of the newly enacted Construction Industry Fair Play Act, with a focus on how that law would be enforced and its impact upon owners and developers. Also discussed during the meeting was the distinction between general contractors and construction managers, as well as the Municipal Home Rule Law and its impact on county licensing requirements.

Tax Law

Meeting Date: 12/7/10

Yvonne R. Cort, Chair

Joint meeting held with the Criminal Court, Law and Procedure Committee, featuring Bernard S. Mark, Esq., an experienced litigator formerly with the Internal Revenue Service District Counsel, as the guest speaker. Mr. Mark delivered a lecture entitled "An Overview of State and Federal Tax Crimes: How to Keep Your Client Out of the Big House" and presented an informative seminar on substantive issues, including recently enacted legislation.

Next meeting will be a one-hour evening panel discussion on Tuesday, January 18, 2010, at 6:00 p.m., to be held jointly with the Surrogate's Court, Estates and Trust Committee and the Elder Law Committee, with tax aspects of various trusts and related elder law strategies anticipated to be discussed. Other upcoming meetings being scheduled will highlight topics such as tax aspects of selling a business and feature an IRS update.

Michael J. Langer

Hospital & Health Law

Meeting Date: 1/6/11

Edmond D. Farrell & Ron Lebow, Co-Chairs

The committee intends to conduct a CLE program in May, 2011, titled "The Changing Healthcare Environment and How It Affects You and Your Clients." Anticipated topics include the restructuring of the healthcare delivery system, changing payment policies, electronic health records, billing mistake provider audits and other related initiatives.

Michael J. Langer, an associate in the Law Offices of Kenneth J. Weinstein, is a former law clerk in the United States Court of Appeals for the Second Circuit, and a former Deputy County Attorney in the Office of the Nassau County Attorney. Mr. Langer's practice focuses on matrimonial and family law, criminal defense and general civil litigation.

Personal Injury & Workers' Compensation Focus

Tort trends: Why NY's Late Notice of Claim Statute routinely denies infant medical malpractice plaintiffs their day in court

By David A. Mayer and Christopher McGrath

New York's Late Notice of Claim Statute poses hidden hazards for the unwary personal injury practitioner handling infant medical malpractice proceedings against municipalities, particularly when coupled with the strict construction of the statute followed by appellate courts. The simple fact of a patient seeking medical care at a public hospital, rather than a private one, automatically establishes significant obstacles to the commencement of a medical malpractice action. It is our belief that the harsh result of such claims being barred for public hospital patients only, while allowing private hospital patients more time to take legal action, thwarts the important goal of equal access to justice for all.

N.Y. General Municipal Law 50-e(5)

Under New York law, before a tort claim can proceed against a public corporation, city, county, town, village, fire or school district, the plaintiff must serve a notice of claim pursuant to Municipal Law §50-e(5) within 90 days of the date of accrual of the tort. The statute is intended to allow the public entity the opportunity to investigate and obtain evidence promptly before claims become stale and the memory or availability of witnesses becomes compromised.[1] Late service of a notice of claim is a nullity if made without leave of the court. Prior to 1976, courts had no general discretion to allow late service of a notice of claim, and the grounds upon which late service might be granted were narrowly construed. Professor David Siegel noted that case annotations in McKinney's were literally a "graveyard of meritorious claims."[2] The 1976 legislative amendment to §50-e(5) expanded judicial discretion to allow a late notice of claim, so long as service took place before expiration of the statute of limitations period, subject to applicable tolls and extensions. The Court of Appeals has held that the time to apply for leave to serve a late notice of claim is the same as the 1 year 90 day limitation period for bringing a tort action against a municipality. Furthermore, because C.P.L.R. 208 grants an infancy toll of a maximum of 10 years for medical malpractice actions, this 10 year period represents the outer time limit during which an infant-plaintiff must apply for leave to file a late notice of claim or find the action barred by a potential jurisdictional defect.[3]

Gen. Mun. Law §50-e(5) expressly empowers a court acting in its discretion to consider, in particular, whether the public corporation acquired actual knowledge of the facts underlying the claim within 90 days or a reasonable time thereafter. The statute, as currently worded, appears to elevate the "actual knowledge" factor to a higher level of significance.[4] The court must also consider all relevant facts and circumstances, including infancy and substantial prejudice to the municipality's ability to defend the claim. The 1976 amendment to § 50(e)5 expressly dropped the requirement of a causal connection or nexus between infancy and the delay, and directed courts to simply consider "whether the claimant was an infant."

Christopher McGrath

Impact on Infant Medical Malpractice Plaintiffs

It is our contention that there is an inherently unreasonably in requiring infant-plaintiffs to file a timely notice of claim without providing recourse in the event of a missed deadline, as the infant's rights are determined by an act that the minor is legally, physically and intellectually incapable of doing.[5] Although there is specific statutory discretion to allow a late filing, New York appellate courts have stubbornly refused to follow the Legislature's direction in permitting these claims to proceed. A uniquely vulnerable class of infant-plaintiffs consists of brain-damaged victims of obstetrical negligence, whose full extent of injury may not be evident until developmental milestones are reached years later, long after the timely filing period has expired. The paradox is that a municipality may escape liability when injuries suffered by the plaintiff are so catastrophic, and their manifestation so delayed, as to render strict compliance with the terms of the notice of claim statute impossible.

See TORT, Page 17

Not-so-strict liability: *Morton v. State* and the 'Nexus' requirement in labor law cases

By Christopher DelliCarpini and John DelliCarpini

Time was, property owners were held strictly liable under the Labor Law for any qualifying work-related injury simply because they owned the site. After *Morton v. State*, 15 N.Y.3d 50 (2010), however, owners may avoid liability under Labor Law if they lack "nexus" to the work performed. This appears to replace the previous standard for Labor Law liability without providing a new test of comparable clarity. Nevertheless, plaintiffs and defendants can take steps to ensure against uncertainty.

Christopher J. DelliCarpini

Coleman: The 'Bright Line Rule'

For years the Court of Appeals applied a "bright line rule": fee owners were strictly liable for Labor Law violations on their property. This rule grew out of the plain language of the two Labor Law provisions most commonly cited by injured workers.

Section 240(1), the "Scaffold Law," requires that "All contractors and owners and their agents ... in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure" provide adequate safety devices to those employed in such work. *Blake v. Neighborhood Housing Service*, 1 N.Y.3d 280 (2003). Section 241(6) requires "All contractors and owners and their agents... when constructing or demolishing buildings or doing any excavating in connection therewith" to comply with specific provisions of the Industrial Code. *Ross v. Curtis-Palmer*, 81 N.Y.2d 494 (1993). Owners of one- and two-family dwellings who do not direct or control the work became exempt by amendment in 1980.

In *Coleman v. City of New York*, 91 N.Y.2d 821 (1997), the Court of Appeals first characterized its "bright line rule." Coleman, an employee of the New York City Transit Authority, was injured while repairing an awning at a Brooklyn train station. The property on which the station stood was leased to the Authority from New York City pursuant to statute.

Quoting *Gordon v. Eastern Railway Supply Co.*, 82 N.Y.2d 555 (1993), the Court of Appeals cited "the bright line rule that 'when the Legislature imposed the duties of Section 240(1) on 'all...owners' it intended to include owners in fee even though the property might be leased to another.'" 91 N.Y.2d at 822-23. The Court in *Gordon* relied on *Celestine v. City of New York*, 59 N.Y.2d 938 (1983), which held a property owner liable despite the fact that the accident occurred on an easement, following *Allen v. Cloutier Construction*, 44 N.Y.2d 290, 301 (1978).

In *Coleman* the City argued that, under the statute that created its lessor-lessee relationship with the Authority, the City had no power to control or supervise the plaintiff's work. The Court of Appeals found this exception nowhere in the Labor Law, however, and held: "We therefore decline to exempt the City – which is in fact the owner – from the plain word and reach of the statute, leaving that for the Legislature if it so chooses." 91 N.Y.2d at 823.

While *Coleman* may seem harsh, it has the virtue of clarity. In three decisions leading up to Morton, however, the Court of Appeals muddied the waters considerably.

Abbatiello, Sanatass, Scaparo: The 'Nexus' Requirement

In the first decision, *Abbatiello v. Lancaster Assoc.*, 3 N.Y.3d 46 (2004), a cable technician was injured while on

See NEXUS, Page 20

Peter's Good Works Recognized

Last month, Peter Schweitzer, Director of NCBA's Lawyer Assistance Program, received the 2010 Sweisgood Award from the Suffolk County Bar Association's Lawyer Helping Lawyer Committee. Schweitzer was honored for his deep commitment, enthusiasm and inspiration to the legal profession, serving as LAP director since 2006. LAP is a special program that provides free confidential assistance to attorneys, judges, law students and immediate family members on issues including alcoholism, drug abuse, depression, stress, gambling, eating disorders and practice closings. For more information, call the Confidential Hotline 1-888-408-6222.

Pro Bono Attorney of the Month

Craig E. Feldherr

By RHODA SELVIN

Craig E. Feldherr began volunteering in the Landlord/Tenant Attorney of the Day Program in 2001 and has never let up. The Pro Bono Attorney of the Month for January 2011, he was given the same honor in December 2001 (after only ten months in the program) and again in July/August 2006. Since the latter time he has served more than 219 hours on 95 cases. Feldherr maintains that landlord/tenant law is one of the most interesting to work in. "You constantly have the ability to shape the law, for it is constantly evolving." The vast majority of cases that Landlord/Tenant volunteers work on require fewer than two hours, though from time to time a volunteer takes on a more time-consuming case. Feldherr has done this several times; and one of last year's cases was so compelling that he spent over twenty hours on it in a three-month period.

The case involving a single mom and a very complex family situation, living in a rent stabilized apartment owned by her estranged father, was filled with emotions in addition to the legal issues.

"This was one of the most difficult cases I've worked on because of the emotions involved," he said.

Feldherr received his bachelor's degree from the University of Pittsburgh in 1987, and his law degree from the Jacob D. Fuchsberg Law Center at Touro College in 1990. He joined his father's law firm as a partner in 1991. He is a member of the Nassau County Bar Association and the New York State Credit Union League.

His main avocation is poker. A longtime, serious player, he participates in tournaments, charity events, and online along with his local games. He proudly reported making the final table in two major competitions in 2008 – a special achievement.

Feldherr's wife Deena is a pre-school teacher. Residents of Merrick, the couple have a 12-year-old son and a 9-year-old daughter.

Craig Feldherr's enthusiasm for the Landlord/Tenant Project and this area of law fuels his commitment to the indigent clients he represents. The Volunteer Lawyers Project is pleased to honor him as Pro Bono Attorney of the Month for the third time.

The Negligence Corner

Avoiding deposition disasters

Editor's Note: The Nassau Academy of Law will offer a program on Depositions as part of their annual Bridge-the-Gap Program to be held January 22-23, 2011.

