Nassau Lawyer

THE JOURNAL OF THE NASSAU COUNTY BAR ASSOCIATION

October 2011 www.nassaubar.org Vol. 61, No. 2

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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.
November 9 & 10 • 9 a.m. – 4 p.m.

Events

WE CARE Italian Feast
Sat., Oct. 15, 2011
6:30 p.m. at Domus
See page 18

Judiciary Night
Tues., October 25, 2011
5:30 p.m. at Domus
See page 6

Pro Bono Legal Fair
Thurs., Oct. 27, 2011
3 – 7 p.m.
See insert

New Member Orientation
Tues., Nov. 1, 2011
5:30 p.m. at Domus
See page 7

Pro Bonothon
Tues., Nov. 29 & Wed., Nov. 30, 2011
12 – 6 p.m. at Domus
See page 9

What's Inside

GENERAL/OCA ISSUE

Standing outside the front door of the Nassau County Bar Association's headquarters in Mineola with the national trophy awarded for the Mortgage Foreclosure Pro Bono Project are some of the many supporters and coordinators of Nassau County Bar Association's efforts to help homeowners in foreclosure distress: (first row, from l.) NCBA Mortgage Foreclosure Task Force Co-Chair Martha Krisel, Director of Pro Bono Attorney Activities Gale D. Berg, Past President Lance Clarke; (second row, from l.) Executive Director Deena Ehrlich, President Susan Katz Richman, (back row, from l.) Director of Marketing and PR Valerie Zurblis, Past President Emily Franchina, Administrator of Community Relations and Public Education Caryle Katz, and Past President Peter Levy.

Mortgage Foreclosure Pro Bono Project Shines National Spotlight on Domus

By Valerie Zurblis

The Nassau County Bar Association's groundbreaking Mortgage Foreclosure Pro Bono Project, with its unique Legal Consultation Clinics program, has won the LexisNexis Community and Education Outreach Award from the National Association of Bar Executives (NABE), an affiliate of the American Bar Association, for outstanding bar association public service and law-related educational programs. This is the third major recognition of the innovative mortgage foreclosure community assistance program, which was honored in 2010 with the New York State Bar Association's Award of Merit, and last month chosen as one of New York Law Journal's "Lawyers Who Lead by Example."

"Unfortunately, Nassau continues to be among those counties in New York State with the largest number of residents facing foreclosure issues. Our unique clinics bring together all resources, including loan modification counselors and bankruptcy attorneys, to provide services all in one room," noted NCBA President Susan Katz Richman. "We also offer assistance to families confronted by foreclosure, in Spanish and many other languages. While we may not resolve every issue in a single meeting, people leave here with a greater awareness their

See PROJECT, Page 2

Upcoming Publications Committee Meetings

Thurs., October 13, 2011 • Thurs., November 10, 2011 – 12:45 at Domus

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

— National Pro Bono Week —

Volunteer for NCBA's First Pro Bono Legal FAIR

Free Assistance, Information and Referral program set for Thursday, October 27

By Valerie Zurblis

In celebration of national Pro Bono Week, this year the Nassau County Bar Association along with Nassau/Suffolk Law Services is hosting a free legal Pro Bono FAIR (Free Assistance, Information and Referral) to be held on Thursday, October 27, 3-7 p.m. at Domus, it was announced by John McEntee, NCBA's 2nd Vice President and chair of the event. Nassau residents have been invited to come to Domus between 3-7 p.m. with a question and meet with an attorney one-on-one for legal guidance.

"We wanted to celebrate NCBA's long tradition of commitment to pro bono and community legal assistance in a new way, and decided to have an 'open house' allowing the public to see all that we do, and to take advantage of free legal information," said McEntee.

Attorneys are volunteering to meet one-on-one with residents to provide information and

See FAIR, Page 2

Nassau Bar Association Supports Proposed Workers' Compensation Medical Treatment Changes

By Valerie Zurblis

At the September Board meeting, after hearing various points of view, the Directors of the Nassau County Bar Association unanimously voted to support proposed New York State legislation that seeks to resolve a conflict which allegedly arises with Workers' Compensation claimants who have "settled" with employers before December 2010. The New York State Workers' Compensation Board issued final Medical Treatment Guidelines (MTG) which took effect on December 1, 2010 and those guidelines are being applied retroactively to pre-2010 claims. Hence, only treatments consistent with the MTG guidelines are pre-authorized and all other treatments must be periodically re-evaluated. "We feel that by going back to cases and changing the medical treatment guidelines after these cases have been settled is unfair to an injured worker's right to guaranteed medical care and is a

See WORKERS' COMP, Page 2

New Legislative Liaisons Strengthen NCBA's Voice in Albany

By Valerie Zurblis

In an effort to increase the Nassau County Bar Association's voice on relevant legislative matters, NCBA President Susan Katz Richman has instituted an expeditious procedure aimed to enhance the timeliness, and therefore, the effectiveness, of the Bar Association's position on pending legislation. She has created the new function of Legislative Liaison, and has appointed Angelo Mangia and Elizabeth Pessala as the first members to serve in that capacity.

"The purpose of the Legislative Liaisons is to assist and encourage NCBA's committees to examine pending legislation and to work with the committees and the Executive Committee in ascertaining and reviewing all matters pertinent to any legislation deemed relevant by a committee. The Legislative Liaisons are also available to assist Committee Chairs in their presentations to the entire Board of Directors to encourage endorsement of, or opposition to, subject legislation," explained Richman. "By improving the process, we hope to enhance the voice of the Nassau County Bar Association in Albany and to have a greater impact on state legislation."

Elizabeth Pessala is the Associate Justice for the Village of Westbury, and Angelo Mangia is former Counsel to the Senate Majority with expertise in state legislative procedures as well as first hand experience with the nuances of the legislative process. The two Legislative Liaisons work together, surveying pending NY Senate and Assembly bills as well as issues that the NY Office of Court Administration deems relevant, and any other issues brought to their attention by committee chairs. NCBA President Richman distributed the review of current pending legislation to the appropriate Committee Chairs as a starting point for an opportunity to effectively respond to the membership.

"The Liaisons summarize pending legislation that may be of interest to our membership and/or their clients, and forward that information to appropriate Committee Chairs for their review," Richman continued. "The Chairs may also ask the Liaisons for additional research and insight and to further examine issues from all sides to determine if a position needs to be taken. The Executive Committee reviews the NCBA's legislative history to identify any resolutions previously passed that may bear on the subject issue. Then, when a Chair or Committee member presents a recommended position to the Board, he or she can explain all sides of the issue so that the Directors can make an informed decision in a timely manner."

Before presenting his committee's proposal on Workers Comp Medical Treatment Changes to the Board in September, John Fiore, Chair of the NCBA Workers' Compensation Committee, was in contact with NCBA 1st Vice President Peter Mancuso, who is the liaison between all the committees and the Executive Committee. He passed the request on to the Liaisons, who reviewed the proposed legislation and its history in the state legislature. Their research included the respective positions of trade groups and other associations opposed to and in support of the legislation. "We found some concerns expressed by the NY Business Council, but also a number of groups in support. The legislation had already passed the Assembly and was now in the Senate, where the bill is sponsored by several Majority senators," Mangia noted. All information was shared with Fiore and committee members before the group decided to recommend that NCBA take a position on the issue.

"This is a new process, and we are still refining it, but we hope to make a significant impact on future laws affecting the profession in New York State," Richman said. "Ensuring that our Committee Chairs have advance notice of pending legislation affords them both the opportunity to make an informed determination to recommend that the NCBA take a position, and if so, to present their case in a timely manner."

As NCBA's new Legislative Liaisons, Elizabeth Pessala and Angelo Mangia and are ready to assist any committees interested in taking positions on legislative issues.

WORKERS' COMP ...

Continued From Page 1

miscarriage of justice," said John Fiore, Chair of the NCBA Workers' Compensation Committee, in seeking the Board's support for the legislative change. (See sidebar above.)

"The Guidelines, as adopted, cause continued confusion in the medical community and disruption in the much needed medical care for injured workers," Fiore stated. "Additionally, the guidelines violate Workers' Compensation laws that guarantee an injured worker medical coverage for 'such period as the nature of the injury or the process of recovery may require.'"

The proposed change to WORKERS' COMPENSATION LAW § 13-a (A.6294 [Wright]/S.3741 [Maziarz]) would add language prohibiting the retroactive application of the Medical Treatment Guidelines. The NCBA has forwarded its recommendation to Nassau County's state legislators, as well as to the bill's sponsors.

PROJECT ...

Continued From Page 1

options. Knowing that we are here to help alleviates their fear of losing their homes."

In response to the unprecedented mortgage foreclosure crisis in Nassau County, in 2008 the Nassau County Bar Association – working closely with Nassau/Suffolk Law Services, the Nassau Regional Office of the Attorney General and the Nassau County Homeownership Center – was the first bar association in New York State to address the looming mortgage foreclosure crisis. NCBA convened a Task Force which eventually launched New York State's first free Mortgage Foreclosure Legal Consultation Clinic in March 2009, and has held a clinic every month since.

In addition to meeting one-on-one with a volunteer attorney, housing counselors from the Nassau County Homeownership Center, Long Island Community Development Corporation, Hispanic Brotherhood of Rockville Centre and La Fuerza Unida are on hand to help with loan modifications. Attorneys from Nassau/Suffolk Law Services, which provides reduced fee legal services for those who meet certain income guidelines, as well as volunteer bankruptcy attorneys, are available to assist residents. In April 2010, Nassau County Bar Association attorneys began representing residents pro bono at daily court-mandated mortgage foreclosure conferences at Supreme Court. Altogether, more than 250 volunteer attorneys have assisted over 4,000 families through NCBA's Mortgage Foreclosure Pro Bono Project, made possible in part by a grant from the New York Bar Foundation.

Any attorney interested in helping out can contact Gale D. Berg, Director of Pro Bono Attorney Activities, 516-747-4070 or gberg@nassaubar.org. Training will be provided.

FAIR ...

