Nassau Lawyer

THE JOURNAL OF THE NASSAU COUNTY BAR ASSOCIATION

May 2011 | www.nassaubar.org | Vol. 60, No. 9

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Of Note

NCBA Member Benefit – I.D. Card Photo
Obtain your photo for court identification cards at NCBA Tech Center. Cost $10.
June 7, 8 & 9 • 9 a.m.-4 p.m.

Events

WE CARE Rebuilding Together
Sat., May 21, 2011

New Member Orientation
Mon., May 23, 2011
5:30 p.m. at Domus
See page 10

Installation of Officers and Directors
Wed., June 1, 2011
6 p.m. at Domus
See insert

Domus Open
Mon., June 13, 2011
Eisenhower "The Red" Course
See insert

What's Inside

Focus: Matrimonial and Family Law

General Articles

NCBA Honors Extraordinary Efforts at Law Day Celebration

By Valerie Zurblis

President John Adams would have been proud to see the impressive accomplishments of the distinguished honorees at the Nassau County Bar Association's 2011 Law Day dinner, held at Domus.

The Liberty Bell Award, which recognizes non-lawyers for activities that heighten public awareness and understanding of the law, was presented to The Workplace Project, the only nonprofit organization on Long Island whose efforts focus exclusively on educating, organizing, and advocating for day laborers and other low wage Latino immigrants, assisting them in their efforts to improve their working and living conditions. The Court Employee of the Year Award, named in honor of NCBA Past President Peter T. Affatato, was presented to John Coppola, who has served as Family Court's Deputy Chief Clerk since 1996, for his professional dedication to the court system and to its efficient operation, and who is exceptionally helpful and courteous to other court personnel, members of the Bar, and the many diverse people whom the court serves.

The theme of this year's Law Day was "The Legacy of John Adams, from Boston to Guantanamo – With a Stop at Domus." Special thanks go to Chris Garvey and Susan Vendikos-Gill, who performed in period costumes as journalist and scandalmonger John Callender and First Lady Abigail Adams.

NCBA President Marc Gann congratulates Peter T. Affatato Court Employee of the Year honoree John Coppola with Hon. Anthony Marano, chief administrator, Nassau County Courts. (Photos by Hector Herrera)

NCBA 112th Annual Dinner Dance

President Gann congratulates William F. Levine, Esq., recipient of the Nassau County Bar Association's Distinguished Service Medallion (left). In addition, Bill Levine, accompanied by his daughter Elizabeth Sharpe Levine, was honored for his 50 years of service to the legal profession (right).

Past Presidents in attendance share in the Toast to Domus.

It's a Three-Peat For Clarke!

Third Straight Year Clarke Students Take Nassau Mock Trial Trophy

By Valerie Zurblis

For the first time in the history of the Mock Trial competition in Nassau County, one high school has won the County title three years in a row. The student team at W. Tresper Clarke High School of Westbury won a close competition in the finals last month, edging out North Shore Hebrew Academy to again take the Marcus G. Christ Championship Trophy, which was presented at NCBA's annual Law Day Awards dinner in April.

The same coaching team has led Clarke to all their victories – volunteer attorney-advisor M. Allan Hyman, partner at Certilman Balin, and Clarke teacher and former attorney Paul Henning. In the past two years, Hyman was joined by assistant attorney-advisor Keri Shannon, who was a member of the student team that won the New York State championship in 2003. This is the sixth time in the past nine years that Clarke has won the Christ Trophy.

See MOCK TRIAL, Page 6

Upcoming Publications Committee Meetings

Thurs., June 9, 2011 • Thurs., July 14, 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.

NASSAU ACADEMY OF LAW

June 16	Dean's Hour	Municipal Law...Ethics
20		Evidence Update (w/@ SAL)
22	Dean's Hour	Veterans Rights-2011 Update
24	Dean's Hour	Ethical Issues in Practicing Animal Law
27		2nd Circuit Criminal Law Update
29		Insurance Law Update
30	Dean's Hour	Class Actions (Comm. Lit)

Matrimonial & Family Law

When Words Wound – A Matter of Opinion

Lawyers are often vexed by social issues presented by clients that lack legal recourse. Only recently have matrimonial practitioners been given the statutory authority to provide a solution for those clients seeking to end their marriages without exacerbating acrimony with a grounds trial.

Nancy Gianakos

Until October, 2010, New York was the only state that did not permit divorce without a fault finding. Prior to its passage, seeking a divorce required a litigant to air the marital laundry in pleadings or possibly perjure themselves. No law in New York specifically recognized a marital breakdown without proving fault though society had been moving away from a fault paradigm for decades. With the enactment of Domestic Relations Law 170 §(7), parties are now permitted to divorce based upon an "irretrievable breakdown" of the marriage in New York. A litigant need only state under oath that the marriage has irretrievably broken down for a period of six months.

As in the case of "no fault" divorce, the law lags the evolution of the internet; arguably, hereto, there is cause for statutory change. Matrimonial litigants far too often engage in slur campaigns via email, blog postings and in social websites. Children are victimized by the modern age school bully, who immune from school authority or parental control, engages with peers in attacks by email, text messages and Facebook pages broadcast to millions courtesy of the internet. Taken to an extreme, cyber bullying has resulted in death. One need only recall the case of Phoebe Prince, a 15-year-old Irish immigrant who as a result of internet taunting by fellow students committed suicide in Massa-chusetts in March, 2010.

Without specific laws addressing "cyber bullying," a victim must look to existing criminal statutes such as "harassment," "stalking," or "civil rights violations" to shut down the cyber bully and/or a civil action in "defamation" which appears to be equally inadequate in providing relief to the internet victim. The level of attack to sustain a criminal verdict is no less burdensome than that for a victim seeking a civil finding of defamation.

Defamation is defined as "the making of a false statement about a person that tends to expose the p[erson] to public contempt, ridicule, aversion or disgrace, or induce and evil opinion of him [or her] in the minds of right thinking persons, and to deprive him [or her] of their friendly intercourse in society."[1] The statement may be oral (slander) or written (libel).

The New York Court of Appeals enumerated the following factors that must be considered by the Courts in a defamation action:

1. Whether the language has a precise meaning or whether it is indefinite or ambiguous;

2. Whether the statement is capable of objectively being true or false; and

3. The full context of the entire communication or the broader social context surrounding the communication.[2]

In *Finkel v. Dauber et al*,[3] Justice Randy Sue Marber (Sup.Ct., Nassau County) applied these factors in her analysis of an adolescent group's internet attack. The plaintiff, therein, brought an action in defamation against her adolescent peers who engaged in an internet exchange of statements about the plaintiff, made on a social networking website, as well as an action against their parents for negligent entrustment. The Defendants were part of a social network group "90Cents Short of A Dollar," a "secret" Facebook group; new members were by invitation of the administrator, in this instance two of the defendants. Notably, the group had no public content on Facebook nor did the Facebook profile of defendants include membership in the group.

The plaintiff alleged that the Facebook group members referred to the plaintiff as the "11th cent" during their exchanges, in which they graphically depicted the "11th cent" as engaging in deviant and bestial sexual acts on a frequent basis. The group exchange also made ludicorous claims that the "11th cent" had caused the spread of numerous sexually transmitted disease. (The precise language is not repeated here, but may be found in the court's decision.) Finally, members of the group posted photographs of the plaintiff and "identified" the plaintiff as the "11th cent."

See WORDS, Page 17

The Lawyer's Role in Court – Annexed Mediation

Mediation is a negotiation between spouses facilitated by a neutral party.
It is not arbitration or litigation. The mediator is not a judge or juror.
The critical component is the willingness to settle and ability to compromise to reach a mutually acceptable resolution.
If both clients and lawyers really want to settle, the case will settle.
Be creative to get around impasses. 97% of litigated divorces settle – your case could too.

By Charles McEvily

Clients going into court annexed mediation expect their lawyer to understand the dynamics of conflict and the mediation process itself.

Despite the increasing use of mediation as the most popular form of ADR process, and even with court annexed mediation in Nassau County, and elsewhere, many lawyers are not prepared for what actually happens in a mediation session.

Some lawyers see their role in mediation as quite limited. They explain the process to the client, may make the opening statement, provide legal advice and then throw their client into the process. Others try to dominate the process. They behave in an adversarial manner, as if they were at trial or judicial conference, and often prevent their client's participation in the process. An ideal balance is achieved by considering the attorney as a "consulting expert" as well as an advocate. Client participation is one excellent indicator of success in mediation. If the client is "heard," the case frequently settles. The lawyer can assure that the client's position is presented (by the client or lawyer) and presented in a way that does not attack or fail to respect the interests of the other party by advanced preparation and review with the client. It is very helpful to ask the client to prioritize her or his interests before the mediation. Is keeping the house worth a reduction in general spending capacity? Can you always leave work early to see the children on the mid-week evening requested in negotiations? Can you give up something to get something else?

The lawyer has a central role in, and responsibility for, making mediation work for their client in a constructive, creative and productive way. Here are some ways you can become a more effective lawyer in mediation:

Client Preparation and Participation

As in litigation, preparation of your client is the most important step you can take. Your client is central to the process in mediation and should be ready to play that role. If you have a client who can speak well, then let him or her interact with the mediator and the other side directly. A well prepared client does not need to be protected. She or he can be most effective to a genuine and honest resolution. Most clients can represent their interests and speak for themselves in mediation. All communications are confidential since they are settlement discussions. In the rare instance in which a client cannot communicate directly, explain that fact to the mediator and assume the responsibility of presenting the client's interests. Sometimes it is necessary to break into caucus sessions to enable the client to speak directly with the mediator. The client's voice must be heard in mediation and the lawyer's work is often done before the client enters the mediation room by empowering the client to speak for him or herself.

"If you don't know where you're going, you'll end up somewhere else"

– Yogi Berra

Interests And Positions

A mediation session is not a trial based on legal and factual positions, but is a facilitated negotiation. Use active listening skills. If you ask questions, make them open ended, as the session is not an examination for discovery or cross-examination at trial. An open ended question incorporates the statement sought to be clarified. For example, when a spouse states "I need the house," the open ended question is "Tell me more about why you need the house?" A question should not be asked to prove a point, but to clarify the client's (or other party's) real interest. Pay attention to body language. Pick up on what others are saying and use that information to assist your client. Highlight the positive but do not ignore the negative. Encourage the clients to speak directly to each other in the session. If possible, separate the people from the problem. Be seen as a problem solver by the other lawyer and the other party. This convinces your own client that you are really seeking a solution and trying to solve his or her problem. Mediation is generally interest-based so try to move from positions to interests and on to mutual interests.

Batna & Watna

Consider your client's best alternative to a negotiated agreement (BATNA), and also, the worst alternative to a negotiated agreement (WATNA), so that you can

See MEDIATION, Page 17

Time Flies When You're Having Fun!

From the President

Marc C. Gann

I can't believe that it's been a year since being inducted as President of this wonderful Association, and, more than that, that it's been six years on our Executive Committee. This experience has been without a doubt the most rewarding of my life in no small measure because of all of you. I have found the attorneys of the Nassau County Bar Association to be most professional, caring, sensitive and giving people that I have ever met. As evidence of that, consider a few examples.

Chris McGrath, our past president, has continued to work tirelessly here on various task forces, our judiciary committee, co-chairing the We Care Fund and in the community with Kiwanis. The Hon. Peter Skelos has not only given of himself in his community but has significantly enhanced the reputation of We Care as its co-chair. Steve Schlissel has maintained a thriving practice and has probably devoted more time and energy to fundraising for the We Care charity than anyone I know. Past Presidents Doug Good and Peter Levy devote hours upon hours to the work of Nassau Suffolk Law Services in an effort to continue to bring quality representation to the less fortunate. Annabel Bazante, Thomas Bucaria, Kate Meng, Lee Beck, Carol Hoffman, Henry Kruman and all the members of the committee, provide the energy and backbone to our Lawyer's Assistance Program. Gale Berg and others have devoted incredible effort to the Mortgage Foreclosure Project. And there are so many more who I can not possibly name but seek to thank for all of the hard work, done without accolades or monetary gain but who make lawyers and this association credible and proud.

I would be remiss if I didn't acknowledge several who are receiving recognition for their efforts this year. Elena Karabatos received the Director's Award for her outstanding efforts as the outgoing chair of the Matrimonial Law Committee. She has made the committee meetings a "must attend" resulting in record participation. The Hon. Andrew Engel and Warren Hoffman received the President's Award for their extra effort this year. As chair of our Grievance Committee, Warren had a tremendous workload in and of itself. But when Helen Phillips had to take some time off, Warren stepped in to take over many administrative responsibilities. Judge Engel, in addition to his duties as Dean of the Academy of Law, led a task force reviewing our dues structure and CLE structure. The result is a new CLE structure providing unlimited CLE to our members for one incredibly low price, our Domus Scholar Circle; take advantage of it. Congratulations to each of you.

I must also thank the members of the Executive Committee, Board of Directors and Committee Chairs for their work this year. The membership was incredibly active as evidenced by the difficulty in availability of space for events and programs at Domus. Keep it up! But working with Emily Franchina, Susan Katz Richman, Marian Rice, Peter Mancuso, John McEntee and Hon. John Kase has been incredible. These are people of diverse backgrounds who provide unique perspectives on the issues that we as lawyers face and who have guided, and will continue to guide, NCBA to immeasurable heights. They are truly stellar people and you are in great hands! Sue will be a great president and Steve Eisman and Martha Krisel are amazing additions to the Executive Committee.

Finally, the staff at Domus is second to none and words truly cannot capture my feelings and appreciation for them and all they do. While they are led by Deena Erhlich, each individual brings so much to the table and is so good at what they do. They juggle so many balls and wear so many hats that it makes my head spin, yet they are able to pull off each and every event with such precision that it seems effortless. Thank you Mindy, Dede, Elaine, Helen, Donna, the Barbaras, Stephanie, Mary, Jessica, Carolyn, Val, Gale, Caryle, Phyliss, Maureen, the Pats, Patty, Henry and Hector! You are the best! And Deena they are a reflection of you, your hard work and heart which truly makes Domus a home.

I love you all!

NCBA New Members

We welcome the following new members

Attorneys

Mary Breen Corrigan
Katuria E. D'Amato
Byron A. Divins Jr.
James Drew
Shikha Gupta
Martin Hoffenberg
Matthew Adam Kaplan
Brian Martin Libert
Jessica Mastrogiovanni
Hani Moskowitz
Susan Paik
Danielle Papa
Christine T. Quigley
Thomas J. Santucci
Terence Scheurer
Jeffrey A. Sunshine

Students

Darren D. Bleier
Jeffrey Bloomfield
Amarilda Brahimi
Michael J. Catallo
Evan E. D'Amico
Elisa Dortenzio
Jamie Alison Rosen
James J. Symancyk
Nkechi Vologwu

In Memoriam

William R. LaMarca
William A. Mapes

NCBA Asks for Further Revision in Proposed Judicial Campaign Rule

The Board of Directors of the Nassau County Bar Association has taken the position that Office of Court Administration proposed changes regarding contributions to judicial campaigns would diminish or decrease, if not eradicate, the public's confidence in the judiciary by causing unnecessary delays and confusion as well as eliminate certain rights of litigants, such as appeals. The board suggests that OCA could improve the public's confidence more effectively through public funding, but in light of today's economic challenges to the Court budget, instead suggested revising the proposal.

The NCBA Board took the position at its meeting in April in response to a request from New York State Chief Judge Jonathan Lippman to comment on Proposed Part 151 of the Rules of the Chief Administrator of the Courts, which was designed to improve public confidence to the judiciary by prohibiting a judge from being assigned cases involving donors to a judicial campaign committee. NCBA President Marc Gann created a task force chaired by NCBA Past President Christopher McGrath to thoroughly review and recommend action to the Board. Task force members also held discussions with counsel to both the Democratic and Republican parties, Nassau Courts Administrative Judge Anthony Marano, and hosted an open meeting the NCBA membership for input before making recommendations to the entire board.

The complete report is available online at www.nassaubar.org.

Revised Judicial Intervention Forms Available

All attorneys are advised they should now use the recently revised Request for Judicial Intervention form (Form UCS-840 Rev. 3/2011) and addenda for use in civil practice in the Supreme and County Courts.

Since its last revision in 2000, changes in the law and court system practice have made the old form outdated. The form has been revised and updated with the assistance of court personnel as well as the professional bar.

The new forms are:

- RJI (UCS-840)
- A general addendum (UCS-840A)
- Addenda for Commercial Division (UCS-840C)
- Addenda for Foreclosure (UCS-840F)
- Addenda for Matrimonial matters (UCS-840M)

These forms may be downloaded at www.nycourts.gov/forms/index.shtml.

To avoid unfairness, the Nassau County Clerk's Office is accepting both the new and former RJI forms for filing until August 31, 2011. Thereafter, only the revised forms will be accepted by the Clerk's Office.

Questions may be directed to Nassau County Clerk Maureen O'Connell, 516-571-2660 or Holly Nelson Lutz, NYS Office of Court Administration Counsel's Office, 518-474-7469.

Nassau Lawyer

The Official Publication of the Nassau County Bar Association
15th & West Streets
Mineola, N.Y. 11501
Phone: (516) 747-4070
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www.nassaubar.org
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Published by Long Island Business News
(631) 737-1700; Fax: (631) 737-1890

President and Publisher
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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.