As the contested facts in a negligence case are crucial to forming the basis of or blocking a potential summary judgment or other motion, asking more questions and preparing your client to answer those questions is more important than ever. The deposition testimony is also extremely important to both plaintiffs and defendants in evaluating the strengths and weaknesses of their case and in trying to start or successfully conclude settlement negotiations. Attorneys now take advantage of the relatively new deposition rules to broaden the scope and detail of their questions. If witnesses are not prepared to answer those questions, many claims or defenses may be weakened or lost.

The following are some suggestions for asking additional questions concerning potentially important issues in several types of negligent cases, and for attorneys representing the witnesses to prepare them to answer these questions. The answers of the witnesses to these additional questions, along with the usual routine questions, should be closely followed by counsel. The answers may suggest many additional questions that could lead to additional useful information. The goal of the deposition is to ask all pertinent questions, especially because you will rarely have another opportunity to do so.

Kenneth J. Landau

Concerning the Force of the Impact

- Movement of plaintiff within vehicle
- Physical contact of plaintiff with interior of vehicle
- Damage to the interior of the vehicle or windows
- Use and effectiveness of restraints
- Pre-accident position of plaintiff in vehicle
- Pre-accident adjustment of seats and restraints
- Pre-accident distance of plaintiff from dashboard and steering wheel
- Effectiveness of restraints during accident
- Discharge of airbags
- Bruises, bleeding, or damage to clothing from impact

Concerning Prior Accidents

- Did each current doctor ask plaintiff about injuries, and treatment of injuries from prior accidents
- Did plaintiff tell each current doctor about injuries, treatment or disability from prior accidents
- Hospital visits, medical treatment, MRIs and x-rays in prior accidents
- Prior lawsuits, claims, no-fault files, and depositions
- Scope and extent of prior treatment and disability
- Last treatment for prior accident

Concerning Serious Injury Threshold (Insurance Law § 5102(d))

- Details of work and leisure activities in year before accident
- Frequency and intensity level of those activities
- Efforts to resume activities
- Medical advice concerning resumption of activities
- Details asked by and provided to treating doctors about scope of work activities
- Reason for disability from work activities
- Availability of limited duty work or special accommodations at work
- Receipt of unemployment or disability benefits prior to, at time of, and subsequent to accident
- Applications for other jobs
- Taking civil service written or physical exams
- Child care or other family duties performed
- Present activities

Other Questions Concerning Disability

- Family doctor
- Other health insurance
- No-fault denial or cut-off
- Are bills being submitted to or paid by other insurance
- Travel for business or pleasure
- Attendance at any type of school or training
- Injections as part of treatment
- Exact circumstances of first visit to health care facility
- Home exercises when given and extent performed
- Utilization of braces or other medical devices
- How travel to work or to medical offices
- Stairs at home

Slip-and-Fall Cases

- Visibility of defect (or distraction from it)
- Familiarity with area
- Alternative routes
- Distractions, e.g., cell phone, iPod, texting
- Exact location of defect and exact nature of defect
- Damage to footwear, clothing, and anything carried

Kenneth J. Landau is a partner in the firm of Shayne, Dachs, Corker, Sauer & Dachs, LLP, concentrating in negligence, insurance and medical malpractice cases on behalf of plaintiffs. He is a past Dean of the Nassau Academy of Law and the host of the weekly radio show Law You Should Know, broadcast Mondays at 4:00 p.m., Tuesdays at noon and Sundays at 7:00 a.m. on 90.3 FM radio, WHPC or at www.itunes.ncc.edu.

NASSAU ACADEMY OF LAW

...Because Law Sch
just the be

Bridge the Gap Weekend

"From Theory to Practice"

For Recent Law Grads, Newly Admitted & Seasoned Attorneys

January 22-23, 2011

SATURDAY, JANUARY 22, 2011

COMMERCIAL DIVISION PRACTICE
• qualifying as a commercial case
• motion practice • practice pointers
John P. McEntee, Esq., Farrell Fritz, Uniondale
Madeline B. Pomerantz, Esq., Law Clerk to Hon. Timothy S. Driscoll, Justice, Commercial Division, Supreme Court, Nassau
1.0 Credit in Professional Practice

MATRIMONIAL & FAMILY COURT CONNECTION
Analysis of the new provisions in the DRL and the Family Court Act and how they impact on handling matters in the Supreme Court and Family Court. Provisions reviewed will include:

- temporary maintenance
- interim legal fees
- automatic orders
- orders of protection

Mary Ann Aiello, Esq., Mary Ann Aiello, Garden City
1.0 Credit in Professional Practice, .5 Credit in Skills, .5 Credit in Ethics

POWERFUL WRITING TECHNIQUES TO HELP YOU PERSUADE JUDGES AND WIN CASES
The ability to write forcefully and effectively is critical to your success as a lawyer. Learn to write more persuasively by the same powerful techniques that copywriters have relied on for years. Discover what these techniques are and how to supply them.
Lisa Solomon, Esq., Ardsley, NY
1.0 Credit in Skills

A "GALLIMAUFRY" OF REAL ESTATE PRACTICE POINTS
...from residential to commercial
Wayne G. Edwards, Esq., Abrams, Fensterman, Fensterman, Eisman, Greenberg, Formato & Einiger, LLP, Lake Success
1.5 Credits in Professional Practice; .5 Credits in Ethics

ADMINISTRATIVE HEARINGS
DWI: Refusal Hearings; Safety Hearings; Traffic Violations Bureau...and more!

Daniel B. Friedman, Esq.
Law Offices of Daniel B. Friedman, Mineola
1.0 Credit in Skills

ELDER LAW: THE ROLE OF A COURT EVALUATOR

- understand the basics
- the appointment process at Part 36b
- the role of the court evaluator
- how to prepare the report

Mary P. Giordano, Esq.
Franchina & Giordano, PC, Garden City

ETIQUETTE AND ETHICS— BE CIVIL!
Proper conduct with clients and adversaries.
Ralph A. Catalano, Esq.
Catalano, Gallardo & Petropoulous, LLP, Jericho

SUNDAY, JANUARY 23

CRIMINAL LAW: FROM ARRAIGNMENT TO DISPOSITION
Discussion of both misdemeanor and felony arraignments and guilty pleas and sentencing
Joseph A. Gentile, Esq., Frankie & Gentile, Mineola
Daniel W. Russo, Esq., Collins, McDonald & Gann, PC, Mineola
2.0 Credits in Professional Practice

ALL ABOUT ADR
Mediation is a little understood, yet very real and effective alternate means to resolve disputes. Parties save significant time, money and turmoil by avoiding traditional adversarial approach taken in litigation.

DEAN'S HOUR

THE "INS AND OUTS" OF MEDICARE & MEDICAID

Monday, January 24, 2011

Noon-2:30 p.m. *Lunch & Discussion*

- History of Medicare claims prior to 2003 and *Ahlborn*
- Practices to be followed when filing a claim
- Medicare Set-Aside (MSA)
- Workers Compensation
- Non-Workers Compensation
- Medicaid Liens
- Facts of *Ahlborn* and New York's Medicaid Lien Law
- Negotiating Medicaid Liens

Speakers
John M. Tomsky, Esq.
Sullivan Papain Block McGrath & Cannavo P.C. New York
David S. Sheiffer, Esq.
Wilson Elser LLP, New York
Moderators
Deanne M. Caputo, Esq.
Chair, NCBA Plaintiff's Roundtable
Sullivan Papain Block McGrath & Cannavo,P.C., Mineola
Jay D. Jacobson, Esq.
Vice Chair, NCBA Plaintiff's Roundtable
Foley Griffin Jacobson & Faria, LLP Garden City

2.0 Credits in the areas of professional practice.

LEGAL WRITING CHECK-UP:
A WRITING WORKSHOP

Monday, February 7, 2011
5:30 - 7:30 p.m.

Are your briefs anemic and lacking pep? Does drafting a contract raise your blood pressure? This workshop, aimed at lawyers in all practice areas, is designed to resuscitate your writing skills. The session will include useful tips for drafting, editing and revising your written work product. Tips on crafting effective e-mails will also be included.

The workshop will be taught by Amy Stein, a Professor of Legal Writing at Hofstra Law School for over a decade.

Please join us for an enjoyable event which should also add new health and vigor to your writing!

****NOTE: Participants are asked to e-mail a short selection of their own writing (three pages maximum) at least one week prior to the event. The instructor will review the samples ahead of time and comment on a few illustrative ones (anonymously!) during the program.**

Speaker: *Amy R. Stein*
Professor of Legal Writing and Program Coordinator; Assistant Dean for Adjunct Instruction, Hofstra Law School

2.0 Credits in skills or areas of professional practice.

TRY IT!

A 6-session hands-on effective trial skills, fr

Wednesday, February 16
Wednesday, March 16
Monday, April 4
Wednesday, April 27
Wednesday, May 18
Wednesday, June 15
5:30 - 8:30 p.m. *Includes Light Supper*

Wednesday, February 16
INTRODUCTION
Hon. Andrew M. Engel, Judge, District Court
Dean, Nassau Academy of Law
JURY SELECTION LECTURE
Jeffrey S. Lisabeth, Esq., Mineola

Wednesday, March 16
CONDUCT VOIR DIRE WORKSHOP
OPENING STATEMENTS LECTURE
David J. Dean, Esq.
Sullivan Papain Block McGrath & Cannavo, P.C. NY

Monday, April 4
DELIVER OPENINGS WORKSHOP
DIRECT & CROSS EXAMINATION LECTURE
Marvin Salenger, Esq., Salenger Sack Schwartz & Kimmel, Woodbury
Ben Rubinowitz, Esq.
Gair Gair Conason Steigman Mackauf Bloom & Rubinowitz, New York

ol was
nning

January - February 2011

rn the techniques!
yl-Anne Sastow, Esq., Sastow Mediation and
aboration Center—Nassau, Suffolk, NYC
Credit in Skills

123's AND ABC's OF FINANCIAL
TEMENTS: ENTITIES & TAXES
s will be on the rudiments of business law.
ert S. Barnett, Esq.
ell, Barnett, Matalon & Schoenfeld, Jericho
Credit in Skills

ABC's of DEPOSITIONS
s, strategy and examples of questions you should
and issues you must cover at depositions in an
accident, slip & fall, construction accident and in
r types of negligence cases. **Added Bonus:** "Torts
ore than a course" - Types of legal jobs in the
d of torts.
neth J. Landau, Esq.
yne, Dachs, Corker, Sauer and Dachs, Mineola
ey J. Epstein, Esq.,
ional Attorney, Nationwide Insurance, Woodbury
ert J. Giard, Esq.
Offices of James J. Toomey, New York
Credits in Skills; .5 Credit in Ethics

AT THE BENCH WANTS!
ellar panel of Nassau County Judges will discuss
courts and expectations of attorneys.
Andrew M. Engel, Judge, District Court;
n, Nassau Academy of Law
redits in Skills; .5 Credits in Ethics

rkshop series to learn and develop
jury selection through summation.

GET THE TOTAL TRIAL EXPERIENCE!