Continued From Page 1

refer them for more assistance if needed. Attorneys will not provide legal representation. Some of the major areas include:

- bankruptcy and consumer debt
- divorce and family issues
- education and special education
- health and disabilities
- immigration
- mortgage foreclosure and housing matters
- senior citizen issues

Bi-lingual attorneys are especially needed. "Through our BOLD (Bridge Over Language Divides) Program, we are reaching out to residents who would be more comfortable speaking with attorneys in their native languages," McEntee added. "We plan to have bi-lingual attorneys fluent in many languages, such as Spanish, Greek, Portuguese, Turkish and Mandarin Chinese, and other languages upon request."

NCBA members who would like to help at either the 3-5 p.m. session or 5-7 p.m. session, (or both) can contact the Bar at 516-747-4070.

LAW DAY 2012

NOMINATIONS REQUESTED

for the
Peter T. Affatato Court Employee of the Year Award

NCBA is seeking nominations for the Court Employee of the Year Award, named in honor of the "Dean of the Bar" Past President Peter T. Affatato, at its annual Law Day celebration. The Award, to be presented at the annual Law Day observance, recognizes a non-judicial employee of any court located in Nassau County who:

- exhibits professional dedication to the court system and its efficient operation, and,
- is exceptionally helpful and courteous to other court personnel, members of the bar, and the many diverse people whom the court system

Nominations should include supporting documents and be submitted in writing as soon as possible but not later than December 12, 2011 to the
Honorable Ira B. Warshawsky, Chair
Law Day Committee
Nassau County Bar Association
15th & West Streets, Mineola, NY 11501
or fax (516) 747-4147 or email ckatz@nassaubar.org

Employment Discrimination

Mitigating Damages in a Weak Economy

In order to succeed on a claim for employment discrimination, an employee terminated from his or her job must attempt to mitigate his or her damages. This means that the employee cannot just exit the workforce and sue the discriminating employer for lost wages. Instead the employee must make reasonable efforts to find other suitable employment. As the current economic slowdown continues, with its attendant high unemployment rates and lack of employment opportunities, courts are being forced to address questions about what mitigation measures can reasonably be expected of wrongfully terminated employees in this weak economy.

Russell Penzer

Mitigation Generally

To prevail on a claim for employment discrimination, under Title VII of the Civil Rights Act of 1964, or any of the other federal employment discrimination statutes, a terminated employee must attempt to mitigate his or her damages by using "reasonable diligence in finding other suitable employment."[1] The test for the reasonableness of a plaintiff's mitigation efforts is a flexible one, and takes into account such factors as: the individual characteristics of the plaintiff, the job market, and the quantity and quality of the measures taken by the plaintiff to procure alternate employment.[2] To satisfy his or her mitigation obligations, a plaintiff need not go into another line of work, accept a demotion, or accept employment in a demeaning position that is not "substantially equivalent" to the one that he or she was denied as a result of the discrimination.[3]

The employer/defendant bears the burden of proving that the plaintiff has failed to mitigate his or her damages and, in the usual case, must do so by establishing (1) that suitable work existed, and (2) that the plaintiff did not make reasonable efforts to obtain it.[4] However, the law within the Second Circuit provides an exception to this general rule, and releases the employer from the burden of establishing the availability of comparable employment if it can prove that the employee made no reasonable efforts.[5]

The Current Weak Economy

The country is currently suffering through what is certainly the worst period of prolonged economic downturn since the passage of Title VII in 1964. One of the ramifications is a protracted period of high unemployment and a lack of job opportunities for the unemployed or underemployed. The bleak prospects for finding employment have caused many job seekers to just give up and drop out of the labor force. In fact, some commentators have suggested that a laid-off employee is now more likely to drop out of the labor force than to find new employment.[6]

Given the state of the job market, courts are now being faced with questions about what can be reasonably expected of an employment discrimination plaintiff in attempting to mitigate damages.

For example, in *Gardner v. Grenadier Lounge*,[7] a federal court sitting in Michigan rejected a defendant's argument that the plaintiff had failed to mitigate her damages and granted the plaintiff, a former waitress, summary judgment on her pregnancy discrimination claims. There, the plaintiff testified that she tried to find work that was comparable to her past employment as a waitress through "job fairs, Internet postings, and 'out walking, driving, looking for work.'" The court, in rejecting her employer's argument that plaintiff's efforts to mitigate damages were insufficient, held that the plaintiff's "diligence in seeking employment is assessed in view of the individual characteristics of the claimant and the job market" and the fact "[t]hat she

was unable to find a job is not surprising, given that since 2005, the economy in Detroit and southeastern Michigan has gotten progressively more dismal." Thus, the Court implied that, given the likely futility of her job search, it was holding the plaintiff to a lower standard for attempting to mitigate her damages than it would have had there been a robust job market.

Counsel for terminated employees in New York should be careful not to overly rely upon the holding in *Garner*, because, as is set forth above, the law in the Second Circuit is that if an employer establishes that the terminated employee made no efforts to find suitable alternate employment, it is not required to demonstrate that such employment opportunities actually existed. Thus, a terminated employee who drops out of the job market will not be able to merely rely upon the fact that the economy is "dismal." He or she will actually have to make a reasonable effort to find work before dropping out of the job market.

See DISCRIMINATION, Page 15

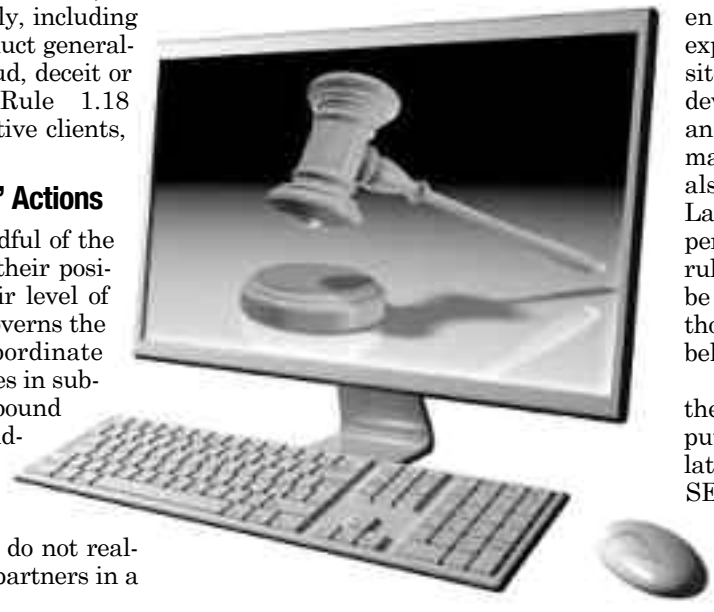
Avoiding Ethical Pitfalls of Internet Marketing

Lawyers have begun turning to the internet more to market their practices, provide information, and communicate with clients. New York's ethical rules[1] with respect to lawyer advertising have undergone changes over the past few years, and some ethics opinions have been issued which may further clarify some of the obligations of lawyers when using these technologies. It is recommended that all lawyers fully familiarize themselves with the ethical rules, and particularly the recent rules with respect to lawyer advertising. This article discusses some of those rules, which may be unfamiliar to many practitioners.

The primary ethical obligations related to lawyer advertising (including lawyer websites) can be found in Rule 7.1, but several other rules also apply, including Rule 8.4(c), prohibiting conduct generally involving dishonesty, fraud, deceit or misrepresentation, and Rule 1.18 regarding duties to prospective clients, among others.

Responsibility for Others' Actions

All lawyers must be mindful of the ethical rules, regardless of their position within the firm or their level of legal experience. Rule 5.2 governs the responsibilities of a subordinate lawyer, and specifically states in subpart (a) that, "A lawyer is bound by these Rules notwithstanding that the lawyer acted at the direction of another person."



What many lawyers also do not realize is that lawyers who are partners in a law firm or in a managerial or supervisory role also have the obligation of ensuring that lawyers whom they supervise will comply with the ethical rules.[2] Thus, where a lawyer directs another lawyer to act in a way that violates the rules, or where a lawyer in a supervisory or managerial role knows should have known of such conduct by a lawyer whom they supervise and fails to take reasonable remedial action, both lawyers will be considered to have violated the ethical rules.

Similarly, a lawyer with direct supervisory authority over the law firm's staff or other non-lawyers may be considered to have violated the ethical rules if they direct a staff member to undertake conduct that would violate the rules, or if they knew of such conduct and failed to take remedial action, if they should have known of such conduct at a time when remedial action could have been taken to avoid or mitigate the consequences of the conduct.[3]

These rules come into play with lawyers who are beginning to more actively market their practices on the Internet, or to provide information about themselves, their firms or their practice areas on the Internet, not only on the lawyer's own websites or blogs, but in legal directories, list serves and social media outlets as well.

Allison C. Shields

Lawyers have begun to outsource some of their internet marketing, or to hire "search engine optimization" (SEO) experts to drive traffic to websites, website designers and developers to create websites and content for their internet marketing efforts, and other professionals to help them with social media. Lawyers must be aware of the actions performed on their behalf, and the ethical rules which govern them, as lawyers may be held accountable for the actions of those they retain to perform this work on behalf of the firm.

For example, Rule 7.1(g)(2) prohibits the use of meta tags or other hidden computer codes that, if displayed, would violate the Rules. A law firm who hires an SEO expert and does not supervise the meta tags being used on the site may be in danger of ethical violations. Rule 7.1(h) requires all advertisements to include the name, principal law office address and telephone number of the lawyer or firm. A lawyer whose website includes only a telephone number and email address would be in violation of the Rules.

Lawyer Websites

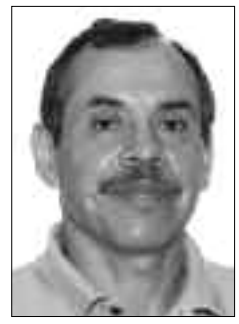
Last summer, the American Bar Association issued Formal Opinion 10-457 addressing lawyer websites.[4] The opinion discusses several issues related to lawyer websites, including website content, visitor inquiries and disclaimers. Although the ABA opinion references the ABA Model Rules rather than New York's rules of professional responsibility, the rules are substantially similar, if not identical in many cases, and lawyers should be guided by the cautions contained in the ABA opinion.