Matrimonial & Family Law

Pendente Lite Applications, Then and Now

Prior to October 12, 2010, when discussing potential *pendente lite* support obligations with a client, the experienced matrimonial practitioner would routinely repeat the mantra "must maintain the status quo," stressing the balancing act of both accommodating the recipient's needs and the payor spouse's ability to meet those needs, as well as his or her own comparable standard of living. In traditional marriages, there is a "monied spouse" who generates the majority of the income to meet the family's financial needs, and a "non-monied spouse" who is the primary caretaker of the parties' children. To avoid being at the financial mercy of the "monied spouse" during a divorce action, the "non-monied" spouse often makes a *pendente lite* support application to ensure that the pre-action financial status quo is uninterrupted.

Jeffrey L. Catterson

In addressing a request for *pendente lite* support, the court was historically guided by the principle that a support award is "designed to ensure that the needy spouse [is] provided with sufficient funds to meet his or her reasonable needs pending trial."[1] In addition to the needy spouse's reasonable needs, the reasonable needs of the children in that spouse's custody are to be considered as well.[2] After *Hartog*, the court also considered the standard of living established during the marriage and the recipient spouse's "actual needs."[3]

The *pendente lite* support award was not designed to divide the "monied spouse's" earnings, but to maintain the parties' pre-commencement status quo and to "tide over the more needy party, not to determine the correct ultimate distribution."[4] Furthermore, in calculating any *pendente lite* support award, the court was required to also take into consideration the "monied spouse's" needs and his or her ability to meet those needs while paying support to the "non-monied spouse."[5]

Adhering to the pre-commencement status quo maintained by the parties, the court historically directed that the "monied spouse," as part of his or her support obligations, continue to pay the carrying charges on the marital residence (*i.e.* mortgage, real property taxes, homeowners insurance, utilities, and maintenance) as well as maintain all existing policies of health, medical and automobile insurance. A direct support award to the "non-monied spouse" would also need to be made to allow the non-monied spouse to afford variable expenses such as food, clothing and recreation.

By way of example, if the parties' Statements of Net Worth showed a total monthly expense for the parties' pre-marital status quo of $10,000, and the expenses that the "monied spouse" was ordered to pay directly totaled $7,000 per month, the direct support award to the "non-monied spouse" would normally be calculated by reducing the remaining $3,000 by any portion of that amount that the court attributed directly to the "monied spouse," which the "non-monied spouse" would not be paying (*i.e.* $2,000 for the non-monied spouse" and the children and $1,000 for the "monied spouse's" expenses). The court would then fashion that $2,000 in direct support award in some combination of child support and maintenance, usually making the whole payment nontaxable, cognizant that this is a net amount needed for the "non-monied spouse" to cover the monthly obligations, with no excess being available to pay any taxes associated with a taxable maintenance award.[6]

In contrast to how *pendente lite* awards may now be calculated under the new statute, the determination of a *pendente lite* support award prior to October 12, 2010 was predicated upon the actual needs and not some arbitrary formula. In fact, while a final child support determination is governed by the Child Support Standards Act ("CSSA"), which specifically provides a set formula to determine said entitlement, a court is not constrained by such a formulaic approach when calculating *pendente lite* child support obligations.[7] This allows the court to issue a *pendente lite* order which directs the "monied spouse" to maintain the children's housing and insurance needs while not "double dipping" by virtue of an excessive interim direct child support award, which the CSSA contemplates will cover these expenses as well.

Conversely, as part of the new "No Fault" legislation that was implemented on October 12, 2010, any action commenced after October 12th is to be governed by a different standard for calculating *pendente lite* maintenance obligations.[8] The legislature has now provided a formula to calculate temporary maintenance entitlements that is analogous to the CSSA. However, contrary to the judi-

See PENDENTE LITE, Page 19

The Bar Association of Nassau County and the Nassau Academy of Law Cordially Invite Members and Their Guests to Attend

Installation of Officers and Directors

We would be honored if you would join us for the 2011 Installation of NAL and NCBA Officers and Directors to be held on Wednesday, June 1, 2011 at 6 p.m. at the Home of the Association

At that time it will be our pleasure to welcome Hon. Anthony F. Marano, Administrative Judge, Nassau County and Hon. William C. Donnino, Supervising Judge, Nassau County Criminal Courts who will administer the oaths of office

Please join us for a Reception following the Installation

OFFICERS
Susan Katz Richman - President
Marian C. Rice - President-Elect
Peter J. Mancuso- 1st Vice-President
John P. McEntee - 2nd Vice-President
Steven J. Eisman - Treasurer
Martha Krisel - Secretary

NASSAU ACADEMY OF LAW
Deborah S. Barcham - Dean
Ralph A. Catalano - Associate Dean
Jeffrey C. Daniels - Assistant Dean
Chandra Mary Ortiz - Assistant Dean
Maribeth Walsh - Assistant Dean
Sondra K. Pardes - Secretary
Robert S. Barnett - Treasurer
Thomas J. Foley - Counsel

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Dorian R. Glover
Patricia Miller Latzman
Gregory S. Lisi
Linda G. Nanos
Lee Rosenberg

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Installation • Wed., June 1, 2011

Name _____

Number Attending _____

The favor of a reply is requested by May 23, 2011. There is no charge for this event; however, reservations are required.

RSVP: Nassau County Bar Association, Att: Special Events
15th & West Streets, Mineola, NY 11501 or Fax 516.747.4147 or email events@nassaubar.org

Clarke High School students proudly receive the Marcus G. Christ Mock Trial Championship Trophy, held by Mock Trial Co-Chair Marilyn Genoa, at Law Day ceremony in April. With the students, (standing l-r) are Hon. Anthony Marano, Administrative Judge, Courts of Nassau County and Team Coach Paul Henning. Standing at the far right is Attorney Advisor Assistant Keri Shannon, Attorney Advisor M. Allan Hyman and NCBA President Marc Gann. (Photo by Hector Herrera)

MOCK TRIAL ...

Continued From Page 1

The annual New York State High School Mock Trial Tournament, the nation's largest, provides students with hands-on opportunities to further their understanding of the law, court procedures and the legal system, while honing their speaking, listening, reading and reasoning skills. With 44 high schools and nearly 500 students arguing in courtrooms at Supreme Court, the Nassau contest is the largest single-county competition in the state.

NCBA Attorneys Make Mock Trial Happen

Each year, Nassau County Bar Association members volunteer as team attorney-advisors and trial judges to encourage high school students to consider a career in the legal profession. This year 117 NCBA members stepped forward to inspire more than 500 students from 44 high schools at the annual Mock Trial Competition, coordinated by NCBA's Caryle Katz.

Mock Trial 2011 Co-Chairs
Jeffrey A. Goodstein
Marilyn K. Genoa
Hon. John G. Marks

Mock Trial 2011 Judges

Hon. Peter Skelos, Associate Justice, Supreme Court – Appellate Division, presided over the Nassau County Championship Final.

Hon. Joel Asarch
Hon. Leonard Austin
Jonathan Bartov
Leland Beck
Hon. Stacy Bennett
Gale Berg
Marjorie Bornes
Hon. Jeffrey S. Brown
Neil Cahn
Andrew Campanelli
Jeffrey Carpenter
Hon. Michael Ciaffa
Helayn Cohen
Hon. Bruce Cozzens
Hon. Edmund Dane
Donnalynn Darling
Hon. Arthur Diamond
Hon. Frank DiKranis
Jaime Ezratty
George Frooks
David Gabor
Hon. Kenneth Gartner
Domingo Gallardo
Christopher Garvey
Joseph Gentile
Jeffrey Gerson
Barbara Gervase
Marston Gibson
Douglas Good
Robert Greco
Hon. Ellen Greenberg
Danny Greenblatt
Jeffrey Grob
Roger Hausch
Adrienne Flipse Hausch
John Hiller
Hon. Fred Hirsh
Alan Hodish
Hon. Steven Jaeger
Hon. John Kase
Richard Kestenbaum
Hon. Susan Kluewer
Jennifer Leahy
Hon. Steve Leventhal
Jack Libert
Gregory Lisi
Mili Makhijani
Michael Markowitz
Hon. David McAndrews
Francis X. Moroney
Robert Nigro
Janis Noto
Hon. William O'Brien
Hon. Anthony Paradiso
Joanne Curran Perrucci
Madeline Pomerantz
Arianne Reyer
Mindy Roman
Daniel H. Russo
Hon. Lawrence Schaffer
Robert Schalk
Hon. Denise Sher
Ira Slavit
Ted Tanenbaum
Hon. Helen Voutsinas
Joy Watson
Hon. Robert Zausmer

Mock Trial 2011 Attorney-Advisors

Gary Alpert
Steve Barnwell
Lewis Bartell
Liora Ben-Sorek
Stephen Bonfa
Melvin Borowka
Susan Altamore Carusi
Helayn Cohen
J. Scott Colesanti
Anthony Colleluori
Paul Delle
Adam Demetri
Anne Donnelly
Brandon Draper
Kathleen Durante
David Ehrlich
Pablo Fernandez
Janine Ferraro
William Ferro
John Ficara
Matthew Flanagan
Lawrence Gerzog
M. Allan Hyman
David Kirschner
Roy Klein
Cynthia Kouril
Josh Mallin
Thomas Mason
James McGlynn
Hon. Thomas McKevitt
Robert McLaughlin
Karen Medard
Moya O'Connor
David Pollack
Janna Rossetti
Karl Seman
Keri Ann Shannon
Joanne Stevens
Gary Turk
Jeff Weiss
Steve Zissou
Isaac Zucker
Hon. Martin Zuckerbrod

Matrimonial & Family Law

E-Discovery Rights and Responsibilities in Matrimonial Cases

Despite the fact that the Uniform Rules of New York Trial courts were amended two years ago to include a provision pertaining to e-discovery, matrimonial attorneys have been slow in taking an active role in preserving and retrieving electronically stored information ("ESI") on behalf of the client.

In today's world, practically everyone owns a computer and there is virtually no limit to stored electronic data from e-mails, instant messaging, digital voicemail, text messaging, word processing files, electronic calendars, proprietary software files, operating systems and application software.

Such ESI is found on desktops, laptops, hard drives, floppy disks, CDs, DVDs, back-up tapes, data stored with Internet service providers, smart phones. Even deleted information in the "unallocated space," which may only be unstructured fragmented data, can still be retrieved under certain circumstances.

As a consequence, the attorney is directly accountable to the client for ESI discovery. While outside vendors may be utilized in the process, make no mistake, the client will justifiably look to the lawyer to get it done. If the discovery responses are inadequate or worse, the courts may sanction the client which, depending on the extent, may well result in a malpractice suit.

Therefore, several important principles of e-discovery, which have been the subject of recent litigation, are addressed in this article. Be advised, however, that this is only a starting point.

Fundamentally, be aware that 22 NYCRR § 202.12(c)(3) provides that the matters to be considered at the preliminary conference ("PC") shall include:

Where the court deems appropriate, establishment of the method and scope of any electronic discovery, including but not limited to

a) retention of electronic data and implementation of a data preservation plan,

b) scope of electronic data review,

c) identification of relevant data,

d) identification and redaction of privileged electronic data,

e) the scope, extent and form of production,

f) anticipated cost of data recovery and proposed initial allocation of such cost,

g) disclosure of the programs and manner in which the data is maintained,

h) identification of computer system(s) utilized, and

i) identification of the individual(s) responsible for data preservation;

Duty to Preserve

As soon as litigation is reasonably anticipated, counsel should advise the client in writing to place a litigation hold on ESI in order to preserve the information and stop the process whereby documents are destroyed and backup tapes are recycled. Generally, the duty to preserve evidence attaches not just when an action is commenced, but prior thereto, when a party knows or should know that the evidence may be relevant to future litigation.

Richard N. Tannenbaum

Once a party can reasonably anticipate litigation, it must suspend routine deletion and document retention policies and place a litigation hold on the relevant ESI of key players. Failure to preserve can result in an adverse finding or a preclusion order. *Einstein v. 357, LLC*, Index No. 604199/2007, 2009 WL 4543044 (Sup. Ct. N.Y. Co., Nov. 12, 2009).

The failure to establish any form of litigation hold may constitute gross negligence, and once a party shows gross negligence in the destruction of evidence, that fact alone is sufficient to support a finding that the evidence was unfavorable to the negligent party. Sanctions may also be imposed where evidence is destroyed after being requested by the other party or after a party has served a notice to preserve.

Generally, a party seeking sanctions such as an adverse inference instruction based on the spoliation of evidence must show the party had an obligation to preserve the evidence at the time it was destroyed; that the evidence was destroyed with a culpable state of mind; and that the destroyed evidence was relevant to, and would support, the party's claim or defense.

The court in *Einstein* found that the defendants intentionally deleted e-mails after a duty to preserve attached, thereby warranting an adverse inference that any deleted e-mails were unfavorable to the defendants.

Prior to the PC, the attorney should become familiar with the location of the client's computers, operating systems, hardware and the persons who use them in order to collect and review the ESI. Counsel is then in a position at the PC to intelligently identify the relevant ESI, discuss the scope of discovery, assess the cost allocation and agree on a preservation order.

Cost Allocation

New York courts have presumed on the basis of CPLR Rule 3120 that the requesting party pays for the cost of producing discovery when a document is relevant and discoverable. This principle has been applied in e-discovery cases.

In *Lipco Elec. Corp v. ASG Consult. Corp.*, 4 Misc.3d 1019(A) (N.Y. Sup. Ct. Nassau Co., Aug. 18, 2004), where the court held that until the requesting party was willing to pay the costs of pro-

See E-DISCOVERY, Page 20

Update on College Credits in Divorce Cases

In February 2008, I wrote an article in the New York Law Journal regarding the issue of credit to a non-custodial parent for college expenses paid against his or her basic child support payments.[1] Three years have transpired, and recent cases provide more uniformity in the law. However, the cases are not highly instructive, as they still fail to provide a specific formula for the calculation that can be consistently followed and applied. In this article, I am once again presenting my suggested approach for drafting language that may prove helpful to practitioners likely to face this issue.

Elena L. Greenberg

Both the Domestic Relations Law and the Family Court Act permit a non-custodial parent to defray certain college education expenses paid by him or her for a child as part of an overall child support award. In considering which types of college expenses can actually be defrayed, all four Appellate Division departments now follow the basic rule that limits the application of a college credit to "room and board" expenses.[2]

Where there is only one child entitled to support, the calculation for the credit is simple and straightforward: the non-custodial parent should receive a dollar for dollar credit for the room and board payments. However, the issue becomes more complicated when there is one child in college and other children remaining in the custodial home.

For a period of time, the case of *Reinisch v. Reinisch* mandated a dollar for dollar credit up to the full amount of child support.[3] At least in the Second Department, *Rohrs v. Rohrs* and *Lee v. Lee* changed all that by holding that the credit could only be applied against the child support attributable to the particular child in college.[4] In June 2008, the Second Department reaffirmed that the calculation of child support credits only applies to room and board payments in and to so much of the payor's overall support obligation as it relates to such particular child in *Levy v. Levy*.[5] Incidentally, in 2009, the Supreme Court of Westchester County gave its seal of approval when it coined the term "Rohrs Credit" in *Fleischmann v. Fleischmann*, affirming *Rohrs* and *Levy* for the same proposition.[6]

The problem with all of these cases is that they fail to specifically address the actual method of calculation where there is more than one child living at home while another attends college. Other lower courts have struggled with this issue and come up with varying solutions.

There is a formula set forth by Justice Peckman of the Delaware County Supreme Court in the case of *Ann Marie T. v. John T.*[7] In that case, the parties had two unemancipated children and were attempting to establish an appropriate credit for the father's contribution

See CREDIT, Page 23

In Brief

Member Activities

The Honorable Angela G. Iannacci, New York State Supreme Court Justice, recently completed a Jurisprudence of Education Training Program conducted by the International Association of Women Judges in Washington, D.C. Jurisprudence of Equality Program provides training for members of the judiciary on the domestic application of international, regional and national law on issues dealing with discrimination and violence against women. Justice Iannacci was elected Judge of the Nassau County Family Court in 2004 and was immediately appointed as an Acting Supreme Court Justice assigned to the Matrimonial Center. During that time she also served as one of the first Judges assigned to the Model Custody Court and as back-up Judge assisting families in crisis in the Integrated Domestic Violence Part (IDV). In 2006, she was elected to the New York State Supreme Court where she has presided over all types of civil litigation including torts, commercial and guardianship matters. In 2009, Justice Iannacci was appointed as Associate Justice of the Appellate Term, Second Judicial Department where she presides over criminal and civil appeals. Justice Iannacci, who earned her Juris Doctor Degree from Pace University School of Law, is a member of the New York State Anti-Discrimination Panel and New York State Domestic Violence Task Force, a frequent lecturer at local colleges and law schools, and a recipient of the Blaine Sloan International Law Award and the Nassau-Suffolk Women's Bar Association Special Recognition Award.