OPEN TO ALL ATTORNEYS, ESPECIALLY IF YOU'VE NEVER HAD THE OPPORTUNITY TO TRY A CASE

Thursday, April 28
CONDUCT DIRECT & CROSS OF WITNESS WORKSHOP

Wednesday, May 18
CONDUCT CROSS & DIRECT OF WITNESS WORKSHOP
SUMMATIONS LECTURE
Robert G. Sullivan, Esq., Sullivan Papain Block McGrath & Cannavo, P.C., Mineola

Wednesday, June 15
DELIVER SUMMATIONS WORKSHOP

* * * * * * * * * * *

16.0 NYMCLE credit hours in skills or areas of professional practice
**Participants completing this course will receive a Certificate of Completion from the Nassau Academy of Law.*

End of Year CD/DVD Sale!

15% OFF
all 2010 NAL CDs & DVDs

Order Now!
See ad page 21

Nassau Academy of Law ORDER FORM

TO REGISTER OR ORDER: Circle your selections in the correct columns and total amount due.
- **By Check:** Make checks payable to NAL and mail with form to NAL, 15th and West Streets, Mineola, NY 11501
- **By Credit Card:** FAX completed form with credit card information to 516-747-4147
- **Order Online:** www.nassaubar.org >MCLE>Calendar, Reservations

Seminar Reservation Form

Date	Seminar Name	P	E	TOTAL Credits	Member	Non-Member	5 Session Ticket
Jan. 22-23 - Bridge the Gap	Recent law school grads, attorneys admitted less than 2 years, law students				$245	$245	~
	Attorneys admitted over 2 years				$375	$485	~
Single Session*		1.0		1.0	$40	$65	~
Single Session*		2.0		2.0	$75	$100	~
Jan. 24	The Ins and Outs of Medicare and Medicaid	2.0		2.0	$55	$75	~
Feb. 7	Legal Writing Check-Up: A Writing Workshop	2.0		2.0	$65	$100	Yes
6 Sessions	Try It!	16.0		16.0	$300	$400	~

**Indicate name of session*

Seminar Reservations Total:

SPRING 2011 CD and DVD Order Form

Area of Law	Seminar Name	P	E	TOTAL Credits	CD/DVD Member	CD/DVD Non-Member	Seminar Code
Business/Corp	The 123's and ABC's of Financial Statements: Entities & Taxes	1.0		1.0	35 /50	50 /70	1BIZ0123
	Commercial Division Practice	1.0		1.0	35 /50	50 /70	1COM0122
Civil Litigation	The Ins and Outs of Medicare and Medicaid	2.0		2.0	70/100	85/120	DH012411
Criminal Law	Administrative Hearings	1.0		1.0	35 /50	50 /70	1HEARD0122
	Criminal Law: From Arraignment to Disposition	2.0		2.0	70/100	85/120	1CRIM0123
Estate/Elder Law	Elder Law: The Role of a Court Evaluator	1.0		1.0	35 /50	50 /70	1EVAL0122
Ethics	Etiquette and Ethics - Be Civil!		1.0	1.0	35 /50	50 /70	1CVL0122
Family Law/Mat	Divorce and the Military Client	1.0		1.0	35 /50	50 /70	DH011811
	The Matrimonial & Family Court Connection	0.5	0.5	1.0	35 /50	50 /70	1MAT0122
General	All About ADR	1.0		1.0	35 /50	50 /70	1ADR0123
	Powerful Writing Techniques to Persuade Judges & Win Cases	1.0		1.0	35 /50	50 /70	1WRITE0122
	What the Bench Wants!	0.5	0.5	1.0	35 /50	50 /70	1BENCH0123
	Your "First" Article 81 Proceeding	1.0		1.0	35 /50	50 /70	DH011011
Personal Injury	The ABC's of Depositions	1.5	0.5	2.0	70/100	85/120	1DEP0123
Real Estate	A "Gallimaufry" of Real Estate Practice Points	1.5	0.5	2.0	70/100	85/120	1REQ0122

CD/DVD Order Total (Shipping & Handling Included)	
Plus SEMINAR RESERVATIONS Total:	
Subtotal:	
ADD SALES TAX: 8.625%	
TOTAL:	

Name: _____
Address: _____
City/State/Zip: _____
Phone: _____

TOTAL CHECK ☐

Email Address: _____

Credit Card Acct. #: _____
Security Code: _____ Exp. Date: _____

For Financial Aid Guidelines or Arrangements: 516-747-4464

Signature:

YOU MAY ALSO ORDER ONLINE: www.nassaubar.org.

Get CLE credits by attending Tech Center Seminars at the NCBA Tech Center!

Intro to Time Slips, Intro to Time Matters, How to use Westlaw

For current schedule and to register call 516-747-4464 x228.

EVIDENCE ...

Continued From Page 5

fault for the destruction of evidence. Here, the court considers whether a plaintiff can prove its case without the crucial evidence.

In strict products liability cases, courts have recognized that a plaintiff need not prove a specific defect, but may prove the necessary facts with circumstantial evidence. *See Coley v. Michelin Tire Corp.*, 99 A.D.2d 795, 795 (2nd Dept. 1984); *Otis v. Bausch & Lomb Inc.*, 143 A.D.2d 649, 650 (2d Dept. 1988); *Yager v. Arlen Realty & Dev. Corp.*, 95 A.D.2d 853, 853 (2d Dept. 1983). "[A] product defect may [also] be inferred from proof that the product did not perform as intended by the manufacturer." *Coley*, 99 A.D.2d at 795.

For example, in *Otis v. Bausch & Lomb Inc.*, a plaintiff claimed she suffered eye injuries from contact lenses. 143 A.D.2d at 649. Although the plaintiff disposed of the lenses because they had dried out, the court permitted the case to go to trial without the lenses because the plaintiff had presented sufficient circumstantial evidence to raise a triable issue. *Id.* at 650. The court acknowledged that both the identity of a manufacturer and the existence of a product's defect can be proven with circumstantial evidence. *Id.* Thus, courts will allow a plaintiff's case to proceed without essential evidence.

Public Policy Reasons for Allowing Cases Involving Destroyed Evidence to Proceed to Trial

Unless the plaintiff has intentionally or negligently destroyed the product, it seems fundamentally unfair for the injured plaintiff to suffer a second injury – the loss of compensation for his injuries – because the product has been destroyed. Must the plaintiff bear this additional loss?

Although the answer is not clear, it appears that courts are expanding the rights of plaintiffs in missing product cases. For example, in 1973, the Court of Appeals expanded manufacturers' liability holding that manufacturers may be liable not only to users of a defective product, but also to injured innocent bystanders. *Codling v. Paglia*, 32 N.Y.2d 330, 335 (1973). In *Codling*, the Court found that a manufacturer of an automobile containing a defective steering mechanism was liable to bystanders who were injured when the defective automobile lost control and collided with the bystanders' vehicle. *Id.* The Court discussed important public policy reasons to support imposing liability.

First, the Court recognized that the ultimate rationale for expanding warranty protection is to cast the burden on the manufacturer which sold the product on the market. Second, the Court noted that

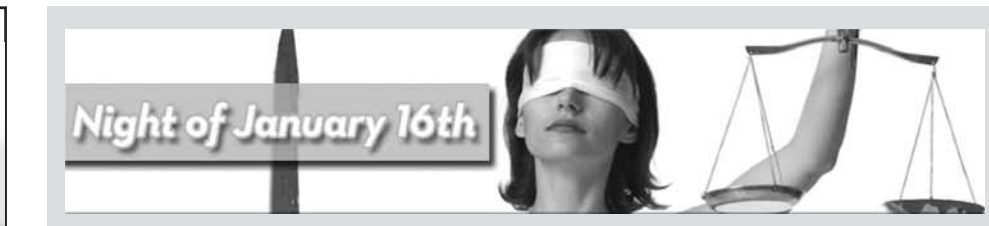
> [t]oday as never before the product in the hands of the consumer is often a most sophisticated and even mysterious article ... Advances in the technologies of material, of processes, of operational means have put it almost entirely out of the reach of the consumer to comprehend why or how the article operates, and thus even farther out of his reach to detect when there may be a defect or a danger present in its design or manufacture. In today's world, it is often only the manufacturer who can fairly be said to know and to understand when an article is suitably designed and safely made for its intended purpose. Once floated on the market, many articles in a very real practical sense defy detection or defect, except possibly in the hands of an expert after laborious and perhaps even destructive disassembly.

Id. at 340.

Finally, the Court recognized that holding manufacturers liable to non-users will pressure manufacturers to create safer products, especially since the manufacturer "alone has the practical opportunity, as well as a considerable incentive, to turn out useful, attractive, but safe products." The Court also noted that the increased price as a result of this burden on the manufacturer is acceptable because users will have the added assurance of safety. *Codling*, 32 N.Y.2d at 341.

The Court's rationale in *Codling* for expanding manufacturers' liability can be applied to the context where a product causing injury to a person is later innocently destroyed. When a product has been destroyed before trial through no fault of the plaintiff, the injured plaintiff should nevertheless be given an opportunity to seek compensation for its injuries. Since the manufacturer sold the defective product on the market, the defect was likely undetectable, and only the manufacturer was in the position to produce a safe product, the manufacturer should be held liable when its defective product causes injuries to others. The manufacturer will still have its day in court, but at least the injured plaintiff will, too.

Madeline Klotz is a recent law school graduate and valedictorian of Touro Law Center. Upon admission to the bar, she will begin her employment as an associate in Meyer, Suozzi, English & Klein's Personal Injury Department.



Art imitates life: Night of January 16th

By Joe Ryan

What would bring a sitting New York Supreme Court Judge, five lawyers, and two physicians together on stage? Ayn Rand's play: Night of January 16th at the Helene Fortunoff Theater on the Hofstra University Campus commencing on January 14th for six performances.

Night centers on a murder trial involving unscrupulous characters, a mistress and an ingenious plot. The verdict will be rendered by a jury selected from the audience, and a discussion will follow to the delight of late legendary author Ayn Rand.

All of the "professionals" have substantial acting experience and will be joined by Hofstra students and other regional actors rounding out the cast.

The cast includes: Hon. Dana F. Winslow (Justice, Nassau County Supreme Court), Marc C. Gann (NCBA President), Joe Ryan (Past President, NCBA) Jim Bradley, Esq. (as the prosecutor), Bruce Roistacher, Esq. (as defense counsel), Dan Odell, Esq. (as the handwriting expert), Ivan Goldfarb, DC (as the medical examiner), and Bert Emmett, MD (as the private eye).

Night will be directed by Hofstra's Artistic Director Robert Spiotto – well known for working with lawyers on stage from prior productions at the Nassau County Bar Association. For Tickets call 516-463-6644 or visit hofstra.edu/hofstraentertainment.

Paralegal Society of Long Island, Inc.

First Annual Paralegal Career Forum & Membership Drive

Monday, January 24, 2011 • 5:30 - 8:30 p.m.
Nassau County Bar Association, 15th & West Streets, Mineola, NY

The Paralegal Job Market: Strategies for 2011
Complimentary buffet dinner, program and panel discussion

Please fill out registration form and send to Jeffrey Bloom,
46 Oak Street, Hicksville, NY 11801 or email paralegal society.li@gmail.com Attn: Jane L. Zukaitis

Paralegal Society of Long Island, Inc. • Jan. 24, 2011

Name_____

Address_____

Tele. #_____ Email _____

Paralegal School/University_____

VIEW FROM THE BENCH ...