The ABA opinion acknowledges that, "Lawyer websites also can assist the public in understanding the law and in identifying when and how to obtain legal services."[5] But it is imperative for lawyers to understand that a lawyer or law firm website cannot be simply created and then ignored. Lawyers who post information on the internet must ensure that the information is current, accurate and not misleading. In order to avoid being misleading, a lawyer or law firm must keep their site up to date and must ensure that they include disclaimers that prevent cre-

See PITFALLS, Page 20

From the President

As National Pro Bono Week approaches, you might expect this month's President's column to be dedicated to that topic. And, of course, I wouldn't want to disappoint you. However, the fact is that our Nassau County Bar Association is always about pro bono and all we do to serve our community throughout the year. I constantly and proudly promote all of our pro bono activities, including – but in no way limited to, our Senior and Mortgage Foreclosure Clinics, our BOLD initiative, and our Pro Bono Project for Domestic Violence Victims, for which training is already under way.



Hector Herrera

Of course, I will seize this opportunity to announce our first Pro Bono Legal FAIR (Free Assistance, Information & Referral), to be held on Thursday, October 27, 2011, from 3:00 p.m.-7:00 p.m., in conjunction with Nassau/Suffolk Law Services. All Nassau County residents are invited to come to the FAIR, at our headquarters on 15th & West Streets and have their questions answered with information provided by our expert volunteer attorneys. The many areas of law to be addressed include bankruptcy, immigration, divorce and family issues, health and disabilities law, and mortgage foreclosure and housing issues.

Bi-lingual lawyers fluent in Spanish, Hindi, Haitian Creole, Russian, Chinese, Korean and many other languages will be present upon request during advance registration, by calling (516) 747-4070.

The term pro bono means for the public good, and is usually used with reference to the rendering of legal assistance. The foregoing having been said, I now write about another kind of pro bono, in connection with the Long Island Business News' Leadership in Law Awards, which recognize the dedication, experience, hard work, skill, and compassion of those individuals intimately involved in the positive impact of the legal profession on Long Island. Specifically, I refer to the Unsung Heroes category, which honors the support staff behind the scenes of professional associations such as ours, whose performance is considered exemplary by going above and beyond the parameters of what should be their normal job routine – as does our own HECTOR HERRERA.

Hector is our unsung hero because in many ways, he is the Nassau County Bar Association. We couldn't be what we are without Hector! He's been a trustworthy, loyal NCBA employee for almost 20 years, and he is the "go-to" guy for staff and bar members alike.

As many of you know, our home, Domus, was built in 1931, modeled after the Middle Temple in London. Well, Hector ensures that this 80-year-old building is always in tip-top shape, to warmly welcome the thousands of people – from the legal community as well as the public, who come to Domus each year. Not only does Hector oversee major building maintenance such as repointing bricks, the installation of an HVAC system, reconfiguring and re-paving the parking lot; he also takes pride in actually doing much of the work himself – especially sanding and waxing our magnificent inlaid hardwood floors.

Hector takes care of the small details, too--he sets up chairs just perfectly for particular meetings,orders all supplies, refills the water cooler, and even fixes jammed copiers and printers. If special video equipment is needed at a gathering, we call Hector. If a computer freezes or the server goes down, Hector is our IT staff. If information must be changed or added to our NCBA website, Hector is the Webmaster.

Have special guests and/or dignitaries coming to Domus and want some photos? Hector is there in a flash, with his camera and intricate lighting equipment. Attorneys in need of their Secure Pass or Committee Chair photographs know that Hector's the man to see. (Even your President knows he gives the best digital facelifts!) Whenever something needs to be done, Hector has already started – or, more likely, finished it!

Originally from Guatemala, Hector is bi-lingual, and often serves as translator for those coming to Domus for assistance. While Hector wears the hats of Building and Grounds Superintendent, House Photographer and Webmaster, his real claim to fame is the person he is – loyal, dedicated, competent, professional, and so very much more!

That's why we proudly nominated him and announce that our very own HECTOR HERRERA has been awarded the Unsung Hero Award that he so rightly deserves! Congratulations, Hector, from your Domus family – we love you and are all very proud!!!!

The Nassau County Women's Bar Association recently honored Franchina & Giordano. (L-R) Joy Watson, Emily F. Franchina, Hon. Elaine Jackson Stack, Mary P. Giordano.

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Better Never than Late: The Improper Use of Motions *In Limine*

Imagine walking into a courtroom, the jury is selected and the trial is about to start. You have been preparing for years for this day, crossing every "t" and dotting every "i." Just as the jury is about to come out, however, your adversary hands up to the court an eleven-page motion for summary judgment masquerading as a motion *in limine*.

Donald Jay Schwartz

The issue presented in the motion is in fact the crux of the entire lawsuit from its inception, which was certainly well known to all sides from the commencement of the suit. Yet your adversary waited until after the jury was selected and the trial was about to begin before making the "motion *in limine*."

Or instead, your adversary hands up not one motion, but three separate motions *in limine* immediately before the jury is to enter the courtroom. The first and second motions seek to prevent your expert from testifying at the trial, claiming his testimony is within the expertise of the jury and his expected testimony is allegedly speculative, despite knowing about your expert two years prior to trial. In the third motion, your adversary attempts to preclude your use of a tremendously expensive video animation to be used by your expert as an aid to the jury in understanding his testimony, claiming it will be prejudicial to the jury, although again your adversary knew about the animation two years prior to the commencement of the trial, but failed to make any motion previously with regard to it.

In both hypotheticals, your adversary presented motions *in limine* not to prevent the introduction of evidence which had just come to their attention, but to preclude evidence that they had known about for years. Can a court accept such a motion, despite it being presented literally on the eve of trial with no prior notice to you?

Last-Minute Motions *In Limine*

You may be surprised to learn that the court can not only permit submission of such a late motion, but can also require you to read the motion *in limine* for the first time while simultaneously having to argue against it. You will have no opportunity to review the cases cited in support of the motions, nor research the issues presented and provide a written response, despite the extreme importance of the decision. Indeed, in both hypotheticals, if you are unable to introduce the evidence objected to in the motions *in limine*, you will be precluded from meeting your burden of proof and will result in the dismissal of both actions.

This trial by ambush is nothing more than an abuse of the purpose behind the motion, which is to "sav[e] the parties and the court from significant litigation time and … significantly streamline the action without compromising either party from proving its case."[1] "*In limine*" is defined as "at the outset" and "preliminarily."[2] When a motion *in limine* is made, however, not "at the outset" when a party first becomes aware of an evidentiary issue that will be raised at trial but on the very eve of trial, the results can be catastrophic.

In *Shufeldt v. City of New York*, the First Department affirmed the lower court's granting of defendant's motion *in limine*, which precluded plaintiffs from asserting theories of liability not asserted in their notice of claim.[3] The plaintiff was injured in a car accident in 1982 and served a notice of claim on the City of New York that same year. Ultimately, the plaintiffs' theory changed after discovery in 2004.[4] As a result, in 2005, plaintiffs amended their bill of particulars and changed their legal theory.

Danielle B. Gatto

The defendant then waited until the eve of trial in 2008 to make its' *in limine* motion, arguing that because the 1982 notice of claim did not indicate the new legal theory – now the sole theory of liability – plaintiffs should not be able to assert this theory at trial. The lower court and First Department agreed, granting the motion *in limine* and dismissing the complaint. As a result, despite legal fees that expanded over 25 years, and despite being well aware of this issue as early as 2005, the defendant waited until the eve of trial to make a motion that resulted in dismissal of the complaint.

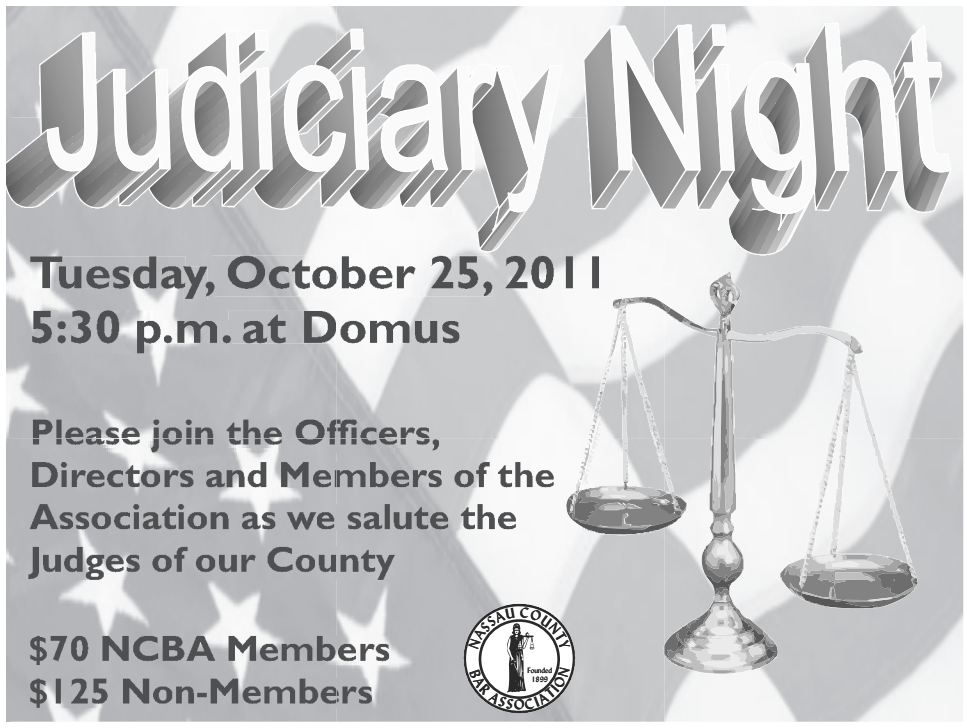
If an attorney is aware of an evidentiary issue well before the trial begins, they should not be permitted to wait until the day of the trial to bring a motion *in limine*. Because motions *in limine* do not have to be in writing or in accordance with CPLR § 2214,[5] nor are there state-wide rules or regulations restricting the timing of such motions, this is exactly what is happening. When it happens, the opposing attorney may have mere minutes to respond to a fully briefed motion which could lead to the dismissal of their case.