Mark S. Mulholland, the managing partner at Ruskin Moscou Faltischek, P.C., was appointed to a seven-member Special Commission on Judicial Compensation, which has been tasked with recommending new salary levels for New York State's 1,300 state-paid judges. The Commission was established to address the issue of judicial pay pursuant to legislation passed on December 13, 2010 and signed into law by Governor Paterson. Mr. Mulholland earned his Juris Doctor from SUNY Buffalo School of Law and served as a J.A.G. officer in the U.S. Army before entering private practice. He was also elected a Board Member of Brookhaven Memorial Hospital Medical Center in 2008 and has served as a Trustee and Vice President of the Board of Education in his home village in the Town of Babylon; was selected to serve as a Board Member of the Long Island Aquarium; and was appointed a Public Member of the New York Mercantile Exchange Adjudication Committee. Mr. Mulholland lectures and writes often on litigation topics, is a frequent contributor to the New York Law Journal and serves as a Mediator in the Eastern District of New York's Federal Court Mediation Program.

Kenneth B. Wilensky and **Michael P. Vessa**, the senior partners in the Uniondale-based law firm of Vessa & Wilensky, P.C., have been named to the New York Times SuperLawyers list for 2010. Mr. Wilensky was named a "SuperLawyer" in the area of family law for the fourth consecutive year and Mr. Vessa was named a "SuperLawyer" in the areas of both family law and personal injury litigation.

Hon. Stephen L. Ukeiley

Ellen Kessler, a partner at Ruskin Moscou Faltischek, P.C., was again selected as one of Long Island's Top 50 Most Influential Women in Business by Long Island Business News. The award recognizes the significant contributions of women professionals in advancing the region's economy and business communities. Ms. Kessler, who concentrates her practice in the area of health law, is also a registered nurse. Prior to her tenure in the legal profession, Ms. Kessler had a distinguished career in nursing and nursing education at St. Barnabas, Bronx Lebanon and Brooklyn Veterans Hospitals. In 2009, she was installed as a director of the Bar Association. Ms. Kessler has authored articles for the New York Law Journal, The CPA Journal and The American Medical Group Association's Group Practice Journal on a wide range of legal issues.

The United Cerebral Palsy Association of Suffolk County has selected **Marvin Salenger** as the honoree for its 22nd Annual Golf Classic. Mr. Salenger, who practices personal injury law as a partner at Salenger, Sack, Kimmel & Bavaro, has also been selected by his peers for inclusion in The Best Lawyers in America® 2011 in the field of personal injury litigation, a distinction he has held consistently since 2006. Mr. Salenger has also consistently held a position on the New York Super Lawyers list, was named among Long Island's Ten Leaders in Civil Trial Law, received the New York City Trial Lawyers Association's prestigious "Lifetime Achievement Award" and has earned the highest A-V rating from Martindale-Hubbell. He has also appeared on television's Today, Inside Edition and major news programs. Mr. Salenger has also served as honoree for Ascent: A School for Individuals with Autism and commits his time and funds to many charitable organizations, including the Interfaith Nutrition Network.

Marc L. Hamroff, managing partner at the Garden City law firm of Moritt Hock & Hamroff LLP, recently spoke at a roundtable discussion "Legal Talk Live" at the Equipment Leasing and Finance Association's (ELFA) Annual Legal Forum held in Scottsdale, Arizona. The discussion included topics such as successor liability, litigation over Program Agreements and liability issues to name a few. In addition to serving as the firm's managing partner, Mr. Hamroff heads the firm's Financial Services Practice which includes the

See IN BRIEF, Page 24

Committee Reports

Young Lawyers

Meeting Date: 3/29/11
Brian P. Sullivan & Terrence Tarver, Co-Chairs

Hon. Edward W. McCarty III, delivered a CLE lecture entitled "How to Plan, Prepare and Conduct EBTs." The interactive lecture included the review of an altered emergency room medical chart document, acting out the symptoms of the patient, giving the attendees time to review the document and having participants conduct a mock EBT as Plaintiff's and Defendant's counsel.

Hospital & Health Law

Meeting Date: 4/7/11
Edmond D. Farrell & Rob Lebow, Co-Chairs

Kevin Mulry, Esq., detailed recent developments in the False Claims Act prosecution of claims and health care provider strategies.

Military Law

Meeting Date: 4/11/11
Daniel T. Campbell, Chair

The committee discussed a potential CLE Dean's Hour in June, 2011. The topics will include employment, immigration and matrimonial issues for veterans and the procedural aspects of representing veterans with veteran's administration benefit claims. The Vets Guide will be updated for next year. The Chair will contact the National Veteran Legal Services Program for a possible training session for NCBA attorneys which will teach them to represent veterans with VA claims.

Intellectual Property Law

Meeting Date: 4/29/11
Aimee L. Kaplan, Chair

The committee was pleased to welcome Gerard Wissing, Esq., an attorney with 20 years of legal experience specializing in the area of intellectual property, who delivered a presentation on IP risk management as a next step in the evolution of an IP practice. Mr. Wissing is the Chief Operating Officer for the Global IP Group at SAP AG, the world's largest business software company with over $10B in annual revenue and products focused on Enterprise Resource Planning, Customer Relationship Management, Product Lifecycle Management, Supply Chain Management and Supplier Relationship Management. Mr. Wissing received his B.S. in Electrical Engineering from the New York Institute of Technology, and his J.D. from St. John's University School of Law.

Michael J. Langer

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.

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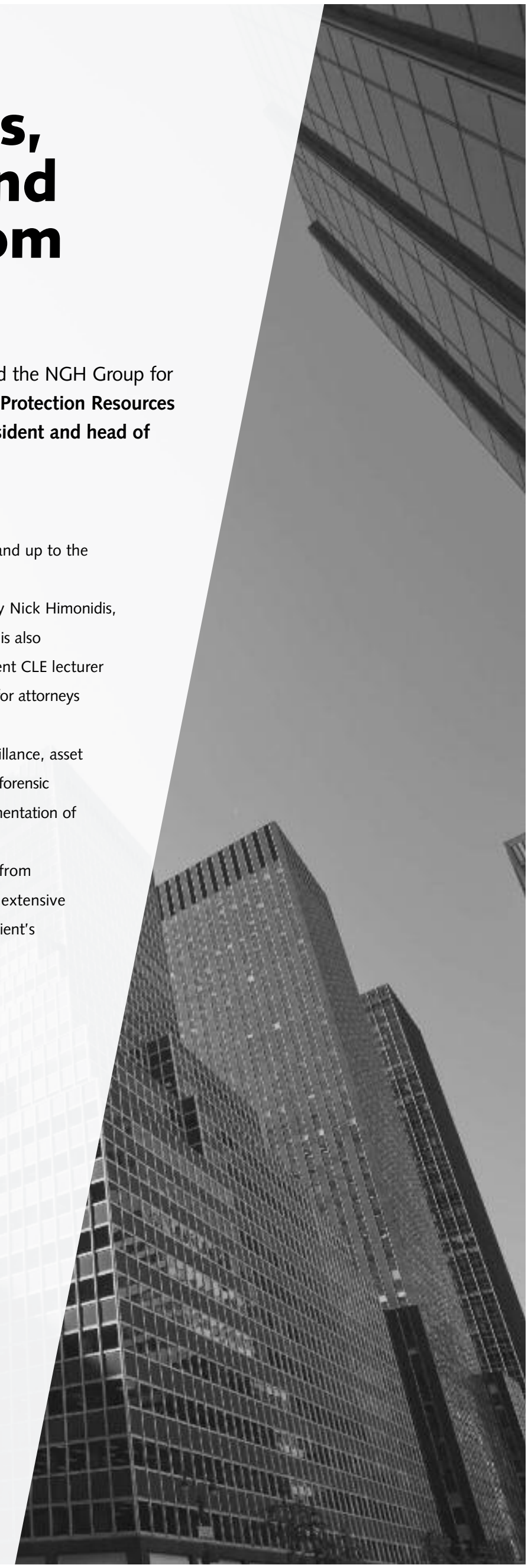

Salute to Rhoda Selvin

Shortly after her retirement from Stony Brook University and completing her second term as a member of the Grievance Committee for the Tenth Judicial District, Rhoda Selvin became a volunteer for Nassau/Suffolk Law Services in 1995.

Rhoda wanted to stay connected with lawyers and the legal system and was concerned about cuts in federal funding for supporting legal services for the needy. Building on her professional experience, her work allowed her to write the Pro Bono Attorney of the Month articles for the Nassau Lawyer. Rhoda has contributed more than 2,000 volunteer hours.

We are sad to see such an excellent person who has worked so hard in contributing to the Pro Bono Project leave. We wish her all the best in the future.

Pro Bono Attorney of the Month

Jacqueline A. Cara

By RHODA SELVIN

When Jacqueline A. Cara first joined the Volunteer Lawyers Project, she spent one day a week as a Landlord/Tenant Program Attorney of the Day and did preparatory work in house for VLP's bimonthly Bankruptcy Clinics. For this she was Pro Bono Attorney of the Month six years ago. The 132 hours she has volunteered since that time has more and more followed the focus of her Garden City firm assisting elderly, mentally ill, disabled clients, their families and care givers.

Ms. Cara entered St. John's University School of Law, graduating in 1991, having completed her undergraduate work at St. John's University in 1988. She is a member of the Nassau County Bar Association, Queen's County Women's Bar Association, New York State Bar Association, St. John's University School of Law Alumni Association, and the Columbian Lawyers Association, Nassau County.

Since 2007 she has provided pro bono Guardian ad Litem services to mentally ill, elderly, and disabled respondents in housing court proceedings in the five boroughs of New York City, providing assistance in litigation and in obtaining services to maintain housing. She has been a member of educational panels on the following topics: issues facing the disabled and mentally ill in housing court and on issues of guardianship; Guardians ad Litem training in the NYC housing court program; and adult protective services staff enrichment regarding guardianship. In 2009 Ms. Cara received the Pro Bono Service Award from the New York State Courts Access to Justice Program for her work as a Guardian ad Litem.

A member of the Garden City Special Education PTA (SEPTA) and the Garden City PTA, Ms. Cara maintains her passion for issues facing the parents and families of children with special needs.

Once again, the Volunteer Lawyers Project honors Jacqueline A. Cara as Pro Bono Attorney of the Month for her dedication to those pro bono activities assisting members of society.

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Included that evening:

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There is no charge for this event. **Reservations are required.**
RSVP to events@nassaubar.org or call 516.747.4070 x. 226 or 206
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Matrimonial & Family Law

Litigating Neglect Cases in Nassau Family Court

This article has been inspired by Nassau County Family Court Judge Edmund M. Dane's recent "View from the Bench" column in the December 2010 "Nassau Lawyer." In the piece, Judge Dane states that, in the child neglect cases that he handles daily in Family Court, "the usual trial procedure is unsettling" and he "challenges those attorneys who represent respondents and children in those proceedings to up their game and rededicate their efforts to preserve and protect the family of origin, openly helping the Court to render a decision giving children in foster care the permanency they so richly deserve, while giving their parents the fairest hearings possible of their case."

John M. Zenir

It should be noted that the overwhelming majority of respondents in neglect matters, usually parents or other custodial parties, are represented by assigned counsel, either by attorneys employed by the Legal Aid Society of Nassau County or by 18-B Attorneys such as myself, because they are indigent. In all child neglect cases, the Family Court will also appoint an Attorney for the Child, formerly known as a Law Guardian. When I represent children who have never been placed in foster care previously, they nearly universally miss their parents and think they (the children) must have done something wrong which required their placement. Serving as attorney for the respondent or as attorney for the child in these cases is always an extraordinary challenge. Sometimes, it can be an impossible task of representing an adult who refuses to, or is incapable of, cooperating with counsel, while at other times it can be extremely rewarding when a child who has been removed from a parent is returned to his/her family.

Every attorney who practices in Nassau Family Court knows Judge Dane to be extraordinarily involved in his cases, as are the other two Family Court Judges who generally handle such matters in Nassau County: Judge Robin Kent, and Judge Ellen Greenberg. I am certain that Judge Dane echoes his colleagues on the bench when he wrote that he would like counsel to "protect the family of origin" in all cases involving the difficult area of law known as "neglect."

By way of brief definition, Section 1012(f) of the Family Court Act, in summary, defines a neglected child as one under the age of eighteen "whose physical, mental, or emotional condition has

See NEGLECT CASES, Page 21

Distributing the Marital Residence in an Era of Minimal Equity

The Percentage Approach

The marital residence is typically the primary and may well be the only significant asset of a couple going through a divorce. Historically this asset increased in value during the course of the marriage, and there was more than enough equity in existence at the time of a divorce action.

John P. Whiteman III

Circumstances have changes dramatically, however, with the sub-prime mortgage crisis and the ensuing real estate market meltdown and economic recession. Now, the marital residence has often decreased in value, and there is not nearly enough equity in existence at the time of a divorce action. The issue becomes how to distribute this minimal equity.

In order to gain an understanding of how to distribute "insufficient" equity, we must have an understanding of how to distribute "sufficient" equity. Assume, for a simplified example, that a couple purchased a primary residence during their marriage for $500,000, that this couple contributed $300,000 for a down payment, and that they took out a mortgage for the other $200,000. Further, assume that the down payment was comprised of $250,000 from the husband's separate property and $50,000 from the wife's separate property.

The law is clear: separate property shall remain such.[1] A party is thus entitled to a return of the total contribution he or she made toward the acquisition of the marital residence from his or her separate property, assuming the party can properly document same.[2] That being said, $300,000 of equity in existence at the time of the divorce action should be returned to the parties as separate property credits, with the husband receiving his $250,000 contribution back and the wife receiving her $50,000 contribution back. Any equity in excess of $300,000 would be distributed equitably between the parties, considering the circumstances of the case and of the respective parties.[3]

See RESIDENCES, Page 20

VIEW from the BENCH

Hurry Up and Wait

A Reflection on New York's Speedy Trial Statutes

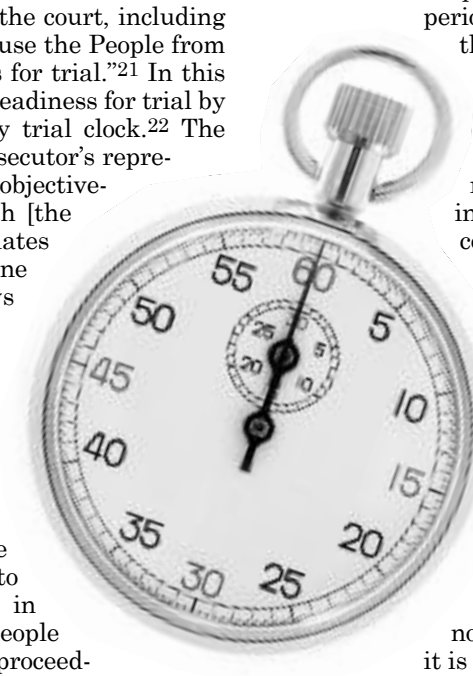
By Hon. Anthony W. Paradiso

I take great delight in the fact that the young lawyers in my criminal part, both ADAs and Legal Aid attorneys, treat each other with courtesy and respect as they advocate their clients' respective positions. Even as they disagree, their voices are rarely raised in frustration. The issue that puts this professional tranquility to the test most often is whether to count time against the prosecution (the "People") for speedy trial purposes. In light of recent events surrounding the Nassau County crime lab, I suspect that the county's criminal court judges will see more contentious exchanges regarding this issue. However, close analysis of New York's speedy trial statutes suggests that the anticipated wrangling may be academic.

The Court of Appeals has stated that CPL §30.30 is a prosecutorial "readiness rule," enacted to serve the narrow purpose of preventing prosecutorial inaction.[1] It was not designed to address speedy trial or due process concerns in a constitutional sense.[2] According to CPL §30.30(1), a speedy trial motion made pursuant to CPL §170.30 must be granted when the People are not ready for the trial of a felony charge,[3] exclusive of homicide offenses,[4] within six months of the commencement of the criminal action. Likewise, a class A misdemeanor charge[5] must be ready for trial within 90 days of commencement, a class B misdemeanor charge[6] must be ready for trial within 60 days of commencement, and a violation charge[7] must be ready for trial within 30 days of commencement. Mere traffic infractions are not subject to speedy trial limitations.[8] These time limits apply when a defendant is not in custody awaiting trial. The speedy trial limitations for an incarcerated suspect are significantly shorter, ranging from 90 days for a felony[9] to five days for a violation.[10]

The Court of Appeals has stated that speedy trial time begins to run on the day following the commencement of the criminal action.[11] In most instances, commencement begins upon the filing of the accusatory instrument.[12] CPL §30.30(5) provides speedy trial exceptions relating to recommencement following a withdrawn plea,[13] and the replacement of an original instrument with one charging a greater or lesser offense.[14] Another important exception to the speedy trial time commencement rule relates to appearance tickets. CPL §30.30(5)(b) provides that, when a defendant is served with an appearance ticket, the action is deemed commenced for speedy trial purposes when the defendant actually appears in court for the first time in response to the ticket.[15] This rule applies regardless of whether the People have actually filed the accusatory instrument.[16] Thus, there is no benefit to a defendant evading prosecution by failing to appear.