Continued From Page 3

The Federal Rule: FRE 801(d) defines "Statements which are not hearsay." One important category of non-hearsay is the "Admission by party-opponent." FRE 801(d) (2) defines such an admission as a

> "statement offered against a party and is (A) the party's own statement, in either an individual or representative capacity or … (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy."

FRE 801(d) (2)(A), (D) and (E).

Under the Federal Rules, every statement by a party or its agent or employee, if offered against that party, is not hearsay, so no exception is required. It is admissible even if it was not against the interest of the declarant when made. It is worth repeating that important distinction from State law. Every relevant out-of-court statement by a party may be admitted against that party. In Federal court, such a statement, whether verbal or in documentary form, is simply not hearsay and is admissible.

In Federal court, such a statement, whether verbal or in documentary form, is simply not hearsay and is admissible.

To appreciate the difference from State practice, it is instructive to consider the seminal New York State Court of Appeals case of *Cover v. Cohen*, 61 N.Y.2d 261 (1984), a major decision in the field of products liability authored by Judge Bernard Meyer. In *Cover*, a vital piece of evidence at trial was the statement by the defendant driver that "his accelerator stuck on him." The New York Court of Appeals ruled that the statement was inadmissible because, among other reasons, it was exculpatory when made by the driver, rather than against his interest. If the same products liability case had been tried in Federal court under its diversity jurisdiction, the defendant/driver's statement would not have been treated as hearsay. It would have been considered relevant and admissible, very probably leading to a different result in the litigation.

To change for a moment to the area of criminal cases, another major difference in State and Federal practice is found in the treatment of statements of co-conspirators. If made during the course of the conspiracy and in furtherance of the conspiracy, such statements by co-conspirators are not hearsay. They are admissible for the truth of their contents under the Federal Rules. This Rule has played a substantial role in the prosecution of major drug and racketeering cases in Federal courts.

The State rule is quite different. In New York State, statements against penal interest are admissible only if the declarant is unavailable to testify, was aware that the statement was against his or her own interest when made, had competent knowledge of the facts, and there is sufficient other competent evidence to assure its reliability. *See People v. Brensic*, 70 N.Y. 2d 9, 15 (1987). A comparison of the difference from the Federal Rule was noted by the U.S. Court of Appeals for the Second Circuit in *Glenn v. Bartlett*, 98 F.3d 721 (2d Cir. 1996), in which the Court of Appeals for the Second Circuit held:

> "As the District Court correctly noted in dismissing [the] habeus petition, even if admission of [the co-conspirator"] statement violated New York Law – which unlike Federal law requires independent indicia of reliability for a co-conspirator's statement-the statement does not offend the Federal Confrontation clause if it falls within Rule 801(D)(2)'s co-conspirator exception."

Glenn, 98 F.3d at 728.

Learned Treatises

Another hearsay exception with marked differences in the two jurisdictions is the Federal exception to the hearsay covering writings cited by experts. FRE 803(18), entitled "Learned Treatises," provides:

> "To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted the statements may be read into evidence but may not be received as exhibits." (Emphasis added.)

Under this Rule, in Federal Court, the relevant passage of a treatise can be used by a party as evidence in chief even if the expert witness on the stand is not willing to recognize the writing as authoritative. Once an expert is on the stand, it is possible to obtain the admission of the writings of a non-witness expert that the witness is willing to recognize as authoritative; that another expert witness recognizes as authoritative; or the judge accepts through judicial notice.

In State practice, there is no comparable evidentiary rule and the use of learned treatises is confined to the impeachment of expert witnesses, and only if the witness is willing to recognize the writing as authoritative.

The "Residual Exception"

As of December 1997, the "Residual Exception," formerly found in two separate Rules, was consolidated in FRE 807, which allows for the admission of statements not covered by other exceptions.

Lest those reading Rule 807 gets the idea that the exception is used frequently, that is not the case. In essence, the Rule provides that hearsay statements that do not qualify for another exception are admissible only if (1) there are equivalent circumstantial guarantees of trust-worthiness; (2) it involves a material fact; (3) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts; and (4) the general purpose of the rules regarding reliability and trustworthiness together with the interests of justice would be served by the statement's admission. Another significant barrier to the use of the statement is the requirement of pretrial or hearing notice to the adversary regarding the proponent's intention to use it and information regarding the statement.

While the residual exception appears to offer a door to admit hearsay statements that are not admissible through any of the traditional exceptions, when Congress enacted the Rule it expressed an intention that the courts would use it rarely, in exceptional circumstances, and only for hearsay with high probative value. As a result, parties are rarely successful in obtaining court approval for the residual exception to the hearsay rule.

Editor's note: This is the first of a two part series by Judge Spatt comparing the Federal and State courts. Next month's column covers unfairly prejudicial evidence, experts, and a comparison of courtroom procedures.

United States District Judge Arthur D. Spatt was formerly a New York State Supreme Court Justice, sitting in the 10th Judicial District from 1978 to 1982, when he became Administrative Judge of Nassau County. He continued in that position until his elevation to the Appellate Division, Second Judicial Department, where he served as an Associate Justice from 1986 to 1989. In 1989, Judge Spatt became a United States District Judge, assuming senior status in 2004. Before ascending to the bench, Judge Spatt was engaged in the private practice of law in New York City for 28 years.

NCBA New Members

We welcome the following new members

Attorneys

Susan Ciccio
Kimberly Johnson Glenn
Devindra R.T. Kissoon
Joseph Milano
Andreas P. Papantoniou
Kenneth Alan Pryor
Meredith L. Sales
Ross L. Schiller
Nancy T. Sherman

Students

DeeJae Diliberto
Jon-Paul Gabriele
Tara Grando
Madeleine Klotz
Daniel Thomas Podhaskie
Natacha Pasquis Simmons
Michelle L Spencer
Christine Wallace

NCBA *Sustaining Members* 2010 - 2011

Martin P. Abruzzo
Jack A. Bennardo
Ruth E. Bernstein
Hon. Robert A. Bruno
Neil R. Cahn
Jacqueline S. Carway
Alan W. Clark
Richard D. Collins
John P. DiMascio
Jerome H. Ehrlich
Steven J. Eisman
Bernard Feigen
Samuel J. Ferrara
Emily F. Franchina
Marc C. Gann
Mary P. Giordano
Douglas J. Good
Hon. Frank A. Gulotta Jr.
H. William Hodges, III
Warren S. Hoffman
Elena Karabatos
Hon. John L. Kase
Hon. Susan T. Kluewer
Jonathan C. Lerner
Victor Levin
Peter H. Levy
Peter J. Mancuso
Hon. Anthony F. Marano
Robert A. McDonald
John P. McEntee
Christopher T. McGrath
Jeffrey A. Miller
Anthony J. Montiglio
Richard L. O'Hara
Hon. Michael L. Orenstein
Marian C. Rice
Susan Katz Richman
Joan Lensky Robert
Edward T. Robinson, III
Jon N. Santemma
Stephen W. Schlissel
M. David Tell
Owen B. Walsh
Rachel J. Weisman
Alfred Wolkenberg

GUIDELINES ...

Continued From Page 5

which – when treatment is cut off – the treating medical providers may choose to continue to treat on a "lien" basis), such a lien is barred by Workers' Compensation Law § 13(f). Workers' Compensation Law 13(f) specifically bars medical providers from accepting fees for medical treatment from anyone except the employer/carrier. The claimant cannot pay the doctor directly; an attorney cannot pay the doctor through either a direct payment or a "lien." What happens when the injured worker's medical benefits run out four months into the claim, but it takes the personal injury attorney four years to get to the courthouse steps?

Assuming the treating physician and the claimant (not to mention his/her attorneys) believe that more medical treatment is warranted beyond what the new Guidelines provide, what options are available to request additional medical care? The answer is the new "variance" process.

The Variance Process

Much like no-fault arbitration of medical treatment issues, requesting a "variance" on the need for ongoing medical treatment involves the risk that a tribunal will find that the injured worker does not need any further medical care.

The "variance" process is initiated not by the claimant or his attorney, but rather by the claimant's treating medical provider on specific forms promulgated by the Workers' Compensation Board. (Forms MG-2 and MG-2.1). In the example above involving a cap of 40 visits for physical therapy, the request for the variance must be initiated by the treating physician who initially prescribed the physical therapy, not by the therapist. After several additional bureaucratic steps, if additional therapy cannot be informally negotiated with the employer/carrier, the claimant has a right to request either: 1) binding, non-appealable resolution by the Workers' Compensation Board's Medical Director, or 2) an expedited formal hearing before a Workers' Compensation Law Judge.

In either process, the claimant risks an early decision by either the Workers' Compensation Board Medical Director or a Workers' Compensation Law Judge that the claimant does not need any additional medical care. In the case of the binding, non-appealable Medical Director decision, this quasi-judicial medical opinion could have an impact on any claim for future medical care in the third party action. Similarly, a decision upholding the denial of further medical care by a Workers' Compensation Law Judge would be bolstered by actual medical deposition testimony from either an Insurance Medical Examiner (IME) or a peer reviewer. Either way, an adverse decision could create practical issues early on in the personal injury claim, especially in regard to a client's ongoing treatment pending trial.

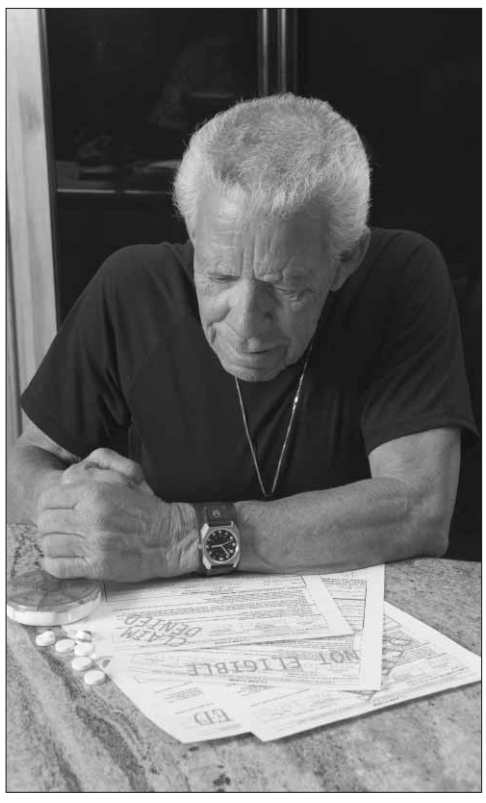
The major hurdle in the variance process is that the burden of proof rests with the treating medical provider to show why additional and/or alternative medical should "vary" outside the guidelines for that particular injury. Remember, the goal of treatment in variance of the guidelines is not simply to maintain the claimant's status quo condition; it should show that additional treatment outside the guidelines is likely to show objectively measured positive results and that the claimant has not yet reached "maximum medical improvement" (MMI). Under the new Medical Guidelines, 12 NYCRR §324.1 defines "maximum medical improvement" as: "an assessed condition of a claimant based on medical judgment that:

- Claimant has recovered from the work injury, illness or occupational disease to the greatest extent that is expected; and
- No further improvement in the condition is expected."