There is nothing in the CPLR or Uniform Rules that expressly authorizes motions *in limine*. In fact, as late as 1966 it appears that courts refused to entertain a motion *in limine* in New York State courts.[6] Rather, this court-created motion appears to have its genesis in the Supreme Court case *Luce v. United States*,[7] where the Supreme Court recognized that motions *in limine* were "developed pursuant to the district court's inherent authority to manage the course of trials."[8]

Judicial Reactions

New York courts have continued to allow these motions, holding that "[d]eciding [a motion *in limine*] is completely within the court's inherent power [to regulate trials before it]."[9] CPLR § 4011 also permits courts to "regulate the conduct of the trial," and thus the ability to decide such motions. More recently, courts are appearing to recognize the

See IN LIMINE, Page 15



Complete and return form below with credit card information or check made payable to NCBA, 15th & West Streets, Mineola, NY 11501 — Att: Special Events

Judiciary Night

Enclosed is $_____ for _____ reservation(s) at $70 pp (NCBA members) or $125 pp (non-members)

List Names of those attending:

_____

_____

_____

_____

Card # _____

Exp. Date _____ Security Code _____

Billing Address _____

_____

Register online at nassaubar.org

Domus Scholar Circle: All Your CLE for Just $189. Such a Deal!

NCBA member Barbara Goglio eagerly signs up for the new Domus Scholar Circle as Nassau Academy of Law Director Barbara Kraut looks on at the September CLE program, "Marriage, Divorce, Estate Planning and Employment Issues for Same-Sex Couples," held at Domus. The three-credit program registration fee was $100, but for just $89 more, Goglio joined the Domus Scholar Circle that evening and can now attend virtually all 1, 2, and 3 credit CLE programs she wants through June 30, 2012. "Members are seeing this incredible value and are signing up in droves," Kraut noted. For more information or to sign up, call the Academy at 516-747-4464 or visit www.nassaubar.org.

Social Media Advertising and Consideration of New York Privacy Laws

What Businesses and Advertisers Show Know Before Advertising on Social Media Websites

Pedram A. Tabibi

The social media rise through websites including Facebook[1] and Twitter[2] and the increased use of electronic communication has dramatically shifted advertising to the Internet. Google[3] and Facebook are among those websites with lucrative and growing advertising revenues. Facebook's online advertising business, in particular, is rapidly growing, taking in an estimated $1.86 billion in worldwide advertising revenue in 2010, with estimates of revenues more than tripling to $5.74 billion by 2012.[4] Companies both large and small advertise on Facebook and use many creative means to market their products to Facebook's over 750 million active users.[5]

Many methods exist to advertise a product on Facebook, most of which are quick and inexpensive, making Facebook advertising appealing and especially attractive to newer businesses. At the same time, the ease and inexpensiveness with which companies may now promote products means companies may neglect safeguards against any illegal or infringing conduct, especially with younger, less well-funded companies with fewer resources.

The subject of this article is to highlight the New York privacy laws, specifically New York State Civil Rights Law §§ 50 and 51 (the "Privacy Laws"), of which businesses and advertisers should be aware before using individual names or pictures for Facebook or other social media advertisements and the consequences businesses may face when using an individual's name or picture without consent. A business or advertiser likely violates the Privacy Laws by using celebrity and non-celebrity names and pictures for trade or advertising purposes without consent. It is therefore wise to first obtain a person's permission before using his or her name or picture on a social media website for advertising purposes, rather than risk exposing a business or advertiser to potential liability to the non-consenting individual.

Facebook Does Not Adequately Address or Inform Users of New York's Privacy Laws

Before addressing New York's Privacy Laws, companies and advertisers must first understand Facebook's own terms of use and advertising guidelines. While Facebook generally prohibits users from violating the rights of others, it does not adequately apprise users of the potential legal issues in using someone's name or picture for commercial purposes and does not warn users of how easily a violation of privacy laws – such as New York's – may occur.

A. Facebook's Statement of Rights and Responsibilities

Facebook's Statement of Rights and Responsibilities (the "Facebook SR&R") generally acknowledge the protection of individual rights.[6] The Facebook SR&R states that a user will not post content or take any action that infringes or violates someone else's rights or otherwise violates the law.[7] This is the only directive the Facebook SR&R dedicates to how a user must protect individual rights. Thus, Facebook's SR&R inadequately addresses individual privacy rights and specific privacy laws.

Facebook's SR&R also includes a section about "Advertisements and Other Commercial Content Served or Enhanced by Facebook."[8] This section directly addresses Facebook's use of an individual's name or picture for commercial purposes and essentially gives Facebook permission to exploit an individual's publicity rights.[9] However, even Facebook is vulnerable to New York's Privacy Laws,[10] despite the Facebook SR&R language. Moreover, Facebook's SR&R – as applied to businesses or advertisers – fails to adequately address New York's Privacy Laws. Facebook users – be it businesses, advertisers or otherwise – must be aware of such laws to avoid any legal pitfalls when advertising online by using an individual's name, portrait or picture.

B. Facebook's Advertising Guidelines

Facebook's Advertising Guidelines[11] similarly stop short of adequately addressing concerns about laws such as New York's Privacy Laws. Interestingly enough, the Advertising Guidelines explicitly mention and prohibit "endorsement of [a] product, service, or ad destination by Facebook"[12] but do not address endorsement of a product, service or ad destination by individuals. Facebook generally addresses privacy rights where it prohibits ads including "any content that infringes upon the rights of any third party, including copyright, trademark, privacy, publicity or other personal or proprietary right." This is inadequate, however, as it does not outline New York's Privacy Laws' specific prohibitions, which are typically unknown to Facebook users, new businesses or certain advertisers.

Thus, for example, something as innocuous as a clothing company posting pictures of a celebrity wearing its jeans in public on the company's Facebook page where the posting originated from a newspaper article on an unrelated topic could be a violation of both New York's Privacy Laws and applicable copyright laws. Such a violation may result in the clothing company paying a large amount of money in damages to the celebrity and the newspaper in addition to having to immediately pull the advertisement. Therefore knowledge of New York's Privacy Laws is important and necessary when using individuals to advertise on Facebook.

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IN BRIEF

Member Activities

The Honorable Steven Jaeger, Nassau County Court Judge, was installed as President of the Theodore Roosevelt American Inn of Court. Judge Jaeger is also an Acting Justice of the Supreme Court in Mineola, where he presides over civil and criminal litigation. The Theodore Roosevelt Inn of Court conducts programs and discussions on matters of civility, ethics, skills and professionalism in the law.

The Honorable Marie Santagata, former Family Court Judge and Supervising Judge of the Nassau County Criminal Courts, was the keynote speaker at the Incorporated Village of Westbury's Constitution Day. Judge Santagata is also a former trustee of Westbury and an Associate Justice in the Village of Old Westbury. She recently served as a Judicial Hearing Officer for the Appellate Division and was honored as "Magistrate of the Year" by the Nassau Magistrates' Association. Her late husband Justice Frank Santagata was an Associate Justice in Westbury for nearly 30 years and served as a President of the Nassau County Bar Association. Village Justice **Thomas F. Liotti**, who initiated the program three years ago, has previously acted as a keynote speaker.

The Honorable Elaine Jackson Stack was recently presented with the Honorable Guy J. Mangano Award by the St. John's University School of Law Nassau Alumni Chapter. A 1979 graduate, Judge Stack is presently serving as a Judicial Hearing Officer in the Nassau County Family Court.

Hon. Stephen L. Ukeiley

Emily F. Franchina and **Mary P. Giordano** of the law firm Franchina & Giordano were recently recognized for their charitable work by the Nassau County Women's Bar Association. Ms. Franchina, who serves as Vice President of the New York State Bar Association, is also a Director on the New York Bar Foundation in Albany and a member of Judge Lippman's Access to Justice Task Force. Ms. Giordano serves as the President of the Columbian Lawyer's Association of Nassau County, is a Trustee of her Parish, St. Peter of Alcantara, and is a Director on the Ozanam Hall Nursing Home Board.

Jeffrey D. Forchelli, founder and managing partner of Forchelli, Curto, Deegan, Schwartz, Mineo, Cohn & Terrana, LLP, was reappointed to the Judicial Hearing Officer Selection Advisory Committee for the Second Judicial Department, Tenth Judicial District (Nassau and Suffolk counties). Mr. Forchelli concentrates his practice on real estate and land use matters, including litigation and tax certiorari for real estate developers and national corporations. He has served as Counsel to the New York State Assembly and was on the Legal Advisory Board and the Board of Directors of Security Title and Guaranty Company. Mr. Forchelli was selected for inclusion in Who's Who in American Law (8th Edition) and is consistently included in the "Who's Who in Law" listing by Long Island Business News. He was selected by his peers for inclusion in New York's Super Lawyers (2007, 2009 & 2010). Mr. Forchelli is a Trustee of Brooklyn Law School and Wagner College where he serves as Treasurer of the Board, and is a past President of the Oyster Bay-East Norwich School District and a former Trustee of Nassau Community College. He is also a past President of Community Mainstreaming Associates and the recipient of the organization's "Humanitarian of the Year" award in 1996. Mr. Forchelli is a Vice Chairman of the Nassau County Republican Committee.

Antonia M. Donohue, a partner and member of the Management Committee of Jaspan Schlesinger LLP, was appointed to serve as Director of Bridge Bancorp, Inc. and its banking subsidiary, The Bridgehampton National Bank. Ms. Donohue also serves as the chairperson of the law firm's Banking and Financial Services Practice Group. She is also a member of the Board of Directors of the Long Island Chapter of the Turnaround Management Association, and, in 2009, she was named one of the most "50 Most Influential Women" by the Long Island Business News. Ms. Donohue, who earned her Juris Doctor from St. John's University School of Law, is also a frequent lecturer on commercial foreclosure, bankruptcy, workouts and collection matters and is the co-author of "The Potential Liability of Attorneys to Third Party Creditors."

Ruskin Moscou Faltischek, P.C. partners **Michael K. Feigenbaum** (Estate Planning & Probate) and **Mark S. Mulholland** (Litigation) have been named to the 2011 Super Lawyers, New York Metro Edition. Super Lawyers features lawyers from more than 70 practice areas who have attained a high degree of peer recognition and professional achievement.