For the purpose of computing applicable speedy trial time, CPL §30.30(4) excludes certain periods of delay. These include delays attributable to pretrial motion practice,[17] as well as delays resulting from adjournments requested by, or granted with the consent of, the defendant.[18] With regard to the latter, such adjournments are rarely controversial, provided the record is clear as to the consent.[19] Defense counsel's mere failure to object to an adjournment will not be deemed consent.[20] It should be noted that delays caused by the court, including calendar congestion, "do not excuse the People from timely declaring their readiness for trial."[21] In this regard, a genuine statement of readiness for trial by the People will stop the speedy trial clock.[22] The court is entitled to rely on a prosecutor's representation of readiness,[23] which "objectively establishes the date on which [the People] can proceed and eliminates the need for a court to determine to whom adjournment delays should be charged."[24]



Genuine readiness is not as high a threshold as defense counsel often insist. Trial readiness is established when "the People have a valid accusatory instrument upon which the defendant may be brought to trial, where the People have complied with their obligation to produce for trial a defendant in their custody, and where the People have complied with all pending proceedings required to be decided before a trial can commence."[25] Actual readiness does not require the People to be able to instantaneously produce their witnesses and does not prevent them from seeking post-readiness adjournments due to the temporary unavailability of a witness.[26] Where the People request an adjournment after announcing ready, they should be charged only with the actual number of days they request.[27]

Much to the dissatisfaction of defense counsel, post-readiness discovery delays are not chargeable to the People unless the delays pose an actual impediment to the commencement of the trial itself.[28] If outstanding discovery is not essential to the People's case, the delay in producing same will not affect the People's readiness for trial.[29] This is so even if the delay impedes the defendant's case.[30] Thus, a delay in producing medical records that are not essential to proving the People's case will not render a statement of readiness illusory.[31] Indeed, "[t]here is nothing in CPL §30.30 to preclude the People from declaring their present readiness, but still gathering additional evidence to strengthen their case."[32] Likewise, in drug cases, a prosecutor's failure to produce formal laboratory analysis results within the time frame mandated by CPL §30.30 will not give rise to a speedy trial violation.[33] If the People have legally sufficient evidence to proceed to trial when they indicate their readiness, such as a trained witness and positive field results, "the fact that formal laboratory results were not obtained until after the expiration of the CPL 30.30 statutory period does not mandate a finding that their statement of readiness was illusory."[34] The cases firmly establish "that the failure of a District Attorney to comply with the mandates of CPL article 240 relative to discovery is in no way inconsistent with the prosecution's continued readiness."[35]

While "discovery failures have no bearing on the People's readiness,"[36] that does not mean that such failures have no consequence. Courts have advised that corrective action other than statutory dismissal, such as preclusion or continuance, is available for post-readiness discovery defaults under CPL §240.70(1).[37] Moreover, even when trial readiness rights are not implicated by a discovery delay, it is possible that a defendant's constitutional speedy trial rights may have been violated.[38]

When responding to a defense claim of a CPL §30.30 violation, it is the People's obligation to set forth with specificity and "conclusive proof" all of the time that the prosecution believes is excludable.[39] File notations made by the court or its non-judicial personnel at the time of an adjournment are not conclusive.[40] Indeed, many testy courtroom exchanges would be tamped down if attorneys

See VIEW FROM THE BENCH, Page 21

Matrimonial & Family Law

Issues Arising From Passage of the 'No Fault' Divorce Law

New York's "No Fault" divorce law became effective on October 12, 2010 and it is applicable to all actions commenced on or after that date.[1]

Russell I. Marnell

Pursuant to this newly enacted provision from the Domestic Relations Law, an action may be maintained by a husband or wife to procure a judgment divorcing the parties and dissolving the marriage on any of the following grounds:

"... (7) The relationship between husband and wife has broken down irretrievably for a period of at least six months, provided that one party has so stated under oath. No judgment of divorce shall be granted under this subdivision unless and until the economic issues of equitable distribution of marital property, the payment or waiver of spousal support, the payment of child support, the payment of counsel and experts' fees and expenses as well as the custody and visitation with the infant children of the marriage have been resolved by the parties, or determined by the court and incorporated into the judgment of divorce."[2]

The passage of this long-awaited legislation has led to numerous issues, some of which have already begun to be addressed by the Courts of this state. For example, ancillary issues surrounding the passage of this addition to D.R.L. Section 170 include, but are not limited to, the following:

1. Can a spouse commence his or her own action for divorce pursuant to D.R.L. Section 170 (7) even though there is already an action for divorce pending which was commenced prior to the effectiveness of the no fault provisions? The obvious purpose of this is to take advantage of the newly enacted no fault provision, as well as the new provisions pertaining to temporary maintenance and temporary counsel fee awards.[3]

2. Is a spouse permitted to oppose a divorce commenced on the basis of the newly

enacted no fault law, such as by claiming that the marriage has not irretrievably broken down? For example, if one spouse claims that there has been an irretrievable breakdown of the marriage, may the other spouse oppose this by claiming that the parties are truly happily married, they recently took a romantic vacation together and/or that they continue to engage in sexual relations?

3. Does the 5 year statute of limitations imposed by D.R.L. Section 210 (a) apply to

D.R.L. Section 170 (7) as well?

Commencing a Second Divorce Action Pursuant to D.R.L. Section 170 (7)

In the case of *Heinz v. Heinz*, which was decided by the Nassau County Supreme Court in February, 2011, Justice Daniel Palmieri determined that one spouse may commence a divorce action pursuant to D.R.L. Section 170 (7) even though a divorce action commenced by the other spouse is pending before the Court and was started prior to the enactment of the no fault divorce law.[4] In *Heinz*, the wife commenced a divorce action via a Summons with Notice prior to the enactment of the no fault divorce law. The grounds for divorce alleged by the wife were cruel and inhuman treatment and constructive abandonment.[5]

Scott R. Schwartz

The husband appeared in the wife's divorce action pursuant to a Notice of Appearance, and then commenced his own, separate divorce action against the wife pursuant to D.R.L. Section 170 (7). He did so subsequent to the effectiveness of the new no fault laws and while the wife's divorce action was still pending.[6] The wife ultimately moved to have the husband's divorce action dismissed on the ground that another action was pending between the parties.

The Court ruled in favor of the husband, determining that his second divorce action pursuant to the newly enacted no fault laws was properly commenced.[7] In so ruling, Justice Palmieri stated that the pendency of an action by one spouse does not, by itself, bar an action by the other spouse on a different ground or grounds.[8]

The Court based its ruling on the legal precedent surrounding the enactment of New York's Equitable Distribution statute in 1980. Justice Palmieri initially cited the Court of Appeals case of *Valladares v. Valladares*, which denied a spouse's attempt to discontinue a divorce action commenced prior to the enactment of the Equitable Distribution law in order to subsequently commence a new divorce action as a means of taking advantage of the new statute.[9] Justice Palmieri compared *Valladares* with *Motler v. Motler*, which was another Court of Appeals case in which a defendant was permitted to commence their own action to take advantage of the equitable distribution laws despite the fact that there was already an action pending for divorce which had been commenced by the spouse prior to the enactment of the statute.[10]

See NO FAULT, Page 22

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DEAN'S HOUR

ESTATE PLANNING and the NEW TAX ACT

Thursday, May 19, 2011

12:30-2:00 PM *Lunch & Discussion*

For some estates it is still 2010; for others there are new exemptions and opportunities. Come hear about how the new tax laws apply and how to best navigate the choices. We will discuss the extended election available for 2010 decedents, how the new tax rules work and planning opportunities to minimize Federal and New York State tax.

Guest Speakers
Robert S. Barnett, Esq. & Gregory L. Matalon, Esq.
Capell, Barnett, Matalon & Schoenfeld, Jericho

James R. Klein, Esq., Floral Park

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DEAN'S HOUR

NUTS & BOLTS OF APPEALING HEALTH CARE AND DISABILITY INSURANCE DENIALS

Tuesday, June 7, 2011

12:30 - 2 p.m. *Lunch & Discussion*

Increasingly, people are struggling with insurance companies denying health care and disability claims. This program will provide the basics of appealing these denials in both state and federal court and will address the following:

- policy interpretation and appeal rights
- appeal deadlines and urgent appeals
- marshaling medical evidence and working with the physicians
- addressing Independent Medical Examiner (IME) reports
- preparing the appeal
- external review of health care denials
- state and federal jurisdiction
- ERISA issues
- preparing the case for potential litigation

Speaker
David L. Trueman, Esq.
Law Offices of David L. Trueman, Mineola & New York; Adj. Prof., Columbia University School of Law

Moderator: TBA
1.0 Credit in the areas of professional practice

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18B*

JUST WHEN YOU THOUGHT YOU KNEW EVERYTHING ABOUT CHILD SUPPORT

With NCBA Family Court & Procedure Committee

Wednesday, May 25, 2011

5:30-8:30PM

RECENT CHANGES TO THE CHILD SUPPORT LAW (re-enactment of a child support proceeding presented by attorneys and Support Magistrates)
Cast
Neil T. Miller, Esq., Patricia Bannon, Esq., and Elizabeth A. Bloom, Esq.
Support Magistrates, Nassau County, Family Court
James Graham, Esq.
Mangi & Graham, LLP, Westbury
Connie Gonzalez, Esq., Bureau Chief, Family Court Bureau, Legal Aid Society of Nassau County

SUBSIDIZED GUARDIANSHIPS IN FAMILY COURT
Jeffrey Carpenter, Esq., Chief Court Attorney, Nassau County Family Court

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★ **Hon. Stephen A. Bucaria** ★
★ **Hon. Timothy S. Driscoll** ★
Justices, Supreme Court, Nassau

With NCBA Commercial Litigation Committee

Thursday, June 2, 2011

5:30-7:30 p.m., Light Supper

The focus of this special program will be on the differences between expert disclosure in state and federal courts, with an emphasis on improving the scope of expert disclosure in the Commercial Division.

Presentations on key issues relating to expert disclosure, a discussion regarding a proposed stipulation that the parties can enter into relating to expert disclosure in state court and a panel discussion with the Judges relating to their views on expert disclosure will highlight the program.

Speakers
Kevin Schlosser, Esq., Meyer Suozzi, English & Klein Garden City
Michael Cardello III, Esq. & Stephen J. Ginsberg, Esq.
Morritt Hock & Hamroff, LLP, Garden City
Jeffrey A. Miller, Esq., Greg S. Zucker, Esq. & Philip J. Campisi, Jr., Esq.,
Westerman Ball Ederer Miller & Sharfstein LLP, Uniondale

2.0 Credits in areas of professional practice

HOW THE CHANGING HEALTHCARE ENVIRONMENT AFFECTS YOU AND YOUR CLIENTS

With NCBA Hospital & Health Law Committee

Tuesday, May 31, 2011

Sign-in 5pm; Program 5:30-8:30pm *Light Supper*

Healthcare reform and other new regulations have ushered in both additional legal requirements and opportunities for physicians, other healthcare providers and their attorneys. Our speakers will discuss recent legal developments in the healthcare environment.
THE PPACA AND INSURANCE COVERAGE: PROTECTIONS FOR CONSUMERS AND WHAT THE NEW LAW FAILS TO ADDRESS
David L. Trueman, Esq.
Law Offices of David L. Trueman, P.C.
Mineola & New York

ACCOUNTABLE CARE ORGANIZATIONS (ACO'S)
Peter Armstrong Egan, Esq.
Nixon Peabody, LLP, Jericho

PHYSICIANS IMPLEMENTING ELECTRONIC HEALTH RECORD SYSTEMS
Ellen F. Kessler, Esq.
Ruskin Moscou Faltischek, P.C., Uniondale
Margaret Kranz, Esq.
Catholic Health Services of Long Island

PAYOR AUDITS AND RAC'S
David A. Zarett, Esq.
Weiss & Zarett, P.C., New Hyde Park
Moderators
Ron Lebow, Esq., Partner
Abrams, Fensterman, Fensterman, Eisman, Greenberg, Formato & Einiger, LLP
Edmond Farrell, Esq.
Deputy General Counsel,
Catholic Health Services of LI
Co-Chairs, Hospital & Health Law Committee
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June 7	**June 9**

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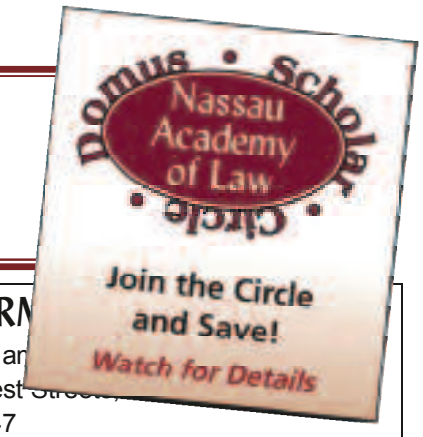
May - June 2011



8B*

HOT TOPICS IN CRIMINAL LAW

Monday, June 6, 2011

5:30 - 8:30 pm

RESERVATION OF ISSUES FOR APPEAL
lon. Peter B. Skelos, JSC, App. Div. 2d

ANEL
aula Schwartz Frome, Esq.,
ase & Druker, Garden City
eremy Goldberg, Esq.,
egal Aid Society of Nassau County
lizabeth S. Kase, Esq.,
ase & Druker, Garden City
harles G. McQuair, Esq., Sea Cliff

OST JUDGEMENT RELIEF, ARTICLE CPL 440 AND EYOND
aula Schwartz Frome, Esq.
lizabeth S. Kase, Esq.

LING A NOTICE OF APPEAL AND OBTAINING STAY OF EXECUTION OF SENTENCE
harles G. McQuair, Esq. & Jeremy Goldberg, Esq.

Moderator
obert M. Nigro, Esq.
dministrator, Assigned Counsel Defender Plan, lassau County
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REAL ESTATE TRANSACTION CLOSING PITFALLS & ISSUES AND HOW TO ADDRESS TITLE AND MUNICIPAL ISSUES NECESSARY TO CLOSE THE DEAL

Thursday, June 9, 2011

5:30-7:30 pm *Light Supper*

his program will present a discussion of certain sues that may arise prior to the closing of both ommercial and residential real estate ansactions. Typically, these issues present emselves after review of a title search, a unicipal department search and/or review of a rvey. Subject matter that will be discussed and is portant to attorneys for both the buyer and eller include:

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- Certificates of Occupancy and Certificates of Completion
- Municipal violations/Open permits, illegal apartments, etc.
- Need for Variances and other approvals/the ABC's for obtaining such approvals
- New York state Building and Fire code issues

uest Speakers:
llison Luskoff, Esq., Underwriting Counsel, First merican Title, Uniondale
homas McKevitt, Esq., *Chair, NCBA Municipal Law ommittee;* Of Counsel, Sahn Ward Coschignano Baker, PLLC, Uniondale

rogram Coordinators/ Moderators:
lichael H. Sahn, Esq. & Daniel J. Baker, Esq.
o-Chairs, NCBA Real Property Law Committee
ahn Ward Coschignano & Baker, PLLC, Uniondale
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The Accountant-Client Privilege: Should It Exist in Federal Court?

Pursuant to the Federal Rules of Evidence 501, a court of the United States has the statutory authority to define a privileged relationship "in the light of reason and experience." The Supreme Court has recognized several privileged relationships such as those of attorney-client, psychotherapist-patient, and spouse-spouse, but not that of accountant-client.

Gaddi Goren

When considering a new privilege, such as that between accountant and client, the Supreme Court might assess how the states and relevant federal tax statutes have addressed the privilege. The Court should also weigh the benefits from the privilege against the costs of evidence lost due to the privilege. While privileges unknown at common law are particularly disfavored, and are strictly construed to limit their application,[1] it can be argued that the federal courts should recognize the account-client privilege as a public benefit that will enhance CPAs' professional services.

Federal Tax Statute that Recognizes a Limited Accountant-Client Privilege

Although the federal courts have not recognized accountant-client confidential communications as privileged, federal tax statutes identify such communications as privileged. These laws recognized the benefit to protecting confidential communications between an accountant and a client for the purposes of rendering tax advice.

As enacted in 1998, the Internal Revenue Code §725(a)(1), Confidentiality Privileges Relating to Taxpayer Communications, provides that as a general rule "with respect to tax advice, the same common law protections of confidentiality which apply to a communication between a taxpayer and an attorney shall also apply to a communication between a taxpayer and any federally authorized tax practitioner to the extent the communication would be considered a privileged communication if it were between a taxpayer and an attorney." Pursuant to IRC §725(a)(2)(A) (B), the privileged communication only exists in noncriminal proceedings before the IRS and noncriminal tax proceedings in Federal court.

This statute is intended to protect confidential communications by federally authorized tax practitioners, including CPAs, attorneys, and enrolled agents and actuaries against obligatory disclosure of tax advice.[2] The narrow scope of this statute is to the same extent that it would be privileged between a taxpayer and a lawyer, with the exception of criminal proceedings.[3] The statute does not protect communications concerning corporate tax shelters.[4] As such, it is challenging to draw a distinction between privileged tax advice and unprivileged business advice.[5] This statute recognizes the benefit of having a privilege protect the relationship between constituents seeking tax advice and federally authorized tax practitioners, including CPAs.