In order for claimants in the future to obtain a "variance" (should they wish to risk the potential adverse outcomes), it is likely that they will have to show a substantial likelihood that granting the variance will result in "objective improvement of their medical condition," as opposed to simply maintaining the status quo or keeping their condition from further deteriorating. The days of the Workers' Compensation Board granting ongoing medical care on a "symptomatic" basis are over. Now, documented and objective potential improvement must be shown (*i.e.* increased range of motion, etc.)

Conclusion

The new Medical Treatment Guidelines are just that – "new." Over the course of the next year, many kinks will need to be worked out. It will not be easy for those representing injured workers. While there is no question that medical care for injured workers (with both old and new cases) will be



severely curtailed in the future, it is also true that the new guidelines in many cases grant more care and easier authorization for care than our own standard medical health insurance. Personal injury attorneys with third party liability claims and an underlying workers' compensation case need to be intimately aware of the new treatment guidelines. The playing field for workers' compensation medical care has changed drastically, and those who practice in this field will have to work closely together to make these changes work for all involved.

Troy G. Rosasco is a partner at Turley, Redmond, Rosasco & Rosasco, LLP, with offices in Hempstead and Ronkonkoma, where he practices workers' compensation and Social Security disability law. He is the author of the New York Disability Law Blog (www.disabledworkerlaw.com) and can be reached for questions at tgrosasco@nydisabilitylaw.com.

Wassail Celebration 2010

2nd Vice-President Peter J. Mancuso gives the Toast to Domus along with Past President Directors.

The C. W. Post Madrigals performing music from the Medieval and Renaissance periods.

Pres. Marc Gann and President-Elect Susan Katz Richman with the honored log carriers who have given of their time for the Mortgage Foreclosure Project. l-r: Gary Alpert, Gale D. Berg, Russell Burcheri, George Frooks, Caryle Katz, Harold Somer, Valerie Zurblis, Will Sparks.

President-Elect Susan Katz Richman narrates the true tale of Wassail.

TORT ...

Continued From Page 9

The case of *Williams v. Nassau County Medical Center*, 13 A.D.3d 531 (2d Dept. 2006) illustrates the problem. Tymeik William's mother was admitted to Nassau County Medical Center at 1 a.m. on September 10, 1993 in active labor. Despite evidence in the medical records that the baby's head was too large to pass safely through the mother's pelvis, doctors administered the drug Pitocin to further stimulate contractions instead of doing a cesarean section. Over the next sixteen hours, hospital personnel ignored mounting signs of fetal distress and administered escalating doses of the drug. This forced the baby's head into the tight bony pelvic ring, causing damage to the fetal brain from lack of oxygen. Finally, doctors did a traumatic forceps delivery, lacerating the baby's face and fracturing his clavicle. The infant-plaintiff suffered from seizures and developmental retardation, the full extent of which was not apparent until years later. It was just prior to his 10th birthday that doctors told Tyrell's mother that his condition was most likely due to brain injury sustained during labor and delivery.

On September 4, 2003, nearly 10 years after the accrual of the claim, but within the limitation period of C.P.L.R 2008, the infant Williams filed a motion for leave to serve a late notice of claim. In granting the motion, Nassau County Supreme Court held, *inter alia*, that the County had received timely actual notice of the facts constituting the claim because it was in possession of the patient's medical records.[6] The Appellate Division, Second Department, reversed that decision, holding that the trial court abused its discretion because: (1) the plaintiff had not established that the delay was caused by his infancy;[7] (2) the mother's ignorance of her son's medical condition and of the law were insufficient excuses; and (3) that defendant's possession of medical records did not give actual knowledge of the claim resulting in prejudice from the delay.[8] Plaintiff appealed from the Appellate Division order.

The Court of Appeals had the final word.[9] In affirming the Second Department, the Court found that the medical "records of the county hospital did not indicate county had actual notice of injuries suffered by infant plaintiff at birth … hospital's records indicated that delivery was difficult, but contained little reason to identify or predict any lasting harm to the child."[10] The Court further stated, in apparent disregard of factual evidence to the contrary, "Merely having or creating hospital records, without more, does not establish actual knowledge of a potential injury where the records do not evince that the medical staff, by its acts or omissions, inflicted any injury on plaintiff during the birth process."[11] The Court's finding of substantial prejudice to the defendant hospital was also left undisturbed, based on the municipality lacking actual notice. Finally, the Court noted that the Appellate Division's holding did not treat the absence of a nexus between infancy and the delay in service as fatal to the claim, although the opinion stopped short of explicitly reprimanding the Second Department for using a legal standard expressly overruled by the Legislature in the 1976 amendment to § 50(e)5.

The Aftermath of *Williams*

Unfortunately, the outcome of this saga was not Tymeik Williams' alone to bear. The reasoning, based on mistakes of law and fact in our opinion, has been followed in a string of recent Second Department cases involving public hospitals, all similarly denying vulnerable infant plaintiffs their day in court. For example, in *Rios v. Westchester County Healthcare Corp.*, leave to serve a notice of claim only 13 months after the statutory 90 day period had expired was denied because the delay was not the product of infancy, and the medical records did not give defendant hospital actual notice of the facts surrounding the claim of negligent birth trauma.[12] Similarly, in *Bucknor v. New York City Health & Hosps. Corp [Queens Hosp. Ctr.]*, leave to serve a notice of claim 9 years after a delay in performing a cesarean section caused birth trauma-related developmental retardation and autism was denied because the delay was not directly attributable to plaintiff's infancy, and medical records continually in defendant's possession and control "gave scant reason to identify or predict any lasting harm to claimant, let alone a developmental abnormality."

Recently, the Court of Appeals took a step in the right direction when it affirmed a discretionary grant to serve a late notice of claim for an infant with lead poisoning. In *Pearson v. New York Health & Hosps. Corp.*, the Court stated that "it would be unfair and unjust to deprive the infant of a remedy based on her mother's ignorance of the law and defendant's possession of medical records affording it actual knowledge of the essential facts constituting the claim."[14] Specifically, the child had elevated blood levels of lead, known to cause delayed brain damage, first detectable when the infant is 7 years of age or older. The impact of *Pearson* beyond the narrow context of pediatric lead poisoning is unclear at present.

Conclusion

Victims of neonatal birth trauma at public hospitals – as opposed to private ones – are uniquely vulnerable under the late notice of claim statute as strictly construed by the appellate courts. Such technical statutory preconditions to seeking court hurt those infants and protect potentially negligent physicians and hospitals, thereby increasing societal harm. Short of a judicially engrafted exception, the ultimate correction of this injustice will fall to the Legislature.

David Mayer, M.D. is a graduate of Hofstra University School of Law and a law clerk waiting admission at Sullivan, Papain, Block, McGrath & Cannavo.

Christopher McGrath is a Senior Partner at Sullivan, Papain, Block, McGrath & Cannavo and is a Special Professor of Law for Advanced Torts and New York Practice at Hofstra University School of Law.

1. David Siegel, New York Practice, 36-40 (Thompson West 2005); *State v. Waverly Central School Dist.*, 28 A.D.2d 628 (3d Dept. 1967).
2. Siegel, *supra* note 4, at 37.
3. *Cohen v. Pearl River Union Free School Dist.*, 51 N.Y.2d 256 (1980).
4. *Palazzo v. City of New York*, 444 F.Supp. 1089 (E.D.N.Y. 1978).
5. *See* David Mayer & Christopher McGrath, And Justice for All: A Proposal to Ameliorate the Harsh Impact of New York's Late Notice of Claim Statute on Infant Medical Malpractice Plaintiffs. (Accepted & awaiting publication in Minn. J. Law, Science & Tech., Fall/Winter 2010).
6. *Citing Medley v. Chicon*, 305 A.D.2d 643 (2d Dept. 2003).
7. The legal standard expressly abrogated by the Legislature in the 1976 amendment to Gen. Mun. Law §50-e(5).
8. *Williams v. Nassau County Medical Center*, 13 A.D.3d 531 (2d Dept. 2006).
9. *Williams v. Nassau County Medical Center*, 6 N.Y.3d 531 (2006).
10. *Id.* at 537.
11. *Id.*
12. 32 A.D.3d 540 (2d Dept. 2006).
13. 44 A.D.3d 811 (2d Dept. 2007); *See also Ali v. New York City Health & Hosps. Corp.*, 61 A.D.3d 961 (2d Dept. 2009); *Gonzalez v. City of New York*, 60 A.D.3d 1058 (2d Dept. 2009); *Rowe v. Nassau Health Care Corp.*, 57 A.D.3d 961 (2d Dept. 2008); *King v. New York City Health & Hosps. Corp.*, 42 A.D.3d 499 (2d Dept. 2007); Cf. *Covera v. Nassau County Health Care Corp.*, 38 A.D.3d 775 (2d Dept. 2007) (finding that medical records documenting birth injuries imparted actual notice of the essential facts underlying the claim).
14. 10 N.Y.3d 852 (2008).

WE CARE

We Acknowledge, with Thanks, Contributions to the WE CARE Fund

Donors

	In Honor Of
Genoa & Associates, PC	Jill Cohen Korman
Genoa & Associates, PC	Stephen Cohen & Family
Ilana Lebensohn	In appreciation of Meryl & Steve Gassman
Martin P. Randisi	Happy New Year to All
Ellen Rosen	Son Jeffrey Rosen & Donna Hajjar's wedding
Hon. Denise Sher	Bob Nigro as new 18B Director
Hon. Elaine Jackson Stack	Birth of Eloise, granddaughter of Hon. Sondra & Mort Pardes
WE CARE Advisory Board	Hon. Peter B. Skelos receipt of the Norman F. Lent Memorial Award
Hon. Claire & Edward Weinberg	Wishing All Our Friends a Happy & Healthy New Year
Martha Weisel	Hon. Helen Voutsinas becoming a judge

Donors

	Speedy Recovery
Deena & Jerry Ehrlich	Hon. John Kase
Executive Committee	Hon. John Kase
Judy & Marc Gann	Hon. John Kase
Hon. Andrea Phoenix	Hon. Steven Jaeger
Joan & Steve Schlissel	Alan Estrin