Howard M. Esterces, of Counsel to Mineola-based Meltzer, Lippe, Goldstein & Breitstone, LLP, has again been named in Super Lawyers as one of the top attorneys in estate planning and probate in the New York Metropolitan area. Mr. Esterces is on the Editorial Board of Practical Tax Strategies and a Fellow of the American College of Trust and Estate Counsel. He is also past Chairman of the Tax Law Committee of the Bar Association, recipient of the Bar Association's President's Award, former member of the Association's Board of Directors and former Chair of the District Director's Liaison Committee for the Internal Revenue Service, Brooklyn, N.Y. District.

Jeffrey M. Kimmel, a partner at Salenger, Sack, Kimmel & Bavaro, LLP, has been appointed to chair the Committee on Committees for the New York County Lawyers' Association. Mr. Kimmel, who serves on the Association's Board of Directors, will oversee the committee work of more than 50 NYCLA committees. Mr. Kimmel manages the firm's medical malpractice area and is A-V ranked by Martindale-Hubbell. He was selected as a NYC "Ten Leaders" in Civil Trial and Personal Injury Law, and is consistently named to the New York Super Lawyers list. He recently wrote on trial preparation and strategy in connection with the "Inside the Minds" series, and was invited to be an inaugural contributor to The New York Law Journal's "Smart Litigator." Mr. Kimmel earned his Juris Doctor from Brooklyn Law School where he received the school's American Jurisprudence Award for

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Member Benefits Corner

LAWYER REFERRAL PANEL

NCBA members who join the panel agree to an initial consultation at a minimal fee, often resulting in fee generating cases. The Lawyer Referral Information Service logs over 10,000 calls per year. NCBA members can join at www.nassaubar.org.

ASSOCIATION DIRECTORY

This invaluable annual guide to practitioners, court personnel, Association committees and much more is updated and distributed annually. Send contact information changes and updates to membership@nassaubar.org.

COMMITTEE MEMBERSHIP

Don't miss out on what may be your most valuable member benefit! Committee Membership. With over 50 committees to choose from, at least one must be right for you! You can select committees online (www.nassaubar.org) or call the membership department (516.747.4070). There are no additional fees for joining committees.

"CALL A COLLEAGUE" PROGRAM

Have a problem case or a question? Information and informal advice is provided by volunteer "mentors" with expertise in a specific area of law.

NASSAU LAWYER

Our monthly newspaper for the membership features timely professional updates and news, as well as Association happenings and information. Members may submit articles for publication.

DOMUS DINING

One of your benefits of membership is that you automatically have a "house" account and can "sign" for your lunch at Domus. You will be billed at the end of each month. There are no charges as long as you keep your account current. Simply present your membership card to the cashier in the Dining Room at Domus.

CAREER CENTER

A section of our website (www.nassaubar.org) created to help connect our members with new employment opportunities. Areas for both job seekers and employers.

For information on these, or any other member benefits, contact Dede Unger at 516-747-4070 or dunger@nassaubar.org

COMMITTEE REPORTS

Matrimonial Law Committee

Meeting Date: 9/14/11
Lee Rosenberg, Chair

The meeting, with format entitled "Annual Administrative Update," featured the latest information related to matrimonial and family law practice in the Nassau County Courts from District Administrative Judge, Nassau County Supreme Court Justice Anthony Marano, as well as Nassau County Matrimonial Center Supervising Judge Hope Zimmerman and Nassau Family Court Supervising Judge Edmund M. Dane.

Michael J. Langer

The featured panel updated the committee on the most recent developments and future possibilities regarding matrimonial parts in this election year given current financial difficulties. Other announcements were made by the Committee Chair, Lee Rosenberg, including his future plans for the committee, introduction of the vice chairs, the formation and naming of a liaison committee between the bar and bench to facilitate an ongoing dialogue regarding issues in the courts, and a potential initiative to form a subcommittee to comment on and address legislative matters of interest. New protocols and NCBA upcoming events were also announced.

Education Law Committee

Meeting Date: 9/15/11
Christie R. Medina, Chair

New members were introduced as plans for upcoming meetings were discussed, including members' expectations from the committee. Preparation was made for the upcoming Annual School Law Conference, scheduled to be held on December 5, 2011, at the NCBA, which included brainstorming about recommended topics and speakers for the Conference. The meeting also featured an open discussion of several upcoming public events that members wished to share with the committee, including several events sponsored by the Long Island Chapter of the Labor & Employment Relations Association.

At the upcoming meeting scheduled for October 20, 2011, at 12:30 p.m., the committee will host guest speaker Robert J. Freeman, Executive Director of the New York State Committee on Open Government ("COG"). COG is responsible for overseeing the implementation of the New York State "Freedom of Information Law" and "Open Meetings Law." The NCBA Labor Law Committee and Municipal Law Committee have been invited to co-sponsor this event.

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.

Unintended Consequences of Matrimonial Agreements

Common as a clause may be, drafters of matrimonial agreements need be forward thinking to the time when terms are effectuated. Custom does not always result in best practices and contract terms do not necessarily guarantee the desired result.

"Speak now or forever lose your piece …"

Case in point is the mandatory provision of the Domestic Relations Law § 236 B (3) frequently ignored in the execution of matrimonial agreements. In order for an agreement to be valid, it must be signed by each party and acknowledged in the form such as that required for a deed to be recorded. The acknowledgement has two components and is not simply the written statement of the notary or official reciting that the party executing the document appeared on a given day before them and signed the document. The party must make an oral declaration to the statutorily authorized officer that he signed the document.

Nancy E. Gianakos

Though seemingly a ceremonial tempest in a teapot, failure to make the oral declaration serves as the basis for a will contest brought on by the surviving spouse seeking to assert a right of election. The right of election (EPTL § 5-1.1A) is a statutory right acquired upon marriage whereby upon the death of a spouse, the surviving spouse is entitled to the greater of one third of the estate of the decedent spouse or $50,000. Frequently, this right is waived in prenuptial agreements as well as final settlement agreements. A valid waiver must comply with the provisions of the EPTL § 5-1.1-A(e)(2), that is:

- it must be in writing,
- subscribed by the maker thereof, and
- acknowledged or proved in the manner required by the laws of the state of New York for the recording of a conveyance of real property.

An acknowledgement sufficient for a recording of a conveyance of real property requires a written certificate of acknowledgement endorsed by one of a number of public officers attesting to the signer's oral declaration. Failure of a party to utter the "magic" words may be that all that stands between the disinherited spouse and the right to elect against an estate worth millions.

Some litigants have successfully argued that there is "substantial compliance" with the acknowledgement requirement even absent the oral declaration. The Nassau Surrogate's Court in *Matter of Cerrito* upheld the validity of the prenuptial agreement for this proposition. Whether this decision and its progeny will survive a review by the Court of Appeals is unknown, in the meantime, best practices would have the practitioner err on the side of caution: observe ceremony and have both parties make the oral declaration to ensure validity of the agreement and the waiver of the right of election.

"The parent giveth and taketh away"

Parents have an obligation to support children to age 21 in New York. Basic support includes food, shelter and clothing. In addition there are statutory mandated "add on" contributions to childcare and health insurance; contributions to private and/or college education are within the discretion of the Court (Domestic Relations Law § 240 and Family Court Act § 413). Drafting provisions regarding parental college contributions is often complicated by a credit to be given to the noncustodial parent for room and board presumably duplicative of the "shelter" expense of the basic support obligation. By case law, a noncustodial parent is entitled to a dollar for dollar reduction of the basic support obligation paid for the "room and board" contribution for a child attending college. The formula's application is simple if only one unemancipated child is involved. Presuming the application of the Child Support Standards Guidelines for the basic support obligation, (Family Court Act § 413), the noncustodial parent's room and board credit cannot exceed his/her *prorata* share of the basic support obligation. If the room and board expense is $10,000 per year, and the noncustodial parent's share is 50% either by agreement or application of the prorata calculations pursuant to CSSA, the noncustodial parent's maximum credit is $5,000 against his/her basic child support obligation.

However, this credit may not reduce the basic support obligation of the other children. If for example, there are three children, the noncustodial parent may not receive the full $5,000 credit if this reduces the basic support obligation for the other two children. This is a case where the intent of the language may be clear, however, unless care is taken in the drafting of the provision, effectuating the provision is fodder for future litigation. Best practices: Avoid ambiguity and provide an example of the application of the provision to the particular circumstances.

"The Porsche versus the B.A."

Frequently overlooked by drafters are the dissemination of the proceeds of UTMA accounts and 529 plans, often made a part of the parental contribution for college expenses. UTMA accounts are usually titled to one parent for the minor child. Upon attaining age 21, the child obtains control of the UTMA account. If the child chooses not to use the funds for college (as may occur with a UTMA) or does not attend college, to whom the funds revert and when are governed by the account terms notwithstanding the presumed intent of each parent. Unlike the UTMA account, a parent may be surprised to learn that the 529 contributions made to the account during the marriage presumably for the child revert to the party in title if the funds are not utilized for college.

Drafters should address the particulars of these accounts in utilizing the proceeds as part of a parental contribution. The plan administrator/custodial institution is not bound by the contractual obligations under taken by the parents in a settlement agreement. Your client may be unaware that a child attaining age 21 is now entitled to the funds of the UTMA account and the parent is without recourse should junior show up with a new car rather than a college curriculum.

"No good deed goes unpunished"

Pursuant to Domestic Relations Law

See AGREEMENTS, Page 19

CALL FOR NOMINATIONS

The Nominating Committee welcomes applications for nominations to the following Nassau County Bar Association offices for the 2012-2013 year:

❑ **President-Elect** ❑ **First Vice-President**

❑ **Second Vice-President** ❑ **Treasurer**

❑ **Secretary**

Applications are welcome for nominations to serve on the Nassau County Bar Association Board of Directors. There are eight available seats, each for a three year term.