Accountant-Client Privilege in States that Recognize the Privilege

Some states, such as Arizona, that do recognize the privilege are in line with IRC §725 and do not permit its application in criminal proceedings.[6] Other states such as Indiana, Georgia, Missouri, Pennsylvania, Tennessee and Texas, do not have restrictions that prohibit the invocation of the privilege in criminal cases.[7] Others restrict the privilege if the accountant has a reasonable basis to believe the client violated federal, state, or local laws.[8]

Another issue concerning this privilege is whether the accountant or the client can invoke the privilege. For instance, in a Maryland federal court decision applying Maryland state law in a diversity case, *Hare v. Family Publications Service, Inc.*, the Court held that the privilege belonged to the accountant.[9] The accountant did not have to answer interrogatories since it related to privileged communications.[10] This holding is in contrast with an Indiana decision, *Ernst & Ernst*, which held that the privilege belongs to the client.[11] The *Ernst & Ernst* Court reached its decision by interpreting the language of the statute, "prohibiting ... from disclosing," to mean that it was a privilege personal to the client and not to the accountant.[12]

Similar to the attorney-client privilege, the accountant-client privilege may be waived if the communication is disclosed to a third party, including an inadvertent disclosure in tax returns.[13] The client may also waive the privilege by conduct inconsistent with the invocation of the privilege.[14] For example, if the client obtains an insurance policy for a business interruption claim requiring disclosure to the insurer of privileged financial information, then the privilege has been waived.[15] Also, there can be disclosure of the accountant-client privileged communications in a malpractice suit against the accountant.[16] Additionally, under the crime-fraud exception, if the communications are used to commit or further a crime or fraud, then such confidential communications are not subject to the privilege.[17]

Benefits of the Accountant-Client Privilege

There are at least 16 states that have an accountant-client privilege, and at least 32 others, as well as Washington D.C. and Puerto Rico, that have some form of an accountant-client privilege.[18] In order to invoke this privilege, the proponent of the privilege must establish that the confidential communications were related to the professional services rendered by the accountant to the client.[19] It is has been argued that the accountant-client privilege has a public benefit that promotes clients to be candid with their accountants, similarto the benefit of the attorney-client relationship.[20]

Although an accountant is not an officer of the court, there are many similarities between an accountant and a lawyer. Both an accountant and an attorney must complete a rigorous education in order to become a trained and licensed professional. Like to an attorney, an accountant must adhere to certain professional and ethical rules and is subject to self-regulation. Also, an accountant's tax advice will often have legal consequences for the client. A further similarity between accountants and lawyers is that they may both be liable for malpractice suits due to professional negligence.

The recognition of the accountant-client privilege by many states reveals the benefits to the privilege. As the Supreme Court stated in *Jaffe v. Redmond* in announcing a then new privilege between a patient and psychotherapist, "denial of the federal privilege therefore would frustrate the purpose of the state legislation that was enacted to foster these confidential communications."[21]

A similar goal of enhancing an important profession-

See PRIVILEGE, Page 25

Are You Ready for the Fair Play Act?

On October 26, 2010, the New York State Construction Industry Fair Play Act went into effect. This new statute is likely to have an enormous impact on the construction industry by imposing stringent requirements for any worker to qualify as an independent contractor. Indeed, many have voiced the concern that the Act will effectively end the use of most independent contractors.

The Act's intent is to stop the misclassification of workers as independent contractors, which has been a prevalent practice in the industry. Studies show that misclassification in construction runs as high as 15%, more than 50% higher than in other sectors. It is estimated that nearly fifty thousand New York City construction workers are either misclassified or work off the books. The result of this misclassification is reduced government taxes, workers not covered by workmen's compensation and an unfair cost advantage to contractors that do not properly classify their workers.

To achieve its ends, the law presumes that any person performing work for a contractor is an employee. It is possible, but difficult, to overcome the presumption. An individual may overcome the presumption if: (a) he or she is free from the contractor's direction and control in performing the work; (b) the work is performed outside the usual course of business for whom the work is performed; and (c) he or she is customarily engaged in an independent trade, occupation, profession or business that is similar to the work at issue. All three of these criteria must be met.

To be considered a separate business entity, and not an employee, a company must satisfy a twelve-factor test. Some of these factors are whether the entity has the freedom to direct and control the work, whether the entity makes its services available to the general public on a continuing basis, and whether there is a substantial investment in the entity beyond tools, equipment and a vehicle. All of the twelve factors, and not merely some, must be satisfied in order for the company to be considered a separate business entity.

The law also requires contractors (and subcontractors) to post a notice that, among other things, describes an independent contractor's responsibility to pay taxes, the rights of employees to workers' compensation and other benefits, and penalties if the contractor does not properly classify a worker as an employee. The notice must be in English, Spanish and any other language required by the Commissioner of Labor, and posted in a prominent and accessible place on the job site. The Department of Labor will issue and post the notice on its website so that contractors and subcontractors can download it.

Adam Browser

Failure to comply with the notice requirements is initially punishable by a fine of up to $1,500. Subsequent violations are punishable by a $5,000 fine. Failure to properly classify a worker is punished more severely and can bring both civil and criminal penalties. A contractor who willfully violates the law is subject to a civil fine of $2,500 per misclassified worker for an initial violation and $5,000 for each subsequent violation. In addition, willful violation is a misdemeanor punishable by thirty days imprisonment and a $25,000 fine for a first violation. Subsequent willful violations are punishable by sixty days in prison and a $50,000 fine.

If the contractor is a corporation, any officer and any shareholder holding 10% or more of the stock is also subject to the civil and criminal penalties if he knowingly permits the corporation to violate this law. In addition, any contractor, officer or shareholder that is convicted of a misdemeanor under this law is subject to debarment and would be ineligible to submit a bid or be awarded any public works project for up to one year for an initial violation, and up to five years for a subsequent violation.

New York State, indeed all municipalities, needs revenue to close large budget deficits. They view misclassification of workers as a lost source of revenue and an opportunity to assist in their budgetary problems. Thus, it is reasonable to believe that the State will make a concerted effort to enforce the law. It is also reasonable to believe that the government will look for a high profile prosecution to encourage compliance. Considering the likelihood of enforcement, and the harsh penalties imposed by the New York State Construction Industry Fair Play Act, contractors and subcontractors must ensure that they comply with this new law. Their counsel should advise them proactively to avoid the significant repercussions.

Adam Browser serves of Counsel to Ruskin Moscou Faltischek where he is a member of the Litigation and Financial Services Departments and its Construction Law Practice Group. He can be reached at 516-663-6559 or abrowser@rmfpc.com

WORDS ...

Continued From Page 3

For this Court, context was key in analyzing the elements of a cause of action for defamation:

- "A false statement,
- published without privilege or authorization to a third party,
- constituting fault as judged by, at a minimum, a negligence standard and,
- it must either cause special harm or constitute defamation per se.[4]

Whether a given statement expresses an opinion or a fact is a question of law for the Court in an action for defamation. Only facts are actionable and "are capable of being proven false."[5] In distinguishing "fact" from "opinion," four factors have evolved as a judicial guide line through case law. Judge Marber focused upon the fourth factor in her determination:

> "a consideration of the broader social context or setting surrounding the communication including the existence of any applicable customs or conventions which might signal to readers or listeners that what is being read or heard is likely to be opinion, not fact."[6]

Citing *Guerrero v. Carva*, 10 A.D. 3d 105, 779 N.Y.S.2d 12 [1st Dept.2004], the Court states that the 'central inquiry' in determining defamation is not one of "sifting through a communication for the purpose of isolating and identifying assertions of fact" but rather "the courts 'should look to the over-all context in which the assertions were made and determine on that basis whether the reasonable reader would have believed that the challenged statements were conveying the facts about the libel plaintiff.'"

The Court acknowledged that the posts exhibited "… an utter lack of taste and propriety"... The entire context and tone of the posts constitute evidence of adolescent insecurities and indulgences, and a vulgar attempt at humor. What they do not contain are statements of fact (emphasis added)...taken together, the statements can only be read as puerile attempts by adolescents to outdo each other."

Would the result be different in the case of internet victims whose business or profession rely on a "good" reputation?

The Court finding no actionable cause for defamation was also at a loss to determine that the posts were actionable as "cyber bullying" , finding no precedent whereby any court in New York recognized internet or cyber bullying as a cognizable tort action in New York.

Nor was there a sufficient basis for a finding of negligent entrustment against defendants' parents. A parent has a duty to protect third parties from harm resulting from an infant child's improvident use of a dangerous instrument… when the parent is aware of and capable of controlling the use.[7] The Court in *Finkel* refused "to declare a computer a dangerous instrument in the hands of teenagers in an age of ubiquitous computer ownership…"

Would the result be different in the case of internet victims whose business or profession rely on a "good" reputation?

In *Field v. Grant*, 34898-2010, (Suffolk County), a matrimonial attorney found himself the subject of anonymous comments posted on two websites describing him among other things as "dumb," a "fool" and "the worst attorney licensed to practice in the State of New York." Suspecting his former client as the source, he filed an action for defamation.[8]

Typically subjective expressions about personal dealings or consumer dissatisfaction are considered nonactionable opinion.[9] Yet, an opinion that implies undisclosed facts is actionable where a reasonable listener would infer that the speaker knows certain facts which support the opinion.[10] Arguably, the defendant in *Field* could be perceived by a "reasonable" internet reader as having pertinent facts about his divorce attorney to support his opinion.

Mr.Field took the position that the defendant's postings on the internet directly reflected upon his integrity and honesty as an attorney, and upon his ability as an attorney. He maintains that these postings were "defamation per se," which by definition, includes stating false facts that tend to injure a plaintiff in his or her business trade or profession.[11]

Not so, says Judge Whelan.

The Court determined that the statements about Mr. Field, viewed in the context in which they were relayed and website forums where posted, as "pure opinions which cast general reflections upon the plaintiff's character and/or qualities which are not a matter of such significance and importance so as to amount to actionable defamation." Unanswered is the query that after reading the defendant's comments posted on the internet about his former attorney, would a person considering a divorce be less inclined to retain Mr. Field as counsel?

Given this sort of judicial affirmation to "opinions" of disgruntled clients, the prevalence of professional disparagement via the internet is assured. Though the Courts of New York turn a seemingly blind eye to the deleterious impact of such opinions upon members of the bar, there is apparent cause for concern. These "opinions" freely posted on the internet, have spurned a cottage industry of companies offering services that include rehabilitating professional reputations under cyber attack.

Commercial redress aside, cyber attacks call out for immediate legislative intervention. Decades of legislative delay, as in the case of "No Fault," is inexcusable.

Nancy E. Gianakos is a matrimonial practitioner, of counsel to Albanese & Albanese LLP, Garden City, New York; admitted in Connecticut, New York and New Jersey and member of the New York State Bar Association, Nassau County Matrimonial and Family Law Committee, The American Family Law Inns of Court, the New York Association of Collaborative Professionals and co-editor of the Nassau Lawyer.

1. *Ava v. NYP Holding Co.*, 64 A.D.3d 407, 885 N.Y.S.2d 247 (1st Dept. 2009)(quoting *Rinaldi v. Holt, Rinehart & Winston*, 42N.Y.2d 369, 379, cert denied ,434 U.S. 969 (1977)).
2. *Gross v. N.Y.Times*, 82 N.Y.2d 146, 603 N.Y.S.2d 818 (1993).
3. 29Misc3d325,906 N.Y.2d 697, SupCt (Nassau Cty, 2010).
4. *Gross*, 82 N.Y.2d 143.
5. *Steinhilber v. Alphonse*, 68 N.Y.2d 283, 292,508 N.Y.S.2d901 [1986]; *Gross v. New York Times, supra* p. 151, 603 N.Y.S.2d 813.
6. *Salvatore v. Kumar*, 45 A.D.3d 560,563,, 845 N.Y.S.2d 384 [2d Dept.2007},lv.denied,10 N.Y.3d 703, 854 N.Y.S. 2d 104 [2008]
7. *Gross*, 82 N.Y.2d 143.
8. *Steinhilber v. Alphonse*, 68 N.Y.2d 283, 292,508 N.Y.S.2d901 [1986]; *Gross v. New York Times, supra* p. 151, 603 N.Y.S.2d 813.
9. *Nolechek v. Gesuale* 46 N.Y.2d 332, 336, 413 N.Y.S.2d340,(1978)
10. New York Law Journal, 1/27/11 "Lawyer's Libel Suit Over Online Rant Is Rebuffed".
11. *Intellect Art Multimedia, Inc. v. Milewski*, 899 N.Y.S.2d 60 (Sup.Ct.,N.Y. Co., 2009)
12. *Gross*, 82 N.Y.2d 146
13. *Liberman v. Gelstein*, 80 N.Y.2d 429, 590 N.Y.S.2d857 (1992)

MEDIATION ...

Continued From Page 3

decide what the parameters of a negotiated agreement should be. Explain these poles to your client and ask him or her where they would accept a settlement point. Remind the client of the costs involved in refusing a settlement. Many cases do not settle over a point that is modest compared to the costs of litigation. How sure are you that a trial will produce the result the client wants? You must have a fallback position so that you can evaluate whether or not your client should continue with mediation or candidly admit a trial is more likely to produce a desired result. Include in this cost-benefit analysis the effect of continued strife on the relationship of the parents where young children are involved.

Prepare Your Case

Explain the process to your client in detail, including the "stages" of mediation. Mention that the first one hour session is free and each hour thereafter costs money. Suggest that the client model behavior calculated to settle the case rather than antagonize the other side. Mediation is not the "touchy/feely" process some litigators believe. Prepare the client for his or her participation in the mediation process. Conversations should be respectful. There should be no cross-talking, shouting, sighs of exasperation, or other disrespectful conduct. No one should interrupt another person who is speaking. Everyone will be heard.

Know your file well and reality-test your client. Be honest in your assessment of the strengths and weaknesses of their case. Know your client's desired outcome and the probable outcome. Know which outcomes your client can live with, and what is unacceptable (BATNA & WATNA). The mediator will, at some time, likely ask what your client really wants/needs to reach a resolution. Your credibility will suffer if you do not have an answer.

Consider an Opening Statement

You may want to open your client's case in the mediation with a statement, although this will vary from case to case. Whether you or your client makes the opening, it is a valuable opportunity to summarize important interests and to set a tone for the mediation. Do not give in to the temptation to grandstand. This is not court. Show that you understand the practice and dynamics of negotiation and use every opportunity to promote resolution. Be firm but not inflexible.

Put your own case forward, but at the same time demonstrate that you recognize both sides will have to move if there is to be resolution. Do not threaten or bluster. Do not talk only about money in your opening statement. Avoid "demands," especially if they have already been rejected. Make sure your opening is directed to the other party, not the mediator. Your comments are for the benefit of the other party, not the mediator, since the mediator has no decision making power. Make the opening clear and focus on key issues.

Use Private Sessions (Caucus) Effectively

Work with the mediator and be as frank as possible in the circumstances. Make sure that there has been an agreement on what the mediator can repeat to the other side after caucus. Trust the mediator. He or she has the skills to help and can do much of your work for you, if used correctly.

If You are Not Part of the Solution, You May be Part of the Problem

In mediation, the lawyer is truly "counsel" to the client. The lawyer helps a client to present his or her side to the other party in such a way that the mediator's presence should be almost irrelevant.

The lawyer, as a problem-solver, has the ability to analyze situations by taking into account client or party interests and the many factors and circumstances of the dispute. By translating client positions into interests, generating and assessing conventional and novel options to address the problem, counsel performs a valuable service to the client, who may not be able to step back from the conflict to see the bigger picture. Perhaps most importantly, counsel can work to build consensus around an option which best addresses the goals and interests of a client or the involved participants.

Studies have demonstrated that, even when not as quick or inexpensive as expected, clients prefer the mediation option over litigation in over 80% of cases. Mediation is hard work, but it is well worth the effort because a satisfied client is the best source of new business and revenue.

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Owen B. Walsh, Chair, WE CARE High School Scholarship Committee presents a check to Heather Artinian, a senior at Glen Cove High School. She is accompanied by her Grandmother Marianne Artinian.

Danielle Preiser a senior at John F. Kennedy High School, Bellmore, accompanied by her parents Leslie and Carl Preiser, accepts a check from Owen B. Walsh.

PENDENTE LITE ...

Continued From Page 5

ciary's prior approach, this new formula is not grounded in the actual reasonable needs of a party, but instead acts to arbitrarily redistribute the income of the "monied spouse."

The revised statute[9] provides a formula that is to be applied to the first $500,000 of income that presumptively yields a correct amount of temporary maintenance, and only results in a support award when there is an income gap where the "non-monied spouse's" income is less than 2/3 of the "monied spouse's" income. For example, where the "monied spouse" earns $200,000 per year and the "non-monied spouse" has no income, the maintenance obligation would be $60,000 per year.

Fortunately, much like the CSSA, the new legislation allows for a deviation from strict compliance with the formula, predicated on a finding that the formula's application would be "unjust or inappropriate." A logical illustration of where a strict application would be "unjust or inappropriate" is where the "monied spouse" is directed to pay all the household expenses and to also remit direct support equivalent to 30% of his gross income to the "non-monied spouse."