Donors

	In Memory Of
Deena & Jerry Ehrlich	Mindy SantaMaria's grandmother
Hon. Sandra Feuerstein	Hon. Nicholas Garaufis mother
Hon. Sandra Feuerstein	Ann Mangano, wife of Hon. Guy Mangano
Hon. Sandra Feuerstein	Hon. David G. Trager
Hon. Sandra Feuerstein	Hon. Reena Raggi's mother
Marilyn K. Genoa	Mary DiBlasi
Eugene Ginsberg	Michael Axelrod
Eugene Ginsberg	Spencer Steele
Lisa Golden	Leon Gotsdiner
Hon. Frank & Joanne Gulotta Jr.	Dr. Albert Levine
Alan Hirschhorn	Leon Gotsdiner
Hon. Fred & Mindy Hirsh	Hon. Steven Fisher
Elaine Leventhal	Mary L. Spina, mother of Carolyn Naranjo Marcantonio
Elaine Leventhal	Mary DiBlasi, grandmother of Deanne Caputo
Elaine Leventhal	Mindy SantaMaria's grandmother
Peter Panaro	Benjamin Langweber, father of Denise
Peter Panaro	Salvatore A. Carruba, father of Robert Carruba
Hon. Andrea Phoenix	Luther Rogers, Jr., father of Elaine Gross
Hon. Andrea Phoenix	Velma Martin
Hon. Andrea Phoenix	Kenneth Bailey
Ellen M. Rosen	Ruth Peppercorn, aunt of Joann Evangelista
Ellen M. Rosen	Marilyn Tucker
Joan & Steve Schlissel	Gino Giambalvo, husband of Alice Giambalvo
Joan & Steve Schlissel	Guenther Michaelis, father of Cecelia Michaelis
Hon. Denise Sher	Dr. Albert Levine, father of David Levine
Hon. Denise Sher	William Seibt, father of Richard Seibt
Hon. Denise Sher	Jerome Ventra
Hon. Denise Sher	Michael Axelrod
Hon. Denise Sher	Armand M. D'Amato, father of Hon. Alfonse D'Amato
Hon. Peter B. Skelos	Ruth Lieberman
Hon. Peter B. Skelos	George C. Trovato, Jr.
Jill Stone	Father of James Joseph
Jill Stone	Norma Cirillo, mother of Darlene Lomb
Hon. Ira Warshawsky	Armand M. D'Amato, father of Hon. Alfonse D'Amato
Hon. Frank E. Yannelli	Jerome Ventra
Hon. Denise Sher	Charlotte Schott, mother-in-law of Law Secretary Philip C. Weis

General

Genoa & Associates, P.C. Law Offices of Gregory Lisi Martin P. Randisi

Contributions may be sent to: NCBA, Attn: ***WE CARE,*** 15th & West Streets, Mineola, NY 11501 or at: **www.nassaubar.org**

Helping hands were plentiful at the Thanksgiving Luncheon this past November at Domus

There was no housing shortage at this year's Gingerbread University.

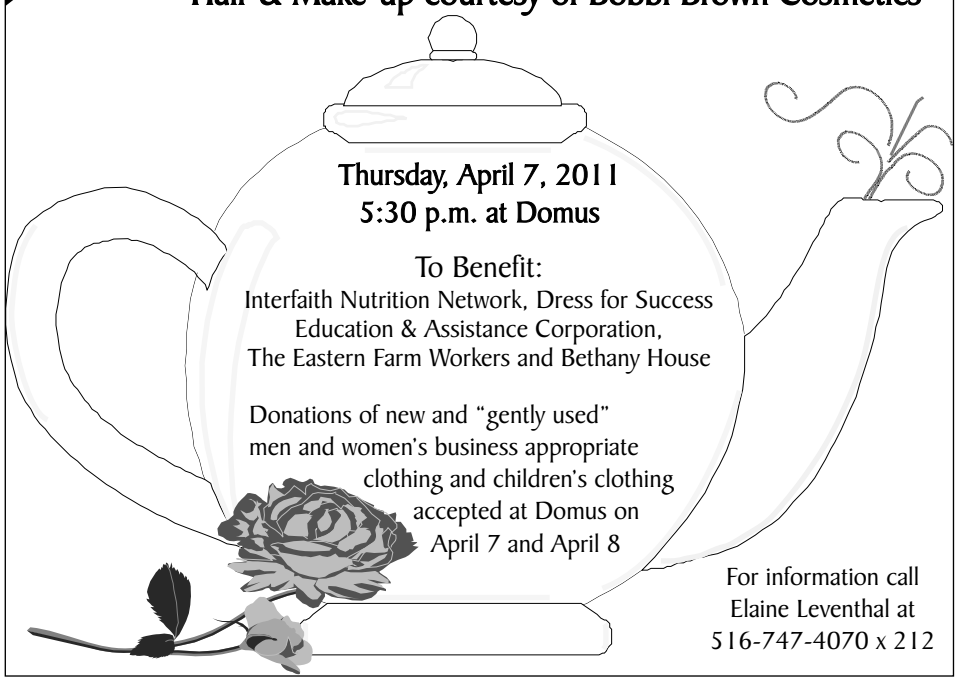
SAVE THE DATE!

"Dressed To A Tea"

A Fashion Show and Light Supper — 2011 Spring Collections

Courtesy of Lord & Taylor

Hair & Make-up courtesy of Bobbi Brown Cosmetics



Thursday, April 7, 2011
5:30 p.m. at Domus

To Benefit:
Interfaith Nutrition Network, Dress for Success Education & Assistance Corporation, The Eastern Farm Workers and Bethany House

Donations of new and "gently used" men and women's business appropriate clothing and children's clothing accepted at Domus on April 7 and April 8

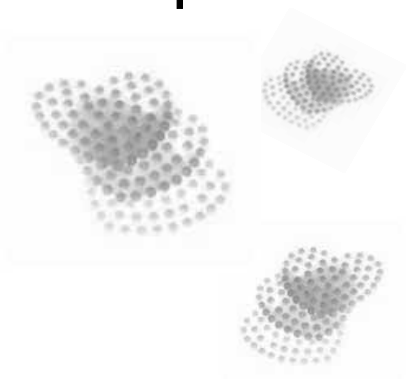
For information call Elaine Leventhal at 516-747-4070 x 212

It's Heartfelt to support WE CARE

NCBA's 23rd Annual Children's Festival
hosted by the WE CARE Fund and the
Community Relations & Public Education Committee

Wednesday, February 23, 2011 at Domus • 12:30 - 2 p.m.

This spectacular event, made possible by your contributions to WE CARE treats deserving and challenged youngsters to a fun-filled afternoon including hot dogs, popcorn, ice-cream, clowns, gifts and other entertainment!



Please open your hearts and wallets for WE CARE:

Gold Heart - $200 Silver Heart - $100 Caring Heart - $50
(suggested minimum donation)

WE CARE Hearts • Mail to: NCBA, Att: Elaine Leventhal
15th & West Streets, Mineola, NY 11501

Name_____

Address_____

City, State, Zip_____

Phone_____ Amount of Donation $_____

Contributions are tax deductible. Make check payable to WE CARE Fund.

PET ...

Continued From Page 7

ray of the dog's throat to determine the cause of its apparent distress and pain. The dog subsequently expired as a result of complications of a perforated esophagus caused by swallowing a chicken bone. The plaintiff's expert found that such an outcome could have been avoided had the defendant determined the problem more quickly and a further procedure to remove the obstruction had been performed. The Court ultimately concluded that defendant's failure to determine whether the dog had swallowed something was a departure from the standard of care of a veterinarian. Further, the Court found that no expert is necessary to explain that a dog's throat, esophagus or stomach should be x-rayed if there is a question as to whether it had swallowed something.[2]

Damages And Pets As Property

While it may give hope to some to learn that a cause of action in veterinary malpractice exists, the truth of the matter is that the extent of the compensation for injury to an animal is extremely limited. The reason for this is simply because, under the law, animals are considered to be chattel, or property, and the law does not address the intrinsic value of property when determining compensation for harm to, or the loss of, that property. Moreover, historically, the courts have not utilized a moral component in determining compensation for injury or harm to an animal. However, there are some discrepancies among the various jurisdictions when it comes to pets. Where an animal is used for commercial purposes, its value, for purposes of compensation, is easily calculable by determining its market value. With an animal that is considered a pet, however, the courts are allowed to consider the animal to be more than just property. For example, while a court may allow a pet owner to recover damages beyond the market value of that pet to compensate for the owner's mental anguish and distress,[3] the pain and anguish suffered by the pet has never been used to assess damages in the United States.[4] More often, the law will only compensate a pet owner in an action of veterinary malpractice, for the loss, or cost of that pet, or, for the costs incurred by the pet owner for the services provided by the veterinarian.

Moving Forward

Today, we have seen much growth in the area of animal rights. With the help of various associations and non-profit organizations fighting for these rights, many states are now recognizing animals as sentient beings and making changes and adjustments in their laws to reflect as much. Although the most publicized changes in the law seem to have occurred with regard to factory farming and the conditions under which farm animals are raised, we have also seen a greater increase in the enforcement of animal cruelty laws and the pursuit of felony charges under them. At the very least, the fact that we hear about these cases, and the subsequent legal action, has shown that the aforementioned associations and organizations have finally forced the media to stand up, take notice and publicize when animal cruelty and abuse is alleged. While a veterinary malpractice action may be a difficult course of action to pursue, as the rights of animals and/or pets and their owners continues to develop and expand, the reasons to undertake such an action and the laws to support them have the potential to carry much greater weight in the future.

Take Action

If your client has a pet that is, or was, under the care of a veterinarian and malpractice is suspected, advise the client to take the following steps:

• First and foremost, remove the animal from the care of the veterinarian, unless doing so would cause it greater harm.

• As soon as possible, have another veterinarian to be examining the animal. More importantly, make sure the second veterinarian would be willing to testify and give a professional opinion as to his or her findings and whether or not malpractice has occurred.

• If the animal has died, find someone qualified to perform an autopsy and give that information to the veterinarian who will testify as an expert.

• Take pictures of any injuries or affected body parts on the animal.

• Write down as much information as possible regarding the course of events that took place leading up to the alleged malpractice. This record should include the symptoms that led to the animal being brought to the vet's office, any and all conversations with the actual veterinarian and/or the office staff, anyone who may have witnessed any of the events, information given with regard to treatment and/or risks of said treatment by any member of the staff or the veterinarian, and what, if anything permission was given with regard to the animal's care.

The client should be counseled that he or she may be going through a grieving process if the animal has died, and that filing a lawsuit takes time and money. In the long run, hiring an attorney to initiate litigation may not be a good substitute for handling the matter another way. For example, the client might be able to resolve the dispute by dealing directly with the veterinarian or by filing a lawsuit in Small Claims Court. In any case of this type, the attorney should be sensitive to the client's loss and provide responsible advice on the court's probable response to the case.

Laura M. Schaefer, Esq., is an Associate at Sullivan Papain Block McGrath & Cannvo P.C., and concentrates in the area of Motor Vehicle Accidents Premises, General Liability, Municipal Liability and Medical Malpractice. She is a 2009 graduate of Hofstra University School of Law.

1. *Restrepo v. State of New York, et al.*, 550 N.Y.S.2d 536 (Ct. of Claims 1989).
2. *Mathew v. Klinger*, 686 N.Y.S.2d 549 (2d Dept. App. Term. 1998).
3. *Corso v. Crawford Dog and Cat Hospital*, 415 N.Y.S.2d 182 (Civ. Ct. 1979).
4. David Favre, Animal Law: Welfare, Interests and Rights 137 (2008).

IN BRIEF ...