The Nominating Committee invites applications for nomination to the following offices of the Nassau Academy of Law for the year 2012-2013:

❑ Dean ❑ Secretary ❑ Associate Dean

❑ Treasurer ❑ Assistant Dean (3) ❑ Counsel

NCBA members interested in applying for any of the above nominations, or in submitting suggestions for such nominations, are invited to submit such information to Marc C. Gann, Chair Nominating Committee, at NCBA, 15th & West Streets, Mineola, NY 11501 or email: msantamaria@nassaubar.org.

Deadline for all nominations is January 13, 2012.

Pro Bono Attorney of the Month

George Frooks

By NANCY ZUKOWSKI

This month, Nassau Suffolk Law Services is honoring a pro bono attorney who has been using his many years of knowledge to help those hit hardest by the growing mortgage foreclosure crisis. George Frooks gained his experience working in many aspects of real estate, and applies this experience to the Foreclosure Clinic* at the Nassau County Bar Association as well as mandatory settlement conferences in Supreme Court

The clients that Mr. Frooks helps are in foreclosure because of death, divorce or loss of income. He believes that the most satisfying thing about working in the Foreclosure Clinic is that "the clients say thank you. People come to us because they are behind in paying their mortgages and believe they are going to lose their homes immediately. We are able to make them feel better than they did when they came in." He also likes the fact that working in this effort keeps him involved in real estate law and allows him to use his extensive knowledge of property assessment laws and building codes.

In three separate cases, Mr. Frooks discovered that the bank extended mortgages to persons whose names were not on the deed. He advised one client that a private real estate attorney would be able to help her work out a settlement with the bank that would be to her benefit. In another case, where proof of primary residence was an issue, a young man was having his mail delivered to his mother's house even though he maintained his primary residence nearby. When the bank refused to accept this explanation, Mr. Frooks counseled the young man to present utility bills, voter registration, and library cards as acceptable proof of residence.

George also lends his insights to practicing attorneys as a contributing writer to the Nassau Lawyer. In a recent article he demonstrated how his knowledge of real estate values helped him spot an inflated appraisal made by the bank. In that case, the mortgage was given on a house with an appraised value of $425,000. "The debtor dies four months later and the house goes into foreclosure. The estate's attorney has another appraisal done a few months later with a value of $250,000. The bank's attorney commissions a new appraisal a year or so later with a value of $150,000 for the same house. Appraisals are supposed to have a margin of error of less than 10%. What was the problem? All the appraisals were wrong. The house was really a tear-down and worth only land value, around $50,000-$60,000. This value was reached because the house was in a particular area of Nassau County where the original value could only be supported by a new house, yet the house was built in the 1930's, with significant lack of maintenance, and no substantial modernization since the 1960's."

Mr. Frooks retired from his private legal practice in northern Westchester, when his family's properties were sold, while continuing to serve as a Small Claims Assessment Review (SCAR) Hearing Officer. He is also a fire inspector for the Plandome Fire Dept. and and has lectured on legal aspects of building codes for several years.

Working with the Foreclosure Clinic has made the full impact of the mortgage foreclosure crisis apparent to George Frooks. He observes that he has gained valuable awareness about the situation. "In some cases banks made egregious errors enticing people with loans they could not pay. The banks were giving money away and they never should never have been allowed to bundle and sell derivatives. The banks did not take responsibility. If they make a loan they should keep it in their own portfolio."

Mr. Frooks encourages other attorneys to do pro bono work because, "This makes you feel good. In the foreclosure process, most people are grateful because they are already at the bottom." His knowledge and insight continue to give some peace of mind to those who are in danger of losing their share of the American dream.

For his generous example of giving back to individuals in dire need, we are proud to honor George Frooks as Nassau County's Pro Bono Attorney of the Month.

** For more information on volunteering at the Foreclosure Clinic, please call Gale Berg at the Nassau County Bar Association 516-747-4070.*

Nancy Zukowski is a volunteer paralegal with a paralegal certificate from Suffolk Community College. She has extensive professional experience in health insurance claims and health care advocacy and has interned at Nassau Suffolk Law Services, Queens Housing Court, and private law offices in Suffolk County.

STATEMENT OF OWNERSHIP, MANAGEMENT AND CIRCULATION

(Act of Oct. 23,1974: Section 4360, Title 39. United States Code)

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E. Total Free or Nominal Rate Distribution, 220.
F. Total Distribution (Sum of C & E), 5,731
G. Copies not Distributed: 69.
H. Total (Sum of 15f and 15g), 5,800

I certify that the statements made by me above are correct and complete.
Deena R. Ehrlich, Executive Director Nassau County Bar Association.

Post-Decision Motions that Defer Time to Appeal Civil Judgments in Federal Court

The Federal Rules of Appellate Procedure (FRAP) provide for the time to appeal a civil judgment to be deferred when certain post-decision motions are pending, provided the motions themselves are timely.

When no post-decision motion is pending, the time to appeal is 30 days from entry of the judgment, pursuant to FRAP 4(a)(1)(A). The time to appeal is triggered by the entry of the judgment in the civil docket, pursuant to Federal Rule of Civil Procedure (FRCP) 79(a), and not by service of the judgment with notice of entry.

Dominic J. Sichenzia

The post-decisional motions which, when timely filed in the district court, defer the time to appeal are listed in FRAP 4(a)(4)(A):

- For judgment as a matter of law on the ground of insufficient evidence under FRCP 50(b)
- To amend
- or make additional findings of fact under FRCP 52(b) whether or not granting the motion would alter the judgment
- To alter or amend the judgment under FRCP 59
- For attorneys' fees under FRCP 54 (d) if the district court extends the time for appeal under Rule 58
- For a new trial under FRCP 59(a)
- For relief from a judgment under FRCP 60 if filed within 28 days after entry of the judgment

This article will discuss each of these grounds in turn.

Motion for judgment as a matter of law under FRCP 50(b)

The first motion is a motion for judgment as a matter of law on the ground of insufficient evidence under FRCP 50(b). It is important to be aware that the only ground for this motion is insufficiency of the evidence, not that the verdict was contrary to the weight of the evidence. In fact, the court, in ruling on this motion, the court may not consider the credibility of witnesses, resolve conflicts in testimony or evaluate the weight of the evidence. *Newton v. City of New York*;[1] *McKithen v. Brown*;[2] *Williams v. County of Westchester*;[3] *Caruso v Forslund*.[4] The court must consider the entire record, not only the evidence in opposition to the motion. *Reeves v. Sanderson Plumbing Products, Inc.*[5] If evidence was erroneously admitted, this evidence may not be considered on the motion. *Weisgram v. Marley Co.*[6] The motion must be filed no later than 28 days after the discharge of the jury.

Motion to amend pursuant to FRCP 52(b)

The time to appeal may also be deferred by a motion to amend or make additional findings of fact under FRCP 52(b) whether or not granting the motion would alter the judgment. The full time to appeal begins to run from the entry of the order disposing of the motion, even if the motion is denied and the denial of the motion itself is not appealable. *Spampinato v. New York.*[7]

The purpose of the motion is to correct, clarify or amplify the findings so that the appellate court will have a thorough understanding of the factual basis of the trial court's decision. *United States v. Local 1801-1, International Longshoremen's Assn.*[8] The parties may use the motion to petition the court to amend findings of fact, to correct manifest error of law or fact or to present newly discovered evidence, but not evidence that was available but not proffered. *Fontinot v. Mesa Petroleum Co.*[9] This motion must also be filed no later than 28 days after the entry of judgment.

Motion to alter or amend the judgment under FRCP 59

A motion to alter or amend the judgment under FRCP 59 must also be filed no later than 28 days after entry. If the motion is granted, a new judgment must be entered and this judgment is appealable on entry. *Lyell Theatre Corp. v. Loews Corps.*[10] If the motion is denied, a new judgment must also be entered and is appealable on entry. *Lyell, supra.* Supporting affidavits must be filed with the motion and opposing affidavits must be filed no later than 14 days after service of the moving affidavits.

Motion for attorneys' fees under FRCP 54(d)

A motion for attorneys' fees under FRCP 54 (d) will defer the time to appeal if the district court extends the time for appeal under Rule 58. Unlike the first three motions, this one must be filed no later than 14 days after entry of judg-

See POST-DECISION, Page 17

Practitioners Beware: DOMA's Effect on Same-Sex Marriage

On June 24, 2011, Governor Andrew Cuomo signed a bill into law making New York the 6th state in the union to allow same-sex marriages. Thousands of happy couples lined up outside city hall so that they could join together in matrimony and finally have their relationships viewed equally in the eyes of the law, or so they thought. While this may be true under New York State law, it is not under Federal law.

For a long time, proponents of same-sex marriage have argued that same-sex couples should have the same rights as heterosexual couples. In New York State, same-sex couples now have the same right to marry as heterosexual couples, but does this mean that same-sex married couples have the same rights as heterosexual married couples.

The answer to this is not in all circumstances.

In 1996, Congress enacted the Defense of Marriage Act ("DOMA"), which President Clinton signed into law. Pursuant to Section 3 of DOMA:

"In determining the meaning of any Act of Congress, or of any ruling, regulation or interpretation of various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or wife."

In January 1997, the General Accounting Office ("GAO") issued a report concluding that DOMA implicates at least 1,049 federal laws, including laws related to entitlement programs such as Social Security, health benefits and taxation. The GAO updated this report in 2004 and concluded that at least 1,138 federal statutory provisions related to marital status.

Subsequent to the passage of the DOMA, seven same-sex couples and three survivors of same-sex spouses filed an action in the United States District Court, District of Massachusetts challenging the constitutionally of Section 3 of the DOMA. On July 8, 2010, Judge Tauro rendered a 39 page decision concluding that the DOMA lacks a rational basis and therefore Section 3 of DOMA is unconstitutional. *Gill et al. v Office of Personnel Management*, 699 F. Supp. 2d 374 (D. Mass, 2010). The Judge's decision was subsequently stayed pending the appeal. Although, President Obama has stated that the Department of Justice will not pursue the DOMA appeals, the House of Representatives has hired an attorney, Paul Clement, to defend the DOMA against pending constitutional challenges. This appeal is currently pending in the U.S. Court of Appeals for the First Circuit.

Mary Ann Aiello

In the meantime, federal agencies are continuing to enforce the provisions of DOMA while the constitutionality of the statute is under review.