In the example cited above, after $7,000 of carrying costs and living expenses that the "monied spouse" would be directed to continue to pay *pendente lite*,a strict application of the temporary maintenance formula would result in the "monied spouse" paying $60,000 over and above the $84,000 being paid in carrying charges. Assuming the "monied spouse" is the husband, and the parties are living apart, after paying his income taxes, the husband would be left with less than the $60,000 he would be paying his wife to afford his own housing costs and his other variable expenses. This inequity could be further exacerbated if he is also directed to pay child support.[10]

Clearly, a strict application of the temporary maintenance formula coupled with an order that requires the "monied spouse" to pay the "non-monied spouse's" housing costs will result in a windfall to the recipient spouse. In most cases, a strict application of the temporary maintenance formula may only make sense if, after that calculation is first made, the monthly expenses are shared between the parties on a pro-rata basis. However, problems exist with this approach as well. For example, as in the scenario highlighted above, should a strict application of the temporary maintenance formula result in a reallocation of a total income wherein the "monied spouse" is left with 67% of the income and "non-monied spouse" 33%, then the fixed monthly expenses should similarly be shared on 67%-33% basis. Unfortunately, as the law now stands, this solution would run counter to the current case law that prohibits any maintenance received from being utilized in the calculation of a parties' pro-rata obligation.[11]

Additionally, should the Court merely utilize a strict application of the temporary maintenance formula as described in the above case, there will be tax consequences to the recipient spouse in the following year that are not calculated as part of her needs and may exceed the income she has available in the next calendar year when the court issues a final order of support.

Despite the new statute, the tools applied historically by the court in maintaining the marital status quo are far better that what the Legislature has provided. The most pragmatic approach is for the court to calculate temporary maintenance as required by statute but then thereafter elect to deviate to avoid income redistribution and to craft a support Order that provides for the actual needs of the parties during the pendency of the action until a full and fair hearing can be conducted, at which time the parties' financial circumstances can be fully explored. As matrimonial practitioners are all well aware, the Appellate Divisions have consistently held that the remedy to perceived inequities in a *pendente lite* award is a speedy trial, and not a recalculation by the Appellate Division.[12]

The best approach when making or opposing a request for *pendente lite* support is to employ the same arguments and facts provided in applications made prior to October 12, 2010 and to demonstrate how the actual pre-commencement standard of living can be best maintained, thereby providing a justification for deviation where necessary. Of course, the application must also include the temporary maintenance formula's calculation and an analysis between the reasonable needs as demonstrated by the parties' pre-commencement standard of living contrasted with the strict application of the temporary maintenance formula.

At the time of the drafting of this article, there was only one reported decision regarding *pendente lite* requests for an action commenced after October 12, 2010; *Scott M. v. Ilona M.*, decided by Kings County Supreme Court Justice Jeffrey S. Sunshine.[13] In his decision, Justice Sunshine set forth an excellent analysis of: (i) the history of the prior and new temporary maintenance statute; (ii) the strict calculations applying the new statute; (iii) the parties' monthly expenses; and (iv) the tax implications and resulting net monies each party would receive complying with the temporary maintenance formula. Justice Sunshine concluded that a deviation was warranted as the larger support award of temporary maintenance would be unjust and improper taking into account factors "(g)," the existence and duration of a pre-marital joint household or a pre-divorce separate household, and "(l)," the need to pay for exceptional additional expenses for the child or children including, but not limited to, schooling, daycare and medical treatment, of the temporary maintenance statute. At the end of the day, Justice Sunshine crafted an appropriate temporary support award based upon the reasonable needs of the parties and the ability of the "monied spouse" to meet those and his own needs.[14]

One can only hope that the judiciary will continue to take such a reasonable approach in addressing temporary support applications implementing the new temporary maintenance statute, rather than blindly applying a statutory formula which could have the effect of creating a new "monied spouse" and a new financial stranglehold or empowerment that was never contemplated by the Legislature in their attempt to protect the "non-monied spouse" and create some uniformity in temporary support calculations.[15]

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1. *Belfiglio v. Belfiglio*, 99 A.D. 2d 462, 469 N.Y.S.2. 978 (2nd Dept. 1984).
2. *Cohen v. Cohen*, 129 A. D. 2d 550, 514 N.Y.S.2 45 (2nd Dept. 1987).
3. *Hartog v. Hartog*, 85 N.Y.S.2. 36, 623 N.Y.S.2. 537 (1995).
4. *Roach v. Roach*, 193 A.D. 2d 660, 597 N.Y.S.2. 468 (2nd Dept. 1993).
5. *Hartog v. Hartog, supra.*
6. *Ciaccio v. Ciaccio*, 162 A.D.2d 494, 559 N.Y.S.2d 143 (2nd Dept. 1990); and *Messina v. Messina*, 101A.D.2d 856, 476 N.Y.S.2d 7 (2nd Dept. 1984).
7. Pezza v. Pezza, 300 A.D.2d 555, 752 N.Y.S.2d 550 (2nd Dept. 2002); George v. George, 192 A.D.2d 693, 597 N.Y.S.2d 129 (2nd Dept. 1993); and *Asteinza v. Asteinza*, 173 A.D.2d 515, 570 N.Y.S.2d 583 (2nd Dept. 1991).
8. Actions commenced prior to October 12, 2010 are still subject to the prior statute.
9. DRL §236 (B)(5-a)(c).
10. The courts have recognized this in deducting paid for the children's housing from the husband's gross income before applying the CSSA formula. *See, Smitreski v. Smitreski*, 251 A.D.2d 490, 674 N.Y.S.2d 418 (2nd Dept. 2008).
11. *Luker v. Luker*,72 A.D.3d 655, 899 N.Y.S.2. 65 (2nd Dept. 2010); *Simon v. Simon*, 55 A.D.3d 477, 867 N.Y.S.2 55 (1st Dept. 2008); and *Tryon v. Tryon*, 37 A.D.3d 455, 830 N.Y.S.2. 233 (2nd Dept. 2007).
12. *Dowd v. Dowd*, 74 A.D.3d 1013, 903 N.Y.S.2. 501 (2nd Dept. 2010); *Levy v. Levy*, 72 A.D.3d 651, 897 N.Y.S. 2. 910 (2nd Dept. 2010); and *Pascazi v. Pascazi*, 52 A.D.3d 664, 861 N.Y.S.2d 95 (2nd Dept. 2008).
13. *Scott M. v. Ilona M.* (2011 New York Slip OP. 21026, 2011 WL 285640).
14. An erudite article authored by Lee Rosenberg appeared in the February 25, 2001 New York Law Journal wherein Mr. Rosenberg pointed out the numerous flaws in the new temporary maintenance statute and Justice Sunshine's practical approach.
15. Hopefully, such practical applications of the new temporary maintenance statute will avoid newly commenced divorce actions, where an action has already been commenced prior to October 12, 2010, solely to obtain a favorable temporary support award. *See, A.C. v. D.R.*, NYLJ 1/25/11, p,1.

Portrait Presentation on May 20

The Nassau County Bar Association has a long-standing tradition of presenting the Nassau County Supreme Court with portraits of Supreme Court Justices.

The formal portrait dedication ceremony for Joseph P. Spinola, former Supreme Court Justice, will be on May 20, 2011 at 2 p.m. in the Ceremonial Courtroom in Nassau County Supreme Court.

Justice Anthony Marano, Administrative Judge of Nassau County, will preside over the ceremony and Marc C. Gann, President of the Nassau County Bar Association will present the portrait.

For more information contact Dan Bagnuola, Director of Community Relations for the Nassau County Courts at 516-571-1478.

E-DISCOVERY ...

Continued From Page 7

ducing ESI, it would not order its production. In 2006, appellate case law began to recognize cost shifting or cost allocation when it made sense.

In *Waltzer v. Tradescape & Co.*, 31 A.D.3d 302, 819 N.Y.S.2d 38 (1st Dept. 2006), the court deviated from the "requestor pays" rule where the cost for the responding party to produce the ESI was insignificant and the information was readily available on two compact discs and did not involve retrieval of archived or deleted information. Further, the court held that privilege and relevancy review costs are to be borne by the responding party.

In *Clarendon Nat. Ins. Co. v. Atlantic Risk Mgmt. Inc.*, 59 A.D.3d 284, 873 N.Y.S.2d 69 (1st Dept. 2009), the court, consistent with Waltzer, directed the plaintiff insurance company (the "responding party") to produce all of its claims files as such files were readily available ESI.

In *Response Personnel Inc. v. Aschenbrenner*, 77 A.D.3d 518, 909 N.Y.S.2d 433 (1st Dept. 2010), the court, in reversing the trial court, held that the requesting party should bear the cost of producing the ESI as such cost would not have been "inconsequential."

Absent an agreement among the parties (preferably at or before the PC), the courts will look at factors including the availability of the ESI, the need for technical experts and whether the cost is to determine the relevancy and privilege of the requested ESI or is limited to responding to a demand in order to determine who pays the cost of the ESI.

Requests to Review Hard Drive

In the absence of judicial clarity, practitioners are still advising their clients to seize their spouses' computers and clone the hard drives. Putting aside for purposes of this article whether the computer can be lawfully seized in the first place, the proper procedure to do so is to commence an action, file a RJI and then move to clone the computer hard drive.

The courts will not simply authorize the cloning of a hard drive, however, but will look to see whether the information sought could not be obtained in a less intrusive manner. Further, before ordering the cloning, the courts will look for a showing of an unjustified refusal to voluntarily provide the ESI, the existence of suspicious deletions, or that deleted ESI exists in another fashion.

The courts are rightfully concerned about ordering without limitation the cloning of an entire hard drive given the tremendous amount of information stored on today's computers. Generally, limitations are imposed to address relevancy and privilege issues, including a representation that the requesting party will pay for the costs to clone the hard drive.

In *Schreiber v. Schreiber*, 29 Misc.3d 171 (2010), the plaintiff wife sought an order directing that her husband's hard disk drive be confiscated or permitted to be copied in its entirety because she alleged he had concealed his income and assets.

The court held the wife was not entitled to an "unrestricted turnover" of the hard drive, finding the request "overbroad as it seeks general – as well as unlimited in time – access to the entirety of defendant's business and personal data stored on his office computer."

The court denied the wife's motion, but with leave to renew if such renewal motion contained a "step-by-step discovery protocol that would allow for the protection of privileged and private material."

The court proposed ten areas to be included in the protocol as follows, to be agreed upon if possible:

- Discovery Referee
- Forensic Computer Expert
- File Analysis
- Scope of Discovery
- First-Level Review
- Second-Level Review
- Discovery Disputes
- Cost Sharing
- Discovery Deadline
- Retention of Clone

In *DeRiggi v. Krischen*, No. 20753/08, NYLJ 1202476938011 (N.Y. Sup. Ct. Nassau Co. Dec. 17, 2010), a non-matrimonial case, the court held that the maker and distributor of surgical equipment could not copy the hard drive of a Long Island man's personal computer to determine if the man and his now-deceased wife visited the company's website prior to the use of their product in her fatal back surgery.

The court questioned if the information sought was material and necessary to the defense of the action and acknowledged that "the risks associated with the proposed fishing expedition are many, including but not limited to, the likely violation of the right to the confidentiality of attorney-client communications." Citing *Schreiber*, Justice Murphy noted that "courts have been loathe to sanction an intrusive examination of an opponent's computer hard drive as a matter of course."

It will be well worth the effort if, before a motion is made to clone a hard drive, the attorneys for the parties agree on protocols in order to demonstrate to the court that the invasive and intrusive nature of such a motion has been addressed in good faith.

Indeed, in every aspect of e-discovery, given the fact that the law is still evolving and not uniform in all jurisdictions, we can make more progress for our client, and at less expense, by meeting and conferring with our adversaries, than we can by litigating or resorting to self-help.

Richard N. Tannenbaum, principal in the Law Firm of Richard N. Tannenbaum. He is the Referee to hear and determine all issues of discovery in Etzion v. Etzion, a leading e-discovery case in New York.

RESIDENCES ...

Continued From Page 11

However, a problem arises when there are one or more claims of separate property which exceed the equity in existence at the time of the divorce action. For a continuation of the simplified example, assume that the fair market value of the marital residence has declined to $350,000 and that the mortgage remains $200,000. There is available equity of $150,000, but the parties have separate property claims totaling $300,000, resulting in a disparity of $150,000. In order for the parties to be fairly compensated, each of them should receive, from the available equity, a separate property credit which is equivalent to his or her share of their combined initial contributions, up to the amount of his or her initial contribution.

The husband contributed $250,000 toward the $300,000 down payment, or 83%, and the wife contributed $50,000 toward the $300,000 down payment, or 17%. That being said, the husband should receive 83% of the available equity as his separate property credit, $124,500, and the wife should receive 17% of the available equity as her separate property credit, $25,500. Each party therefore absorbs a proportional share of the decline in value.

At first glance, this approach would seem to be in conflict with existing case law. In *Heine v. Heine* the First Department has rejected the percentage approach to distributing equity in a marital residence.[4] *Heine* is not analogous to the issue presented here, however, and should be distinguished. That case involved distributing equity that was far more than the separate property contribution by the husband. The example discussed in this article involves distributing equity that is far less than the separate property contributions by the husband and wife. The difference is appreciation, or the lack thereof.

Another problem arises when there are different types of claims of separate property which exceed the equity in existence at the time of the divorce action. Continuing with the simplified example, assume that the husband also contributed $100,000 from his separate property for improvements to the marital residence. The husband's separate property contribution now totals $350,000, while the wife's separate property contribution remains at $50,000. At the time of the divorce action, the husband might seek a credit for $100,000 toward improvements in addition to $250,000 toward acquisition.

Case law does provide that a party is entitled to a credit for any contribution of separate property used in the acquisition or improvement of the marital residence.[5] The wife could argue that there should be no credit for improvements because the property decreased in value. The husband can counter, however, that but for the improvements the property would have declined even further in value.

This leads right over to the "elephant in the room," that is, money. At what cost would the husband be willing to pursue a separate property credit for his contributions toward improvements? Would the husband pay to retain an expert for a report and/or testimony as to how the improvements prevented the property from further declining in value?[6] The answer will obviously depend upon the facts at hand, with such a pursuit being prudent in certain cases but foolish in others.

Unfortunately, there is a dearth of case law that adopts and delineates the use of the percentage approach to distributing equity that is insufficient to satisfy separate property credits, whether for acquisition or improvement. This is not the first economic recession; cases utilizing the percentage approach have surely been litigated during prior recessions. But for one reason or another they have not been reported, of if so, then their use of the approach cannot be clearly discerned.

Cases which would utilize the percentage approach during the current recession are hopefully not being litigated. If the marital residence at issue has not appreciated in value and there is not enough equity in existence to satisfy separate property credits, it would seem that the parties should be doing everything possible to settle their case and preserve what minimal equity does exist for themselves, not litigate the case ad nauseam to the tune of thousands upon thousands of dollars. Such a hope is unrealistic, however, as "things" are never so simple.

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1. N.Y. Domestic Relations Law §236B(5)(b).
2. *Maczek v. Maczek*, 248 A.D.2d 835 (3d Dept. 1998).
3. N.Y. Domestic Relations Law §236B(5)(c). *See e.g., Butler v. Butler*, 171 A.D.2d 89 (2nd Dept. 1991) (finding that parties shared down payment for marital residence such that wife contributed 86.2% and husband contributed 13.8%, that they are entitled to separate property credits for amounts of their respective contributions to down payment, and that remaining equity should be shared between them such that that wife receives 75% and husband receives 25%).
4. 176 A.D.2d 77 (1st Dept. 1992).
5. *Pulver v. Pulver*, 40 A.D.3d 1315 (3d Dept. 2007).
6. *See Cincotta v. Cincotta*, 221 A.D.2d 306 (2nd Dept. 1995) (denying husband credit for separate property funds contributed to improve marital residence for failing to prove how improvements impacted property value).

NEGLECT CASES...

Continued From Page 11

been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent, or other person legally responsible for his care, to exercise a minimum degree of care." The County Attorney's Office presents such cases in this jurisdiction on behalf of the Nassau County Department of Social Services ("DSS"). Some petitions they file charge parents with having "impairments" or disabilities that result in the potential for the children becoming "impaired".

I offer some means that I have encountered over the years that should help attorneys representing parents and children in such cases to meet Judge Dane's challenge to "up our game" in this highly emotionally charged area of litigation. First of all, while Article 10 of the Family Court Act is the controlling statute in neglect matters, that is only the beginning. The Uniform Family Court Rules of the State of New York, which are found at Sections 205.1 through 205.86, offer all kinds of good information, such as what rules govern permanency hearings. Section 205.17 of the Uniform Rules of the Family Court requires that, once a child is placed in foster care, there must be permanency hearings no less than every six (6) months, and all counsel are to be provided with a detailed permanency report at least fourteen (14) days before the permanency hearing.[1] This report must include all of the pertinent data required by Section 205.17(d)(1)(2) and (3), as well as Family Court Act Section 1089, which includes a requirement that DSS state if its goal is to return the child to the parent or to seek another resource and offer services to the parent which will set the parent on a course to have the child returned upon completion of required services.

An aggressive advocate can help shape the outcome of the permanency hearing by insisting that the services required by DSS actually relate to a specific shortcoming of the parent that the agency alleges constitutes the alleged neglectful behavior. It is not unusual for DSS to require a respondent to attend "parenting classes," without specifically indicating what behavior (if any) is sought to be modified. Requiring a parent to enroll in a program which can measure the parent's progress and point toward specific measurable success should be counsel's goal, since it allows greater participation by the client and is more likely to generate a successful outcome. In short, specific measurable goals are far more achievable and verifiable than are generalized concerns, such as "parenting skills" classes.