Continued From Page 8

to the company's chief legal and principal financial officer. He is also counsel to the Fast Forward Fund, which generates social investment partnerships for projects led by young visionaries, and an active participant in the pro bono programs of the Nassau/Suffolk Law Services Committee, Inc.

Penny B. Kassel of Penny B. Kassel, P.C. recently presented free seminars on "How to Protect Your Assets As You Age." Ms. Kassel also lectured at the Winthrop University Hospital Stroke Club in Mineola.

Brian Andrew Tully has joined the Academy of Special Needs Planners, an organization that assists attorneys in providing quality service and advice to individuals with special needs and their families. Mr. Tully is certified as an elder law attorney by the National Elder Law Foundation and focuses his practice on life care planning, elder law and Medicaid benefits. He was recently named to the Board of Directors of the Life Care Planning Law Firms Association and received accreditation from the United States Department of Veterans Affairs to represent and assist veterans and their spouses in the preparation, presentation and prosecution of claims. In 2004, Mr. Tully founded the ElderCare Resource Center, Inc., which the following year was voted Educational Business of the Year by the Suffolk Nassau Regional Business Partnership.

Charles Skop, a member of Meyer Suozzi English & Klein, P.C., recently served as a moderator at the Fair Media Council's "Connection Day 2010," a forum in which reporters, business and community leaders, and representatives of Long Island's nonprofit community discussed the means by which media can be pitched stories in the quickly changing media business. Mr. Skop, who earned his Juris Doctor from New York University School of Law, has served as Chairman of the Subcommittee on Corporate Governance, Committee on Corporations of the Association of the Bar of the City of New York, and has been a member of the Board of Directors of the Merrick Jewish Centre since 1995 and he currently serves as Chairman of the Legal Committee.

Seth I. Rubin, a partner at Ruskin Moscou Faltischek, P.C., where he is chair of the firm's Healthcare Finance Practice Group and a member of the Health Law and Corporate & Securities Departments, has been elected to the Long Island Regional Board of the American Jewish Committee (AJC). Founded in 1906, AJC promotes pluralistic and democratic societies. Mr. Rubin is Chair of the Corporations, Banking and Securities Committee and a member of the Publications Committee of the Bar Association, and, in 2007, he was named to Long Island Business News' "Ones to Watch" list.

Rivkin Radler recently received the Cradle of Aviation Museum's Donald E. Axinn Community Service Award at the museum's 8th Annual Air & Space Gala. Created by the late philanthropist, pilot, developer and writer, Donald E. Axinn, the award recognizes the firm's outreach on behalf of Long Islanders. In addition, the Rivkin Radler received Law Services' Partner in Justice Award for the work of its attorneys who serve on Nassau/Suffolk Law Services' Landlord-Tenant Dispute Panel.

Attorneys and staff members of Geisler & Gabriele recently took part in the Manhasset Women's Coalition Against Breast Cancer's 5K Run/Walk for a Cure. The firm matched dollar for dollar the amount of money raised by its employees on behalf of the charitable organization.

New Partners, Of Counsel and Associates

Neil M. Kaufman has been named partner and chair of the Corporate Department at Abrams, Fensterman, Fensterman, Eisman, Greenberg, Formato & Eininger, LLP. Mr. Kaufman, who concentrates his practice on corporate, securities and business law, is Chairman of the Long Island chapter of Financial Executives International, a nationwide organization of chief financial officers and other financial executives, and former chairman of the Banking and Securities Law Committee of the Bar Association. As Vice Chairman of the Long Island Capital Alliance, a non-profit organization that holds local capital forums, Mr. Kaufman has helped dozens of companies raise over $100 million of investment capital.

Kevin P. Mulry has joined Farrell Fritz as a commercial litigation partner. Mr. Mulry previously served for 15 years as an Assistant United States Attorney in the Civil Division of the U.S. Attorney's Office for the Eastern District of New York. From 2005-2010, Mr. Mulry was Principal Deputy Chief of the Civil Division. In 2004, he received the Henry L. Stimson Medal from the Association of the Bar of the City of New York for outstanding service as an Assistant United States Attorney. Mr. Mulry, who earned his Juris Doctor from St. John's University School of Law, is a former law clerk to the Honorable John E. Sprizzo, United States District Court Judge for the Southern District of New York and adjunct professor at St. John's School of Law.

Joseph Milano has joined Capell Barnett Matalon & Schoenfeld LLP as a partner. Mr. Milano concentrates his practice in professional discipline, church governance, commercial and estate matters and general litigation. Mr. Milano is also Vice President of the Board of Directors of the Samuel Field Y, one of the largest social service agencies in Queens County.

New Firms and Locations

The Labor and Employment law firm of the Law Offices of Howard E. Gilbert has relocated its offices to 532 Broadhollow Road, Suite 107, Melville, New York.

Capell Barnett Matalon & Schoenfeld LLP has opened a second office located at 230 Park Avenue, Suite 460, New York, New York.

The In Brief section is compiled by the Honorable Stephen L. Ukeiley, Suffolk County District Court Judge. Judge Ukeiley is also an adjunct professor at the New York Institute of Technology and an Officer of the Suffolk County Bar Association's Academy of Law.

PLEASE E-MAIL YOUR SUBMISSIONS TO Nassau Lawyer: nassaulawyer@nassaubar.org with subject line: IN BRIEF

NEXUS ...

Continued From Page 9

a service call. The subscriber was a tenant in the building owned by the defendant, who not only did not know of the work but under Public Service Law § 228 was statutorily barred from interfering with the installation of cable television facilities.

Coleman would appear to hold the landlord liable on the basis of ownership alone; indeed, the Second and Third Departments in similar cases had done just that. The Court in Abbatiello, however, noted that the First Department had been construing *Whelen v. Warwick Valley Civic & Social Club*, 47 N.Y.2d 970 (1979), to find cable technicians not to be "employees" under the Labor Law because they had not been hired by the owner or its agents.

The plaintiff in *Whelen* was a member of the defendant club and had volunteered to make repairs on the club grounds. On this basis the Court could have distinguished Whelen and allowed Abbatiello to sue the landlord à la *Coleman*. The landlord then could possibly obtain indemnification from the cable company. As the Court held in *Chapel v. Mitchell*, 84 N.Y.2d 345, 347 (1994), "an owner who is only vicariously liable under the Labor Law may obtain full indemnification from the party wholly at fault."

Instead, the *Abbatiello* court asserted that it has always required in Labor Law cases "some nexus between the owner and the worker, whether by a lease agreement or grant of an easement, or other property interest." In *Abbatiello* the court held no such nexus existed; the plaintiff was on the premises solely by operation of the Public Service Law. Therefore the landlord was not liable. The Court never squared this conclusion with *Coleman*, where the worker's statutory right to enter the property did not exempt the owner from liability.

In the second decision, *Sanatass v. Consolidated Inv. Co., Inc.*, 10 N.Y.3d 333 (2008), the plaintiff was injured while installing a commercial air conditioning unit for a tenant in the defendant's building. The Court held that the defendant landlord had a nexus to the work through its lease to the tenant who ordered the work. That the lease required the tenant to obtain written permission before such work mattered not; otherwise, the Court held, owners could contract away their Labor Law liability.

The Court distinguished *Abbatiello* because there the Public Service Law "established mandatory access for cable repair workers," and left that defendant "powerless to determine which cable company is entitled to operate, repair or maintain the cable facilities on its property." 10 N.Y.3d at 341. The Court did not explain how the plaintiff in *Sanatass* was any less a trespasser, since his presence on the property violated the lease that created nexus.

In the third case, *Scaparo v. Village of Ilion*, 13 N.Y.3d 864 (2009), the plaintiff was a village employee injured while installing a sewer lateral line under a utility right-of-way on property owned by a county agency. The Court of Appeals applied *Abbatiello* to hold that the agency was not an "owner" because it lacked nexus; "it had no choice but to allow the Village to enter its property pursuant to a right-of-way, and it did not grant the Village an easement or other property interest creating the right-of-way." *Id.* at 866. This time, the Court did not even mention *Coleman*.

These three cases suggest that despite *Coleman*, nexus does not exist where the owner is by law powerless to control the work performed. *Morton*, however, refutes this definition without providing one of its own.

Morton: Nexus Redefined

On April 3, 1997, Alan Morton was injured while repairing a water main beneath Carman Mill Road in Massapequa. The road is part of the New York State Highway System, but the main was owned by Morton's employer, New York Water Service Company, who directed his work. Morton and his wife sued the State for, among other things, violation of Section 241(6). The State sought summary judgment, claiming that it was not liable because the water company failed to obtain a permit as required under Highway Law § 52.

The Court of Claims, citing *Celestine*, held that the Highway Law did not negate the "nondelegable duty" under Section 241(6) and denied the motion. *Morton v. State*, No. 2003-028-002 (Ct. Cl. Apr. 9, 2003). After trial the State appealed, and the Second Department dismissed the 241(6) claim. Citing *Abbatiello*, the court held that because the water company did not obtain a permit, Morton was a trespasser. 13 A.D.3d 498, 500 (2nd Dept. 2004).

The Court of Appeals affirmed the Second Department, finding no nexus. "Here, there was no lease agreement or grant of an easement or other property interest creating a nexus between claimant and the State." 15 N.Y.3d at 56. The Court added, however, that "the work permit would have created the nexus between the claimant, the injured worker, and the State, the property owner. Without the permit, though, claimant was a trespasser to whom the State owed no duty under Labor Law § 241(6)." *Id.* at 59-60. The Court did not explain, though, how in *Morton* a right of entry under a statutory permit would create a property interest where a right of entry under a statute as in *Abbatiello* did not.

In dissent Chief Judge Lippman conceded the need for nexus, but found it in the fact that the State was a fee owner in full possession of the road. He distinguished *Abbatiello* and *Scaparo* as turning "not upon the absence of a connective property interest, or even upon the absence of permission, but upon the legal incapacity of the owner to withhold access for the injury producing work." 15 N.Y.3d at 63. In *Sanatass*, he explained, the lease provided the nexus despite its requirement of written permission because nexus does not equal permission. In dismissing Morton's claim, he contended, the Court for the first time equated nexus with permission. *Id.* "This is a significant and unwarranted departure," the Chief Judge noted, "that the Legislature may well wish to curtail." *Id.*

Finding Nexus – And Avoiding It – After *Morton*

Unless and until the Legislature takes up this issue, injured workers may find their claims dismissed because their employer failed to obtain the proper permits, and landlords may face liability for injuries sustained during work that they tried to prevent. It all depends on what constitutes "nexus."

Obviously, more than ownership is required. A lease apparently suffices, as in *Sanatass*, even if it purports to bar the work performed. A statutory right of entry will negate nexus, as in *Abbatiello* even for an in-possession owner. Apparently the county agency in *Scaparo* would not have been liable even if it had known of the sewer work on its property. A statutory

permit will also create nexus according to *Morton*, though if unpermitted work has no nexus then how does a permit issued under the Highway Law create "some property interest?"