As practitioners, we need to be cognizant of DOMA and its impact in application of the federal relative to prenuptial agreements, as well as divorce agreements. A few are outlined here that will likely have a significant effect on how practitioners approach agreements and eventually divorce proceedings.

The first of several categories of federal laws that distinguish based on marital status are: social security, medicare, and medicaid. Because DOMA defines "marriage" and "spouse" for the purpose of these statutes, many spousal benefits under these laws will not extend to same-sex spouses.

For example, two men get married. John is 35 years old and makes approximately $150,000 per year. Tim is 28 years old and is currently unemployed. The parties are married for 20 years when John decides to file for divorce. Tim has never earned more than $3,000 in a single tax year. Under the current law, although Tim should be entitled to social security spousal benefits based on the higher earn-

See DOMA, Page 16

NASSAU ACADEMY OF LAW

...Becau

DEAN'S HOURS All programs held 12:30—2 p.m. at Nassau County Bar Association. *Lunch & Discussion*

1.0 Credit Hour Each

WHAT LAWYERS NEED TO KNOW ABOUT CAPACITY

Thursday, October 13, 2011

This program on civil capacity is important for attorneys practicing in almost every area of the law. The presentation will provide an overview of mental capacity. Application of these issues will be examined in relation to a client's ability to retain an attorney and understand their rights.

Special attention will be paid to the execution of documents, including, but not limited to a Will, Health Care Proxy, Living Will, Power of Attorney and Trusts.

Guest Speakers:
David L. Trueman, Esq.
Law Offices of David L. Trueman, Mineola & NY
Adj. Professor, Columbia University School of Law
Carolyn Reinach Wolf, Esq.
Abrams Fensterman, Lake Success

1.0 Credits in Areas of Professional Practice

PIXEL PERSUASION: LEGAL WRITING FOR THE 21ST CENTURY

Tuesday, October 25, 2011

More and more judges are reading briefs on computer screens, rather than on paper. While many of the basic principles of effective brief writing apply regardless of the manner in which the court consumes your brief, the electronic medium presents new opportunities to leverage both technology and principles of document design and web usability to give your brief even more persuasive power.

In this program, you'll learn how to more persuasively present information intended to be read on a screen in pdf format. We'll discuss:

- the important differences between screen-reading and paper-reading
- the F-pattern
- tips for writing for the 21st Century legal reader

Guest Speaker: Lisa Solomon, Esq.
Legal Research & Writing, Ardsley
Moderator: Gale D. Berg, Esq.
NCBA Director of Pro Bono Attorney Activities

1.0 Credit in Areas of Professional Practice

ANNUAL SECURITIES ARBITRATION UPDATE 2011

Thursday, November 10, 2011

And you thought it was over? The nation remains mired in a recession, convicted insider traders are heading off to jail, and some less-than-scrupulous types on Wall Street are still scheming against your clients, while honest securities professionals are fighting for their lives.

You are in the middle of it. Appearing with your clients at FINRA, the Financial Industry Regulatory Authority. FINRA has been very busy over the last year, imposing new rules and contemplating new programs that have a serious impact on the practice of securities arbitration in that forum.

Which is why, whether you prosecute cases for aggrieved investors, defend industry players accused of wrongdoing or serve as an arbitrator or mediator (or both) at FINRA, this program will appeal to you. Experienced practitioners and new attorneys alike will find this program highly rewarding. Anticipated topics include:

- FINRA's new rules for the composition of the arbitration panel.
- The new Discovery Guide and the changes it has wrought.
- Motion practice—what is doable, and what is frowned upon.
- The "score sheet"—who's winning and who's losing FINRA cases.

And, as always, handy practice tips, including Q&A with our guest speakers.

Keynote Speaker: *Professor J. Scott Colesanti*
Associate Professor Of Law, Hofstra University School of Law, Former NY Stock Exchange Division of Enforcement attorney

Moderator: *Anthony Michael Sabino, Esq.*
Sabino & Sabino P.C.,
Professor Of Law, St. John's University
Tobin College of Business

1.0 credit in Areas of Professional Practice

THE RIGHT TO CONFRONTATION

EVIDENCE PART 2

Tuesday, November 15, 2011

In 2004 the United States Supreme Court (Scalia, J.) decided the case of *Crawford v. Washington*, 541 US 36, and re-defined our concepts of the right to confrontation. In the seven years since that landmark decision, there have been several significant decisions that have interpreted, followed and expanded the *Crawford* holding. Supreme Court Justice Arthur M. Diamond will review those decisions and discuss their impact on our practice.

Guest Speaker *Hon. Arthur M. Diamond*
Justice, Supreme Court, Nassau

Moderator *Hon. Elaine Jackson Stack*
JHO, Nassau County Family Court

1.0 Credit in Areas of Professional Practice

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Into to Time Matters 8:30 - 10 a.m.

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NY CPLR UPDATE '11

With Professor Vincent C. Alexander an
Vice Dean Emeritus Andrew J. Simons,
St. John's University School of Law

Monday, November 2, 2011

Sign-in 5p.m.; Program 5:30-8:30 p.m

3.0 Credits: 2.5 Professional Practice; .5 Ethics

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Oct 13	What Lawyers Need to Know About Capacity
Oct 17	Choices in Today's Legal Environment
Oct 25	Pixel Persuasion: Legal Writing for the 21st Century
Oct 26	Tort Tips and Tactics
Oct 28	Criminal Law and Procedure Update 2011
Nov 2	New York CPLR Update '11 w/ Profs. Alexander & Simo
Nov 10	Annual Securities Arbitration Update 2011
Nov 14	Interaction Between Animal Law and Municipal Law
Nov 15	The Right to Confrontation - EVIDENCE Part 2

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SPRING 2011 CD a

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Bankruptcy	The Impact of Stern V. Marshall
Business/Corp	Annual Securities Arbitration Update 2011
Civil Litigation	New York CPLR Update '11 w/ Profs. Alexander & Simo
	TRIP: Tips Regarding Injuries on Premises
Criminal Law	Criminal Law and Procedure Update 2011
Estate/Elder Law	Medicaid and Enhanced Estate Recovery
General	Interaction Between Animal Law and Municipal Law
	Pixel Persuasion: Legal Writing for the 21st Century
	Refreshing Recollection and Prior Inconsistent Statemen
	The Right to Confrontation - EVIDENCE Part 2
	What Lawyers Need to Know About Capacity
Labor/Employ	Basics of Employment Law
Matrimonial	Same-Sex Couples
Personal Injury	Tort Tips and Tactics

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OCTOBER 2011

Domus • Scholar Circle • Nassau Academy of Law

Professors Alexander and Simons will discuss recent statutory and judicial developments in the law of NYS Civil Procedure. They will cover the spectrum of the CPLR and related statutes including recent statutory changes concerning new requirements for service, pleadings, HIPPA releases, subpoenas and inclusion of "red lined" papers. Recent decisions of the U.S. Supreme Court on personal jurisdiction and class-wide arbitration, and New York appellate precedents will be discussed.

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	2.5	0.5	3.0	$100	$135	0	yes
ns	2.5	0.5	3.0	$100	$135	0	
	1.0		1.0	$38	$55	$18	
	2.5	0.5	3.0	$100	$135	0	
	1.0		1.0	$38	$55	$18	
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CHOICES IN TODAY'S LEGAL ENVIRONMENT

With the General/Solo/Small Firm Practice, Grievance, Lawyer Assistance Program (LAP), Senior Attorneys, & Young Lawyers NCBA Committees

Monday, October 17, 2011
5:30-7:30 p.m.

Whether you are a solo practitioner, practice at a smaller law firm, are looking to change practice areas, are unemployed or underemployed, or planning to close your practice, this seminar will explore some alternatives you may wish to consider.

TRANSITIONING TO A PERSONAL INJURY PRACTICE
Brian J. Sauer, Esq.
Shayne Dachs Corker, Sauer & Dachs, LLP, Mineola

TRANSITIONING TO A COMMERCIAL PRACTICE
Mark S. Mulholland, Esq.
Ruskin Moscou Faltischek, PC, Uniondale

ALTERNATIVES FOR A GENERAL/ TRANSACTIONAL PRACTICE
Abraham B. Krieger, Esq.
Meyer Suozzi English & Klein, Garden City

ETHICS RULES FOR ADVERTISING
Chris G. McDonough, Esq., Westbury

ETHICAL ISSUES ON MERGER, CONSOLIDATION, SALE, OR CLOSURE OF A LAW PRACTICE
Warren S. Hoffman, Esq.
Hoffman & Behar, Mineola

Moderator: *M. Kathryn Meng, Esq.*
Meng & Associates PC, Garden City

2.0 Credits: 1.0 Professional Practice and 1.0 Ethics

CRIMINAL LAW & PROCEDURE UPDATE 2011

18B*

Jointly presented with the Suffolk Academy of Law

Friday, October 28, 2011
Sign-in 12:30 p.m. Program 1-4 p.m.
Nassau Supreme Court Central Jury Room

Kentucky v. King — *Bullcoming v. New Mexico*
People v. Pacquette — *People v. Boscic*
Michigan v. Bryant — *People v. McKinnon*
People v. Duhs — *People v. Harnett*

Speakers
Hon. Mark D. Cohen, Judge, Court of Claims
Acting Supreme Court Justice, Suffolk
Kent Moston, Esq., Attorney in Chief,
Legal Aid Society of Nassau County

Moderator: Robert N. Nigro, Esq.,
Administrator
Assigned Counsel Defender Plan, Nassau County

3.0 Credits: 2.5 Professional Practice, .5 Ethics

TORT: TIP$ AND TACTIC$

Wednesday, October 26, 2011
5:30-8:30 p.m.