Further, the Court can order DSS to produce additional reports, such as school records and clinical evaluations.[2] Uniform Rules of Family Court Section 205.17(d)(2) does not limit the kind or type of reports the Court can order. This Court Rule gives counsel the opportunity to request the use of additional tools to assist the client, such as a court mandated "observer" of visitation who is not affiliated with DSS or perhaps the use of a specific therapist or a therapeutic protocol to assist the client in modifying negative behavior that led to the allegations of neglect.

Lastly, Uniform Rule of the Family Court Section 205.17(e) requires the court to consider the child's position at the permanency hearing. The Attorney for the Child must advance the child's expressed preferences unless there is data indicating that doing so would place the child in imminent risk of harm. In the event the Attorney for the Child opposes the return of the child to the respondent's care, respondent's counsel may want to press the attorney for information to be sure that the position is not based upon the attorney's wishes, rather than the child's own perspective.

Another excellent source of information can be found in the New York Codes, Rules and Regulations. The Rules governing the conduct of the Department of Social Services are located at 18 N.Y.C.R.R. 400 and higher. Information detailing the "preventive services" the Department of Social Services must provide is located at 18 N.Y.C.R.R. 423.4. This Section provides that "preventive services shall be provided according to the needs of the child and the family," which is a powerful and useful tool for counsel to employ when requesting appropriate services for his or her client. 18 N.Y.C.R.R. Section 423.4(d)(1)(a) through (g) describes for counsel the "core services" to be provided as preventive services to a family by DSS. These services include (a) daycare, (b) homemaker services, (c) parent aid, (d) transportation, (e) clinical services, (f) respite services, and (g) emergency services, which may prevent placement of a child in foster care.

The most helpful resource I have encountered over the years is an organization called the "Center for Family Representation," (CFR) located at: www.cfrny.org

The most helpful resource I have encountered over the years is an organization called the "Center for Family Representation," (CFR) located at: www.cfrny.org. CFR represents respondents in the City of New York in neglect matters only. If you go to their website and click on "practice tools," you will find a treasure trove of resources to help you represent people charged with neglect and children. Some of the areas covered in general terms are:

- How to utilize the N.Y.C.R.R. in representing a client;
- Visitation practice tips and sample forms;
- Permanency Hearing worksheets; and
- Preparing your client for conferences with the Department of Social Services.

Having this kind of information available can help those of us working in a neglect area to be more informed and proactive practitioners.

The last practice tip from CFR is something that I find exceptionally valuable for my adult clients, since it is extremely difficult for a respondent meet with DSS workers and not become defensive and perhaps frustrate a possible advantageous settlement. For example, in order to diffuse the obvious negative effect the word "adoption" may elicit in a parent, if counsel prepares the client in advance of the client-DSS meeting about the fact that the DSS worker may speak of the Adoption and Safe Families Act, it is likely the meeting will be more productive. CFR's materials on "preparing the client for family-team conferences" covers fifteen (15) topics to discuss with the client, which can allow the client to be involved in a very positive way in putting the family back together or keeping the family together.

Lastly, our colleagues practicing in the criminal arena have long used the resources of outside agencies to assist their clients in presenting a "positive" position during the litigation. For example, a client facing a DWI charge may very well undergo an alcohol evaluation or one charged with petit larceny may get involved with the "Stop Lift" program as directed by defense counsel. The only "program" generally offered to the respondent-parent in the neglect matter are those offered by the DSS caseworker. Needless to say, respondents are sometimes resistant since the caseworker works for the accusing agency. Accordingly, counsel's use of an independent caseworker or a social worker can go a long way to helping the respondent eliminate the issue that brought him or her to court in the first place.

The idea of employing a social worker, when representing a respondent or the child, is such a good one that I wish it had been my original idea, but it is not. CFR and Lawyers for Children are agencies that have been employing social workers in representing respondents and children respectively for a number of years with great outcomes. The most important possible results are that children have less need for foster care and parents' "recidivism" in Family Court is reduced.

I know that this can work here in Nassau County, as well, because I have seen it work. For example, I recently represented a Spanish-speaking woman who was able to get involved with "Circulo Day La Hispanidad, Inc. Programs," located in Hempstead, New York. The program, commonly known as "Salva," provided her with an advocate worker who assisted her in setting up therapy, both group and individual, anger management, domestic violence counseling, and housing. "Salva" worked with the DSS caseworker to be certain that the various programs were acceptable to DSS, but all the while my client was made aware that "Salva" was working for her, not the governmental agencies. This resulted in my client being a willing participant in shaping her destiny and removing the conditions that DSS charged was as "impairment to her children's well-being." The outcome was that the child was able to leave foster care and go home.

I offer some of the above examples to my friends and colleagues, and thank Judge Dane for issuing the challenge to "up our game," hoping that his article will stimulate a dialogue amongst the judiciary and counsel to explore new approaches to better serve the children who are the subject of "neglect" matters.

John M. Zenir, Esq., has offices in Mineola and practices exclusively in the area of Family and Divorce Law.

1. *See* Uniform Rules of Family Court, Section 205.17(c).
2. *See* Uniform Rules of Family Court, Section 205.17(d)(2).

VIEW FROM THE BENCH ...

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would keep in mind that a binding determination regarding whether the People should be charged with time can be made only when the court has an opportunity to consider a formal CPL §30.30 motion.[41] Without the benefit of context and a grasp of all the events contributing to a delay "there is no necessary connection between the validity of a particular ground for an adjournment and the question whether such a period is to be excluded" in computing speedy trial time.[42] Thus, interlocutory markings are merely advisory. This is all the more reason why attorneys should remember to "play nice" in the courtroom, and prepare for the possibility of trial when they get back to the office.

Judge Anthony W. Paradiso is a Judge of the Nassau County District Court.

1. *People v. McKenna*, 76 N.Y.2d 59, 63 (1990); *People v. Sinistaj*, 67 N.Y.2d 236, 239 (1986); *People v. Anderson*, 66 N.Y.2d 529, 535 (1985).
2. *Id.*
3. CPL §30.30(1)(a).
4. CPL §30.30(3)(a).
5. CPL §30.30(1)(b).
6. CPL §30.30(1)(c).
7. CPL §30.30(1)(d).
8. *People v. Dorilas*, 19 Misc 3d 75, 77 (App Term, 2d Dept. 2008)
9. CPL §30.30(2)(a).
10. CPL §30.30(2)(d).
11. *People v. Stiles*, 70 N.Y.2d 765, 767 (1987).
12. CPL §1.20(16).
13. CPL §30.30(5)(a).
14. CPL §30.30(5)(c)-(f).
15. *People v. Stirrup*, 91 N.Y.2d 434, 438-39 (1998).
16. *Id.* at 439.
17. CPL §30.30(4)(a).
18. CPL §30.30(4)(b).
19. *People v. Liotta*, 79 N.Y.2d 841, 843 (1992).
20. *Id.*
21. *People v. Smith*, 82 N.Y.2d 676, 678 (1993).
22. *People v. Chavis*, 91 N.Y.2d 500, 506 (1998); *People v. Smith*, 82 N.Y.2d at 678.
23. *People v. Caussade*, 162 A.D.2d 4, 12 (2d Dept. 1990).
24. *People v. Smith*, 82 N.Y.2d at 678.
25. *People v. Caussade*, 162 A.D.2d at 8 (citations omitted); *People v. Sherman*, 24 Misc 3d 344, 347-48 (Crim. Ct., N.Y. County 2009).
26. *People v. Camillo*, 279 AD2d 326 (1st Dept. 2001); *People v. Dushain*, 247 A.D.2d 234, 236 (1st Dept 1998).
27. *People v. Williams*, 32 A.D.3d 403, 404-05 (2d Dept. 2006).
28. *People v Anderson*, 66 NY2d at 534; *People v. Caussade*, 162 A.D.2d at 11; *People v. Cecala*, 27 Misc 3d 135[A] (App Term, 2d Dept. 2010); cf. *People v. McKenna*, 76 NY2d at 64.
29. *People v. Caussade*, 162 A.D.2d at 12.
30. *People v. Anderson*, 66 N.Y.2d at 534.
31. *See People v. Wright*, 50 A.D.3d 429, 430 (1st Dept. 2008); *People v. Holden*, 260 A.D.2d 233, 234 (1st Dept. 1999); *People v. Caussade, supra*.
32. *People v. Wright*, 50 A.D.3d at 430.
33. *People v. Hunter*, 23 A.D.3d 767, 768 (3d Dept. 2005); *People v. Van Hoesen*, 12 A.D.3d 5, 8 (3d Dept. 2004); *People v. Johnson*, 25 Misc. 3d 132[A] (App Term, 1st Dept. 2009).
34. *People v. Van Hoesen*, 12 A.D.3d at 8-9.
35. *People v. Caussade*, 162 A.D.2d at 8.
36. *People v. Wright*, 50 A.D.3d at 430.
37. *People v. Anderson*, 66 N.Y.2d at 537; *People v. Aquino*, 6 Misc. 3d 25, 26 (App Term, 1st Dept. 2004).
38. *People v. Anderson*, 66 N.Y.2d at 543.
39. *People v. Berkowitz*, 50 N.Y.2d 333, 349 (1980).
40. *Id.*
41. *Id.*
42. *Id.*

NO FAULT ...

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The difference in these two prior Court of Appeals cases, according to Justice Palmieri, was that the party seeking to commence the new action was not the plaintiff in the earlier suit, and thus was not attempting to circumvent the Legislature's determination by undoing what she herself had begun.[11] Therefore, in holding that the husband could proceed on his divorce action commenced subsequent to the enactment of the no fault statute even though his wife's divorce action was still pending, Justice Palmieri concluded that

> "[t]his Court can find no reason in law or logic to depart from the teachings of the foregoing authority. The language regarding the applicability of part B, and the new subsection (7) of Domestic Relations Law Section 170, to actions commenced on or after such effective date is the same, and the law of permissive counterclaims has not changed. Moreover, in the present case the wife acknowledges that the husband was served with the Summons with Notice on November 22, 2010. This means that no jurisdiction over his person had been acquired, and no appearance in her action could even occur, before the new statute came into effect. This makes the husband's position that there was no impediment to the commencement of his action all the stronger. In any event, the result here would be the same even if a counterclaim in the pending action had been asserted and discontinued, as in Motler."[12]

In a similar case entitled *A.C. v. D.R.; D.R.C. v. A.C*, Justice Anthony Falanga of the Nassau County Supreme Court allowed a wife to bring an action for a no fault divorce, even though there was already a pending action for divorce which was commenced by her spouse prior to the enactment of the no fault divorce legislation.[13] In reaching his decision, Justice Falanga, like Justice Palmieri, also cited to the *Motler* case, discussed above.[14]

Opposing a Divorce Commenced Under the No Fault Law

Both the Essex County Supreme Court and the Kings County Supreme Court[15] have recently ruled that a spouse may oppose the granting of a divorce being sought under the newly enacted no fault law.[16] Thus, according to the rulings from these two cases, a trial will be required if a party disputes the factual allegations asserted by their spouse that the marriage has broken down irretrievably.[17]

In the Essex County case, entitled *Strack v. Strack*, the wife sought a divorce based upon the newly enacted no fault grounds.[18] The husband opposed the divorce, claiming that the Complaint failed to state a cause of action.

In ruling that there should be an immediate trial on the issue of whether the relationship between the parties had irretrievably broken down for a period of at least six months, the Court stated, "Domestic Relations Law Section 170 (7) is not a panacea for those hoping to avoid a trial. Rather, it is simply a new cause of action subject to the same rules of practice governing the subdivisions which have preceded it."[19] In concluding that the husband was entitled to a trial on this issue, the Court considered that "Domestic Relations Law Section 173 provides that in an action for divorce, there is a right to trial by jury of the issues of the grounds for granting the divorce, and here, the Legislature failed to include anything in Domestic Relations Law Section 170 (7) to suggest that the grounds contained therein are exempt from this right to trial. Had it intended to abolish the right to trial for grounds contained within Domestic Relations Law Section 170 (7), it would have explicitly done so."[20] The Court also took into consideration the fact that "insofar as the phrase broken down such that it is irretrievable is nowhere defined in the statute, the determination of whether a breakdown of a marriage is irretrievable is a question to be determined by the finder of fact. The Court does hold, however, that whether a marriage is so broken that it is irretrievable need not necessarily be so viewed by both parties. Accordingly, the fact finder may conclude that a marriage is broken down irretrievably even though one of the parties continues to believe that the breakdown is not irretrievable and/or that there is still some possibility of reconciliation."[21]

Statute of Limitations

The Essex County Supreme Court in *Strack* was also faced with the question of what the Statute of Limitations is with respect to actions for divorce under Domestic Relations Law Section 170 (7).[22] The Court determined that the five year statute of limitations imposed pursuant to Domestic Relations Law Section 210 (a) was also applicable to actions pursuant to Domestic Relations Law Section 170 (7).[23]

Russell I. Marnell, lead counsel at the Law Offices of Russell I. Marnell, P.C. in East Meadow and Smithtown, and senior associate Scott R. Schwartz concentrate in matrimonial and family law.

1. D.R.L. Section 170 (7)
2. *Id.*
3. D.R.L. Section 236 B (5-a) and D.R.L. Section 237.
4. *Heinz v. Heinz*, 2011 N.Y. Slip Op 21049, N.Y. Misc. LEXIS 359 (Sup. Ct. Nassau Cty. 2011.)
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Valladares v. Valladares*, 55 N.Y.2d 388, 449 N.Y.S.2d 687 (1982).
10. *Motler v. Motler*, 60 N.Y.2d 244, 469 N.Y.S.2d 586 (1983).
11. *Heinz v. Heinz*, 2011 N.Y. Slip Op 21049, N.Y. Misc. LEXIS 359 (Sup. Ct. Nassau Cty. 2011).
12. *Id.*
13. *A.C. v. D.R.; D.R.C. v. A.C.*; NYLJ, January 25, 2011.
14. *Id.*
15. The Kings County Supreme Court case of *Stroffolino v. Stroffolino*, NYLJ, February 7, 2011 has been appealed to the Appellate Division, Second Department.
16. *Strack v. Strack*, 2011 NY Slip Op 21033, 2011 N.Y. Misc. LEXIS 169 (Sup. Ct. Essex Cty. 2011); *Stroffolino v. Stroffolino*, NYLJ, February 7, 2011.
17. *Id.*
18. *Strack v. Strack*, 2011 NY Slip Op 21033, 2011 N.Y. Misc. LEXIS 169 (Sup. Ct. Essex Cty. 2011.)
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. Domestic Relations Law Section 210 (a); *Strack v. Strack*, 2011 NY Slip Op 21033, 2011 N.Y. Misc. LEXIS 169 (Sup. Ct. Essex Cty. 2011.)

CREDIT ...

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for anticipated room and board expenses for the eldest daughter, who was then a senior in high school. The example set forth by the Court considered the credit for college room and board expenses if the soon-to-be high school graduate boarded at college. The Court used the financial information and applied a two-thirds model as set forth in the following paragraph.

The father's income was $48,000 per year, which resulted in a child support obligation for two children (*i.e.* 25%) of $1,000 per month. Since the father's child support obligation for one child (*i.e.* 17%) was $680 per month, the difference in the support amount for one unemancipated child away at college and one unemancipated child at home was 8% (*i.e.* 25%-17%), or $320 per month. The Court determined that the college bound child's share of child support should be reduced by 2/3 to $213.33 per month as and for a credit for college expenses, *i.e.* room and board. If both children should reside away at school, two thirds of the entire $1,000 per month would be credited to the father. While this formula is in conformity with the principle set forth in *Rohrs*, *Lee* and *Levy*, which restricts the non-custodial parent to a credit for college expenses only as it relates to a particular child, it lacks precision reaching the actual cost of the college expense to the non-custodial parent.[8] Instead, Justice Peckman attributed an arbitrary 2/3 reduction from basic child support for said expense.

In *Chalif v. Chalif*, Justice Falanga of the Nassau County Supreme Court handled the issue of college credits differently.[9] In that case, the Court did not reduce the monthly child support payment while the children were in college. Notwithstanding the enormous disparity in the parties' income, the Court directed the custodial parent to pay 50% of the room and board expenses and 25% of the other college expenses. This obviated the need for calculating an exact credit on behalf of the higher earning non-custodial parent.

However, a more precise method of calculation could be utilized by the Courts and matrimonial attorneys. By way of example, assume the facts in *Anne Marie T. v. John T.*[10] Also assume that the non-custodial parent is paying $8,000.00 per year for college room and board expenses.

The Stipulation could be drafted as follows:

> The Father will be entitled to a credit from his overall child support obligation for the cost of room and board expenses actually paid; such credit shall be applied against so much of the Father's overall child support obligation as it relates to such particular child or children attending college away from the mother's residence."

For example, if the Father's income is $48,000 per year (joint parental income is $80,000 per year, and the Father's proportionate share is 60%), the Father's overall obligation for two children at 25% would be $12,000 per year and for one child at 17% would be $8,160 per year. The Father's obligation for one child away at college would be the

difference in support for two children as compared to one child, *i.e.* $3,840 per year. Accordingly, the Father would be entitled to a credit for room and board expenses paid for one child up to $3,840 per year, even though his actual room and board expenses totaled $8,000 for that child. If both children are attending college away from the residence of the custodial parent and the non-custodial parent's room and board payments total $16,000 per year, the credit applied would eliminate the $12,000 per year child support obligation in its entirety.