The essence of nexus appears to be an affirmative act by the owner, whether by right of contract or law, in contemplation of the work at issue being performed. The owner need not actually authorize or permit the work, though is hard to imagine that the Court of Appeals would have found nexus in *Morton* if the State had denied a permit and the water company had gone ahead with the repairs.

How can injured workers meet the "nexus" requirement? By being imaginative, probing and persistent in discovery. Boiler-plate demands will not do; counsel should seek the production of deeds, insurance policies, leases, contracts, repair and maintenance records, accident reports, correspondence, permits, plans, photographs, certificates of occupancy and any other documents conceivably relevant to the exercise of ownership. Given this scope, counsel must issue these demands promptly after receiving the answer and cannot accept cursory, incomplete, or delayed responses. A preliminary conference order should require prompt compliance, followed by a motion for sanctions if not met. Counsel should secure such discovery before the owner's deposition, which of course should also be utilized to probe for any evidence or witnesses not yet demanded or disclosed. Plaintiffs should also seek discovery to prove the elements of common-law negligence, which is codified in Labor Law § 200, including actual or constructive notice of the condition causing the injury.

How can property owners defeat the "nexus" requirement? First, by being vigilant for unpermitted work on their premises before injuries occur. A cease and desist letter might establish a trespasser where a lease provision as in *Sanatass* does not. Once a lawsuit has begun, owners must be imaginative as well. They likely will have to show that the work bore no relation to any exercise of their ownership rights. That may require a statute, regulation, or ordinance that somehow entitled the worker to enter the property despite the owner's wishes. This may be easier for state and municipal defendants than private landowners, given provisions like Highway Law § 52. Perhaps, however, a private landowner could show that the contractor was a trespasser for failing to obtain some local, state, or federal permit. Defeating nexus may also require discovery from third-party contractors and other potential trespassers. If nexus is inescapable, then owners should seek indemnification from potentially responsible parties. Owners' ability to seek indemnification from injured employees' employers, however, is limited to cases of "grave injury" under Section 11 of the Workers' Compensation Law or the assumption of liability by contract. Perhaps liability can be mitigated by agreements in leases that tenants shall indemnify the landlord for Labor Law liability arising out of work performed in violation of the lease. Whichever way the facts lie, it may be that Labor Law cases are now more amenable for summary judgment.

Given the somewhat unsettled landscape after *Morton*, especially in light of the Chief Judge's pointed dissent, there will likely be further attempts by our appellate courts, and perhaps even the Legislature, to refine the "nexus" requirement. Until then, we must use discovery to determine whether the work performed bore any relation to any affirmative exercise of ownership.

Christopher DelliCarpini and John DelliCarpini are principals of the DelliCarpini Law Firm, representing plaintiffs in personal injury matters.

LAWYER TO LAWYER

COMMERCIAL ARBITRATION AND MEDIATION

MICHAEL A. LEVY, J.D., LL.M. (Taxation)

Experienced commercial arbitrator and mediator
Extensive background in transactional law and commercial/Surrogate's Court litigation. Highly skilled complex commercial case arbitrator – domestic and international cases. Member, mediation panel, U.S. District Court, Eastern District of New York

Commercial Arbitration and Mediation Services, Inc.
"Arbitration and mediation the way they were intended"

mlevy@levyschneps.com (516) 365-3000 WWW.LEVYSCHNEPS.COM

ENVIRONMENTAL LAW AND LITIGATION

FREDERICK EISENBUD, ESQ.

Practicing Environmental and Municipal Law Since 1984
Co-Chair, Environmental Committee, HIA
Ready to assist you or your client with:
Civil • Criminal • Administrative • Municipal
Hazardous Waste/Oil Spill Cost Recovery Litigation
Environmental Issues In Commercial Real Estate

Law Office of Frederick Eisenbud
THE ENVIRONMENTAL LAW FIRM℠
6165 Jericho Turnpike, Commack, NY 11725-2803
Phone: (631) 493-9800 Fax: (631) 493-9806

E-Mail: fe@li-envirolaw.com www.li-envirolaw.com

PERSONAL INJURY

DAWN MUNRO, ESQ.

Per Diem Services
Experienced Personal Injury Attorney

Available For Motions, Conferences, Hearings, Depositions

Nassau • Queens • Brooklyn
Bronx • Westchester
516-314-8559

DEFENSE ATTORNEYS

RAISER & KENNIFF, PC

NEW YORK'S CRIMINAL DEFENSE TEAM
Former Assistant District Attorneys, U.S. Army Judge Advocates
Felonies • Misdemeanors • White Collar • Federal
All Aspects of Litigation and Appeals

1-888-504-CRIM (2746)
Suffolk • Nassau • Manhattan
criminaldefense@raiserkenniff.com
www.raiserkenniff.com
"Se Habla Español"

LEGAL WRITING/ APPELLATE PRINTING

MITCHELL DRANOW, ESQ.

Legal Writing and Appellate Printing

$3250 Fee for Writing Briefs and Printing Records for Insurance Law § 5102 Appeals

(516) 286-2980
mdranow@hotmail.com

75 Main Avenue
Sea Cliff, New York, 11579

TRADEMARK ATTORNEY

ROBERT S. BRODER, P.C.

Experienced Trademark Attorney
Serving the Nassau Community for 19 years
Availability/Clearance Searches • Application Prosecution
Maintenance Filings • TTAB Proceedings • Due Diligence
Licensing • Assignments • Security Interests • Cease and Desist • Litigation • CTM and International Applications • Copyright Matters

24 HOUR SERVICE AVAILABLE

516-771-0349 www.broderlaw.net rsbroder@optonline.net

DIVORCE MEDIATION

KENNETH B. WILENSKY, ESQ.

- Fellow, American Academy of Matrimonial Lawyers since 1992
- Named to NY Times List of Family Law "Super Lawyers" 2007, 2008, 2009 and 2010
- Author, Chapter on Alternative Dispute Resolution, Matthew Bender, New York Civil Procedure, Matrimonial Actions-1997
- Chairperson (1993-1996) Nassau County Bar Association Committee on Alternative Dispute Resolution
- 27 years of mediation/collaborative law experience

Law Offices of Vessa & Wilensky P.C.
626 RexCorp Plaza, Uniondale, N.Y. 11556
(516) 248-8010 • www.lawvw.com

PER DIEM ATTORNEY

STEVEN C. NOVEMBER, P.C.

Experienced Personal Injury Attorney
– 20 Years of Litigation Experience –

Available for Depositions,
Motion Writing, Court Appearances

NYC • Long Island • Westchester

(917) 327-7706
novemberlaw@gmail.com

WORKER'S COMPENSATION

THE LAW OFFICES OF LEE S. BRAUNSTEIN, P.C.
1025 OLD COUNTRY ROAD
SUITE 403 NO.
WESTBURY, NY 11590
TELE 516-739-3441 FAX 516-739-3442

"WORKERS' COMPENSATION & SOCIAL SECURITY DISABILITY CLAIMS COUNSEL TO THE BAR"

270 Main Street
Sayville, NY 11782
631-360-7750

215-48 Jamaica Avenue
Queens Village, NY 11428
718-465-3100

OFFICE SPACE

GARDEN CITY

Fully furnished double windowed 13x10 office in newly renovated boutique law suite with elegant glass wall conference room. Telephone answering, fax, copy machine, scanning services and high speed internet available. Great parking and immediate availability. 585 Stewart Avenue.

Please contact Mike at
(516) 227-2121 or
(516) 222-2722

HEMPSTEAD/ GARDEN CITY

Professional Suite w/ 4 Offices & Private Bathroom $1500/month includes all 2 month rent concession for Feb 1st Lease
4 Office Suite w/ Large Secretarial Area
Located in beautifully renovated Victorian on Hilton Ave. Near all Courts/Reception service available. Call Steve Davis

(516) 486-8500
Email Joxath@aol.com

GARDEN CITY

Three windowed office available – upscale suite furnished/unfurnished
666 Old Country Road,
Garden City, NY
Reply to
sscaring@scaringlaw.com

MINEOLA

Furnished office in law suite, telephone system, internet access, parking, amenities, walk to courts, LIRR. Perfect for sole practitioner.

516-742-5995

BUSINESS CARD DIRECTORY

ALLIED LEGAL SERVERS

GUY MAMMOLITI
PRESIDENT

516 **302-4744**
fax 516 **302-4745**

2776 Long Beach Road
Oceanside, NY 11572

info@alliedlegalservers.com

Have you taken advantage of all NCBA has to offer?

Great New Member Benefit!

Looking for a New Job?

OR

Looking for Legal Help?

Try Our New Online

NCBA Career Center

Job Seekers Can:

- Post an Anonymous Resume.
- Set a Personal Job Alert.
- View jobs.
- Create a Jobseeker Account.

Exclusively for NCBA Members

√*Members see all newly posted jobs for 14 days before they can be viewed by the general public.*

√*Member resumes are listed first in employer searches.*

Employers Can:

- Browse Resumes for FREE.
- Post a job.
- Create a Profile.
- Email Broadcasts.

Long Island's First Online Job Board For The Entire Legal Profession

Get Started Today!

www.nassaubar.org

Are you feeling

Overwhelmed?

The NCBA Lawyer Assistance Program can help.

We understand the competition, constant stress and high expectations you face as a lawyer, judge or law student. Sometimes the most difficult trials happen outside the court. Unmanaged stress can lead to problems such as substance abuse and depression.

The LAP Committee provides referral services, professional and peer support, and assistance with law firm closings. All services are completely free, strictly confidential and protected under Section 499 of the Judiciary Law.

Call the Confidential 24-Hour Hotline:

888.408.6222

LAP Lawyer Assistance Program

Lawyer Assistance Program
Sponsored by
NYS Lawyer Assistance Trust
Nassau County Bar Association

Looking to Build Your Client Base This Year?

Then Take a Look at Joining NCBA's Lawyer Referral Information Service

NCBA receives 250 calls a week from people seeking all sorts of legal help.

All callers are personally evaluated and referred to appropriate NCBA member attorneys on the LRIS panel, who agree to charge no more than $50 for the first half hour consultation. Fee arrangements are then between the attorney and the client.

Join LRIS today!

LRIS annual membership remains at the low starting fee of just $250.

Apply online at www.nassaubar.org, or contact Pat Carbonaro, 516-747-4070 x219.

LRIS

Lawyer Referral Information Service

We encourage you to contact our Corporate Partners* for special Members-Only offers

CBS Coverage Group, Inc.
(516-394-7562)

NORTH PARK CONSULTANTS INCORPORATED
INSURANCE & FINANCIAL SERVICES
(800-250-2283)

CHAMPION OFFICE SUITES
(516-873-8880)

RealtimeReportingInc.
(516-938-4000) National Court Reporting Services

CAPITAL PAYMENTS
(631-719-8657)

Paragon Group, LLC
CORPORATE REAL ESTATE & TENANT REPRESENTATION
(516-336-5440 x18)

***Corporate Partnership** represents the highest level of sponsorship, which helps to offset expenses for Bar Association programs and services*

For more information about these benefits or Corporate Partnership contact Dede Unger at 516-747-4070 x226 or dsunger@nassaubar.org