The same logic would apply to any case involving any number of children at college and/or at home. Simply use the difference in the CSSA percentages for the total number of children entitled to support, and then calculate the specific percentage of support for the child or children away at school. To illustrate, the difference between five children (35%) and four children (31%) is 4%, the difference between four children (31%) and three children (29%) is 4%, the difference between three children (29%) and two children (25%) is 4%, and the difference between two children (25%) and one child (17%) is 8%.

The nature of the college credit in the above example protects the full amount of basic child support for all children who remain living at home. In no instance can the credit for college be any greater than the amount afforded to the children at home. However, in applying this formula in a case where no children remain at home, the custodial parent could in some circumstances be left with no basic support with which to contribute to his or her fixed housing expenses, which remain the same regardless of whether the children attend college away from home or not. Justice Kehoe's dissent in *Kellogg v. Kellogg* addresses this concern.[11]

In addition, a number of caveats are in order. First, bear in mind that the "college credit" is not mandatory. Whether or not a Court will grant it depends entirely upon the facts and circumstances of each case.[12] However, most recently, the Second Department held that it was error for the Family Court to direct a father to pay for his son's college expenses without reducing his child support obligation by any amounts he pays for room and board expenses when the child was not living at the custodial home with the mother.[13]

Equally important to practitioners, as pointed out in the recent case of *Dorcean v. Longueira*, where parties provide for the payment of college expenses in an agreement without providing for an offset or credit, the non-custodial parent cannot thereafter receive a credit.[14] Also, a parent who co-signs an educational loan for a child will not receive a credit against the child support obligation for the value of the loan.[15] Lastly, practitioners should also be attentive to agreements where child support is disguised as maintenance because the "college credit" may be substantially reduced.[16]

Elena L. Greenberg, Esq. is a partner at Fass & Greenberg, LLP, a matrimonial law firm in Garden City.

1. Elena L. Greenberg, Esq., "Applying College Credits In Divorce Cases," 2/5/2008 N.Y.L.J. 24, (col. 1).
2. *Paro v. Paro*, 627 N.Y.S.2d 465 (3rd Dept. 1995); *Burns v. Burns*, 649 N.Y.S.2d 602 (4th Dept. 1996); *Finklestein v. Finklestein*, 701 N.Y.S.2d 52 (1st Dept. 2000); *Rohrs v. Rohrs*, 746 N.Y.S.2d 305 (2nd Dept. 2002); *Lee v. Lee*, 795 N.Y.S.2d 283 (2nd Dept. 2005); *Levy v. Levy*, 860 N.Y.S.2d 617 (2nd Dept. 2008).
3. *Reinisch v. Reinisch*, 641 N.Y.S.2d 393 (2nd Dept. 1996).
4. *Rohrs, supra; Lee, supra.*
5. *Levy, supra.*
6. *Fleischmann v. Fleischmann*, 897 N.Y.S.2d 669 (Supreme Ct. Westchester Co. 2009).
7. *Ann Marie T. v. John T.*, 820 N.Y.S.2d 841 (Supreme Ct. Delaware Co. 2006).
8. *Rohrs, supra; Lee, supra; Levy, supra.*
9. *Chalif v. Chalif*, 12/10/2000 N.Y.L.J. 23, (col. 6).
10. *Ann Marie T., supra.*
11. *Kellogg v. Kellogg*, 752 N.Y.S.2d 462 (4th Dept. 2002).
12. *Paro, supra.*
13. *Ataande v. Ataande*, 909 N.Y.S.2d 124 (2nd Dept. 2010).
14. *Dorcean v. Longueira*, 834 N.Y.S.2d 410 (2nd Dept. 2007).
15. *Kent v. Kent*, 810 N.Y.S.2d 160 (1st Dept. 2006).
16. A special thanks to Joseph Lobosco, a law clerk at my office, for his assistance in the preparation of this article.

IN BRIEF ...

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bankruptcy, equipment leasing, secured lending and creditors' rights groups. He also regularly provides educational and strategic seminars on a multitude of issues affecting the leasing and secured lending community and has authored numerous articles on various topics related to the financing industry.

Erica B. Garay, a member of Meyer, Suozzi, English & Klein P.C., was recently appointed Chair of the firm's newly formed practice group specializing in Alternative Dispute Resolution. Ms. Garay is on the panel of neutral arbitrators for the American Arbitration Association (Commercial and Complex) and a mediator for New York Supreme Court, Suffolk County (Commercial Division).

Life's WORC, a private, not-for-profit organization providing comprehensive support for individuals with developmental disabilities, will be honoring **Alan B. Hodish** of the Law Offices of Alan B. Hodish, LLC, at its upcoming "24th Annual Geraldo Rivera Golf and Tennis Classic." Mr. Hodish, who earned his Juris Doctor from St. John's University School of Law, is a former teacher and coach in the Hempstead School District, where he served for over 20 years. In 1982 and 1983, Mr. Hodish received "Coach of the Year" honors, and during his teaching and coaching tenure, he was a member of the coaching staff that earned the school's football team New York State titles in 1986 and 1989, and lacrosse championships in 1983 and 1985. In addition to his coaching honors, Mr. Hodish was awarded the 2000 Hempstead Public Schools' "Community Trailblazer Award," and in 2005 he received the "Education Trailblazer Award." Mr. Hodish concentrates his practice in the areas of personal injury, criminal law, real estate and education law. He is also a former member of the Board of Directors of the Bar Association and is the founder and Chair of the Bar Association's Mentor Program involving under served middle school students. In 2008, the Bar Association awarded him with its "Directors' Award" in recognition of his leadership in the Mentor Program's development and success.

Leslie A. Berkoff, a partner at Moritt Hock & Hamroff LLP, recently moderated a panel discussion "The Preferences and Thoughts of Judges and Trustees" at the National Business Institute's Bankruptcy Judicial and Trustee Forum. Ms. Berkoff serves as Co-Chair of the firm's Litigation and Bankruptcy practice groups and concentrates her practice in the area of bankruptcy and restructuring litigation and corporate workouts. She served as Chair of the International Women's Insolvency and Restructuring Confederation and has served on its Board of Directors for over ten years. Ms. Berkoff currently serves as Co-Chair of the American Bankruptcy Institute's Healthcare Insolvency Committee and is a former Chair of the Bar Association's Bankruptcy Committee. In addition, Ms. Berkoff serves on the Board of Editors of Pratt's Journal of Bankruptcy Law and is a past President and Board Member of Hofstra School of Law's Alumni Association.

Farrell Fritz, P.C. partner **Charlotte A. Biblow** was appointed to the board of Unisphere, Inc., a private non-profit corporation seeking to transform Flushing Meadows Corona Park into a model for urban parks nationwide. Ms. Biblow heads the firm's environmental practice group and also serves on the board of directors of the Long Island Fund for Women and Girls; on the Board of Directors of Sustainable Long Island; and on the Board of Directors of the Queensborough Community College Fund, Inc. She is also a former board member of the American Heart Association, Long Island Region. Ms. Biblow earned her Juris Doctor from St. John's University School of Law.

The Maurer Foundation, a Long Island-based breast health education non-profit, introduced new board member **Maureen Dougherty**, a partner of Comerford & Dougherty, LLP. Ms. Dougherty was appointed as the Prosecutor for the Village of Old Westbury in 1993 and the Village of Rockville Centre in 2002 and continues to serve as the Prosecutor in both Villages. She is also a member of the Nassau County Women's Bar Association and was appointed Treasurer in 2010 and was appointed to the Board of Directors of the Nassau Lawyer's Association of Long Island in 2002. Ms. Dougherty has lectured at the Academy of Law, the Nassau County Bar Association, and the New York State Bar Association and has been a member of the Board of Directors at Sacred Heart Academy in Hempstead since 2006; a member of the Garden City Chamber of Commerce; and a lifetime member of the Girl Scouts USA.

Joseph J. Ortego, a partner at Nixon Peabody LLP and partner and leader of the firm's Products: Class Action, Trade & Industry Representation practice and NP Trial® team, recently served as director of the eleventh annual National Trial Academy held at the Judicial College at the University of Nevada at Las Vegas, in Reno, Nevada. The program was sponsored by the Tort Trial & Insurance Practice Section of the American Bar Association and the American Board of Trial Advocates.

Joel M. Greenberg, a senior partner in the Lake Success-based law firm of Abrams, Fensterman, Fensterman, Eisman, Greenberg, Formato & Einiger, LLP, was recently the featured guest speaker at the annual Gala End of Year Meeting of The New York Pediatric Society at the National Arts Club in Manhattan. The subject of Mr. Greenberg's talk was "The Rapidly Changing World of Health Care: What Every Pediatrician Needs to Know in Order to Survive."

Robert S. Barnett, a partner at Capell Barnett Matalon & Schoenfeld LLP, recently conducted a seminar on the topic of cancellation of debt income and debt workouts.

Willets S. Meyer, a partner at Farrell Fritz, was named to the Board of The WaterFront Center. Mr. Willets, an experienced sailor, concentrates his practice in tax certiorari law. He earned his Juris Doctor from Tulane University Law School is also a member of Queens Botanical Gardens' Board of Directors.

Congratulations to **Jeannie Boyle**, a Nassau County Bar Association member, who graduated this Winter from St. John's University School of Law and recently passed the February 2011 NYS Bar exam. Her husband Patrick and daughters Amber and Annie congratulate her on her great achievement.

New Partners, Of Counsel and Associates

Stephanie M. Reilly Keating has been named a partner of Schwartz & Fang, P.C. Ms. Reilly Keating, who earned her Juris Doctor from St. John's University School of Law, is also a Certified Public Accountant and concentrates her practice in the areas of Estate Planning, Probate/Estate Administration, Taxation and Real Estate. She has lectured at continuing legal and professional education programs in addition to authoring articles on estate planning.

Maureen O'Rourke has joined Herman Katz Cangemi & Clyne, LLP as senior counsel. Ms. O'Rourke concentrates her practice in real property tax matters primarily in the private sector. Ms. O'Rourke earned her Juris Doctor from New York Law School where she currently serves as a mentor.

Gary B. Schreiner has joined the Lake Success-based full-service law firm of Abrams, Fensterman, Fensterman, Eisman, Greenberg, Formato & Einiger, LLP as the partner and director of the Trusts & Estates Law Practice Group. Mr. Schreiner has decades of experience in dealing with multi-generational estate planning for families and closely held business owners, business succession planning, administration of decedents estates, administration of trusts and elder law.

New Firms and Locations

Richard N. Tannenbaum opened his own firm located at 666 Old Country Road, Suite 900, Garden City, for the practice of matrimonial and family law. Mr. Tannenbaum is also a Court-Referee.

The In Brief section is compiled by the Honorable Stephen L. Ukeiley, Suffolk County District Court Judge.

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2011 Judicial Campaign Ethics Training and Guidance

Mandatory Training*

All attorneys involved in judicial campaigns and all judicial candidates who are seeking state-paid elective judicial office must complete a two-hour judicial campaign ethics training program. 22 NYCRR 100.5(A)(4)(f); 100.6(A); NY Rule 8.2(b).

At this time, the training sessions for 2011 are available for viewing on-line.

The training should be completed no later than 30 days after the date of receiving the nomination, or 30 days after filing a designating petition for those running in a primary.

Campaign committee members may also watch the training video, but may not take the training in lieu of the candidate.

Please register for the training by contacting the Judicial Campaign Ethics Center at 1-888-600-JCEC.

Advisory Opinions

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Additional Resources

For more information about court rules applicable to judicial candidates, or for a copy of the Judicial Campaign Ethics Handbook, please visit our website at www.nycourts.gov/ip/jcec or call the Judicial Campaign Ethics Center at 1-888-600-JCEC.

***Candidates for town or village justice are invited, but not required, to watch the training video.**

PRIVILEGE ...

Continued From Page 16

al relationship was articulated by a state court that recognized the accountant-client privilege as follows:

"[T]he purpose of the accountant-client privilege is to insure an atmosphere wherein the client will transmit all relevant information to his accountant without fear of any future disclosure in subsequent litigation. Without an atmosphere of confidentiality the client might withhold facts he considers unfavorable to this situation thus rendering the accountant powerless to adequately perform the services he renders."[22]

Proponents of an accountant-client privilege have a stong arugment that the societal benefits of the privilege would promote full and frank discussions between clients and their accountants in order to enhance the accountant's professional services, which outweigh the cost of losing otherwise relevant evidence.

Costs of the Accountant-Client Privilege

Although many states recognize an accountant-client privilege, some states, such as New York, do not believe the benefits outweigh the costs. These states prefer disclosure of relevant evidence to further the interests of justice. Moreover, as stated in *U.S. v. Nixon*, the Supreme Court applies a high standard to find a new privilege, which "are not lightly created nor expansively construed, for they are in derogation of the search for the truth."[23]

An example of a decision that did not extend nor endorse the accountant-client privilege is *Mitsui & Co. (U.S.A.) Inc. v. Puerto Rico Water Res. Auth.*[24] In that diversity case the Federal Distric Court was considered whether to apply Puerto Rican law that recognizes an accountant-client privilege or New York law, which does not. In denying the privilege, the Court described the accountant-client privilege as "looked upon with dismay since the benefits gained by the accountant-client relationship due to the privilege are slight."[25] It went on to write, "New York … does not recognize the privilege since it was more concerned with the full disclosure of all relevant and otherwise admissible evidence, thus, improving the accuracy of the fact finding process and the administration of justice."[26]

Additionally, the dissent in *Jaffe* illustrates the Court's reluctance to find a new privilege due to the costs of the evidence lost. The dissent in *Jaffe* makes note that all fifty states had some form of a psychotherapist-patient privilege, but there was an "enormous degree of disagreement among the states as to the scope of the privilege" and no "uniform federal policy can honor most of them."[27] The dissent argues that there is no empirical evidence to show how many people talk more freely to a psychotherapist now that those confidential communications are privileged.

The rational in the *Jaffe* dissent may be applicable to the current status of the accountant-client privilege, which vary greatly in scope from state to state. It can be argued that federal recognition of the accountant-client privilege will not bridge the gap between the states. It could also be argued that an accountant-client privilege would frustrate the "fundamental maxim that the public ... has a right to every man's evidence."[28] Moreover, an accountant-client privilege in some states does not mean that clients will now talk more openly with their accountants. Those who oppose the accountant-client privilege conclude that the costs of relevant evidence lost outweighs the benefits for clients of the ablility to talk more freely with their accountants.

In conclusion, despite the critics of the accountant-client privilege, the pattern shown by the states as well as IRC §725 supports the position that the benefits of the privilege outweigh the costs. An accountant-client privilege encourages clients to have full and frank discussions with their accountants in order for the CPA to offer reliable services. Moreover, as the Georgia Supreme Court stated, absent the accountant-client privilege, the client may withhold unfavorable information that will render the accountant's professional services ineffective.[29]

The concerns regarding the costs of the privilege, such as the loss of evidence have been addressed by the states. For instance, to restrict the accountants from furthering a crime or fraud, the accountant-client privilege is subject to the crime-fraud exception. Also, the accountant-client privilege is not absolute and is subject to a waiver. Furthermore, pursuant to the traditionally strict application of new privileges, the accountant-client privilege may be restricted only to non-criminal cases. After considering the public benefits of the privilege, there are strong arguments favoring federal recognition of an accountant-client privilege, albeit with certain limitations, as already endorsed by many states and IRC §725.

Gaddi Goren is a member of the Moot Court Honor Society and is a graduating student from Brooklyn Law School.

1. *Ernst & Ernst v. Underwriters Nat. Assur. Co.*, 178 Ind.App. 77, 85 (Ind. Ct. App.1978)
2. Swain. *Recognition of Accountant-Client Privilege for Federal and State Tax Purposes*; LexisNexis Tax Communities – Tax Communities; July 2, 2010
3. Rosenthal, Jason. *The Accountant-Client Privilege: Does it Exist?*; The American Institute of CPAs; June 7, 2010
4. Swain. *Recognition of Accountant-Client Privilege for Federal and State Tax Purposes*.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Hare v. Family Publications Service, Inc.*, 334 F.Supp. 953, 961 (D.C. Mid 1971)
10. *Id.*
11. *Ernst & Ernst* at 83
12. *Id.*
13. Rosenthal. *The Accountant-Client Privilege: Does it Exist?*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. Causey and Causey, *Duties and Liabilities of Public Accountants; Accountant's Press*, 5th ed., 1995, p. 116, Exhibit 4-2; Mendelson, Dan L. *The need for CPA-client privilege in federal tax matters*; The Tax Advisers; March 1, 1996
19. Rosenthal. *The Accountant-Client Privilege: Does it Exist?*
20. *Id.*
21. *Jaffe v. Redmond*, 518 U.S. 1, 13 (1996)
22. *Gearhart v. Etheride*, 208 S.E. 2d 460, 461 (Ga. 1974)
23. *U.S. v. Nixon*, 418 U.S. 683, 710 (1974)
24. *Mitsui & Co. (U.S.A.) Inc. v. Puerto Rico Water Resources Authority*, 79 F.R.D. 72, 78-9 (D.C. Puerto Rico, 1978).
25. *Id.*
26. *Id.* at 79.
27. *Jaffe* at 24, 33
28. *Id.* at 9
29. *Gearhart* at 461

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