This program will provide unique tips for attorneys who represent, plaintiffs, defendants or carriers in tort cases

ASSUMPTION OF RISK-
- theories • case law • claims and defenses
- important discovery • making and defeating SJ motions

Tracey Epstein, Esq
Epstein Frankini Grammatico
Regional Atty, Nationwide Trial Division, Woodbury

CLAIMS AGAINST MVAIC-
WHAT YOU SHOULD KNOW-
- scope of coverage • how to make and pursue claims

Frank Cruz, Esq., Managing Attorney
Cruz & Gangi and Associates,
Staff Counsel, MVAIC New York

MAKING AND DEFEATING SJ AND THRESHOLD MOTIONS
Dennne Marie Caputo, Esq.
Chair NCBA Plaintiff's Round Table
Sullivan Papain Block McGrath & Cannavo, P.C
Mineola

HOW TO EVALUATE & SETTLE TORT CASES
Hon. R. Bruce Cozzens, Jr., Supreme Court, Nassau

Moderator: *Kenneth J. London, Esq.*
Shayne, Dachs, Corker, Sauer & Dachs, LLP
Mineola
3.0 Credits: 2.5 Professional Practice and .5 Ethics

INTERACTION BETWEEN ANIMAL LAW AND MUNICIPAL LAW

Monday, November 14, 2011
5:30-8:30 p.m.

EMERGENCY MANAGEMENT AND DISASTER RELIEF FOR ANIMALS
Craig Craft, Commissioner, Nassau County Office of Emergency Management
Representatives from OEM
Beverly Poppell, Esq., New York
Nancy Lynch, Pet Safe Coalition, Locust Valley

DANGEROUS DOGS
Hon. Anthony Paradiso, Judge, District Court, Nassau
Amy L. Chaitoff, Esq., Chaitoff Law, Bayport

ANIMAL REGULATORY LAWS
Zoning • restrictions and bans on types • numbers and breeds of animals allowed • feral cats • dog licensing • nuisance • spay/neuter
Thomas McKevitt, Esq.
Sahn Ward Coschignano & Baker, PLLC, Uniondale
Elizabeth Stein, Esq.
Law Office of Elizabeth Stein, New Hyde Park

ANIMAL CRUELTY AND HOARDING
Jed L. Painter, Esq., ADA, Nassau
Public Corruption Bureau, Chief, Animal Cruelty Unit

Moderator: *Elinor Molbegott, Esq.*
Law Office of Elinor Molbegott, East Williston
3 Credits: 2.5 Professional Practice; .5 Ethics.

VIEW from the BENCH

Evidentially Speaking

By Hon. Arthur M. Diamond

I am very happy this month to add a personal note of congratulations to our new Association president, Susan Katz Richman. Yes, you may know her for her pink lipstick and ever present smile but Suzie (I'm allowed) and I have been friends and colleagues since our days in the Nassau County District Attorney's office one hundred years ago and I am very, very proud that she has ascended to heading our wonderful association. So now its time for our spring and summer review of evidence cases that you may have missed while you were sipping your margaritas in East Hampton!

Crawford v. Washington, 541 U.S. 36 (2004) remains the evidence gift that keeps on giving. This past spring and summer both the Court of Appeals and the U.S. Supreme Court continued to add to their *Crawford* progeny and both cases are worth updating you about. *People v. Michael Duhs*, 16 N.Y.3d 405[2011] was decided on March 29, 2011 by the Court of Appeals. The defendant was babysitting his girlfriend's three-year-old son and allegedly scalded the child's legs and feet when he placed them in a boiling hot bath. The mother returned home five hours later and they both took the child to the ER. At the ER the pediatrician asked the boy why he did not get out of the tub and the boy stated, "He wouldn't let me." The statement was not included in the medical record but was testified to at trial. The boy did not testify. The issue before the Court of Appeals was whether the statement was admissible as being germane to the child's medical diagnosis and treatment, and if yes, was it testimonial in nature thus violating the defendant's right to confrontation. The doctor testified that the questions were germane to the child's treatment of the second and third degree burns because it was important to know the time and mechanism of the injury in order to properly administer treatment. (*Id.* at 407) The Court affirmed the trial court's ruling holding that the statement was not testimonial but rather was part of an interrogation the purpose of which was to meet an ongoing emergency. Citing *Michigan v. Bryant*, 562 U.S.___,1315.S. Ct. 1143, 1154 [2011] quoting *Davis v. Washington*, 547 US 813, at 822 [2006].

The next *Crawford* related case is the case of *Bullcoming v. New Mexico*, 131 S.Ct. 2705 decided June 23, 2011 by the U.S. Supreme Court. I think to no one's surprise that the court logically extended its previous ruling in *Melendez-Diaz v. Massachusetts* 129 S. Ct. 2527 [2009]. In *Melendez*, the Court held that a forensic lab report, which indicated that a substance was cocaine, was testimonial in nature for the purposes of the Confrontation Clause. The Court held that it was not enough to introduce the report without a live witness present who was competent to testify to the truth of the contents therein. In *Bullcoming*, the defendant was charged with driving while intoxicated and the main evidence against him was a lab report that certified that his blood alcohol content was in excess of the legal limit. At trial, the state called a different analyst than the one who had prepared the report. The witness was able to testify that he was familiar with the lab's testing procedures but he had not participated in or observed the test done on the Bullcoming sample. Over objection the trial court admitted the document as a business record. The defendant was convicted, the New Mexico Court of Appeals affirmed, finding that the report was not testimonial in nature and prepared under stringent enough guidelines to ensure its trustworthiness. Interestingly, *Melendez* was decided while the appeal to the New Mexico was pending. The New Mexico court was undeterred, however, articulating two reasons why the report was not testimonial. First, it stated that the individual who prepared the report, and was not present at the trial, was a "mere scrivener" who simply recorded the results of the gas chromatography onto the report. Secondly, the individual who did testify was qualified as an expert on the process and he was present in court and available to be cross examined about the procedures followed in such testing. The U.S. Supreme Court rejected their analysis and reversed the conviction. One factor that the Court did refer to several times in the decision was that the state gave no explanation of why the testing analyst was unavailable-only that he was on some type of leave.

I would like to mention the case of *Valenzuela v. City of New York* 59 A.D.3d 40 (1st Dept. 2008) because it concerns an area of trial practice-argument and conduct of counsel- that should be of concern to trial lawyers and judges alike. In this case, plaintiff in a personal injury action sued the City of New York for injuries sustained in a city park while playing softball. The decision is full of counsel's outlandish and inappropriate comments and conduct which led to a mistrial being requested by the City and denied at trial term. The Appellate Division reversed, holding that he created "undue prejudice or passion which played upon the sympathy of the jury (*Marcoux v. Farm Serv.& Supplies, Inc.* 290, F Supp2d 457, 463 (SD N.Y. 2003). Practitioners should read the decision for the details but I am interested in it because it highlights something that I have seen in the last year in the trials that I have presided over which is that arguments of counsel during opening statements and summations have gotten a bit out of control. I will remind trials lawyers that especially when it comes to opening statements the purpose of such statements is to preview the evidence for the judge or jury. That is "the plaintiff is going to call four witnesses. They are Larry, Moe, Curly and Shemp. They will tell you in some detail about what they saw the day of the incident which brings us into court today."

Finally, I found the case of *Caldwell v. Cablevision Systems and Communication Specialists* 2011 N.Y. Slip Op 04618 (May 31, 2011) interesting as it addressed a novel issue: payments to a fact witness. The issue on appeal to the Appellate Division was whether or not a voluntary payment to a fact witness in the amount of $10,000 rendered that testimony inadmissible, or in the alternative, required a special instruction pertaining to the issue of bias caused by the payment. Communication Specialists was contracted by Cablevision to install a fiber optic cable underneath a street in Peekskill. The defendant cut a trench 2 feet deep by 4 inches wide running 3,000 feet. They also dug a series of test pits along the way looking for utility lines. The plaintiff was walking her 100 pound dog in a rainstorm at 10 p.m. and tripped on a re-paved road on that street. The plaintiff sued claiming that the defendant failed to backfill the trench and test pit properly creating a dangerous condition. At trial, in the liability phase, the defendant called an orthopedic surgeon who had examined plaintiff in the ER after she fell. He was called solely to testify as to the description that plaintiff gave to and recorded by him as to how the accident occurred. He stated that he was served with a subpoena to testify and paid $10,000 for "lost time." The plaintiff moved to strike his testimony on the ground that it was improper to pay that amount to a fact witness, or, in the alternative for a special jury instruction pertaining to the payment. The trial court denied the motions. The Appellate Division did not reverse but agreed that not giving a specific instruction on the payment was error. Noting that while the statute (CPLR 8001[A]) does not expressly prohibit voluntary payments in excess of the $15 statutory fee such payments are "questionable public policy." There is a difference, the court noted, between compensating a witness for lost time and paying for their testimony and it discusses in depth how the lines between the two may be improperly blurred.

Arthur M. Diamond is a Supreme Court Justice in Mineola. He welcomes evidence questions & comments and can be reached at adiamond@courts.state.ny.us.

DISCRIMINATION ...

Continued From Page 3

Another question that the courts will have to revisit is how much time and effort a wrongfully terminated employee is required to put into finding a new job prior to returning to school for training in a new job field. In the past, courts have held that a wrongfully terminated employee must use diligent efforts to find work in his or her field, and that such efforts must prove fruitless, prior to going to school for alternative job training in order to satisfy his or her mitigation obligations.[8] However, at least one recent decision indicates that courts may consider the economic realities of the current weak job market in easing this burden on plaintiffs.

In *Siegel v. Edmark Auto Inc.*,[9] the plaintiff, who had been employed as an Internet sales associate by the defendant, claimed that her employment had been terminated in violation of the Family and Medical Leave Act. Following the termination of her employment, the plaintiff quickly enrolled in dental assistant school. The plaintiff presented expert testimony that, as she was terminated during a significant recession, it was unlikely that she would have been able to mitigate her damages. The defendant presented alternative expert testimony based upon what the defendant's expert deemed to be plaintiff's "failure to perform a job search that included her best set of skills and experience, which was sales." In ruling on defendant's motion for summary judgment, the court rejected the defendant's argument that plaintiff had failed to mitigate her damages by enrolling in dental assistant school, holding that a jury could find that the plaintiff had acted reasonably "especially in light of the economic conditions at the time." Thus, the Court did not strictly impose the requirement that the terminated employee seek new employment in the same field in order to mitigate her damages.

In *EEOC v. Dresser Rand Co.*,[10] a federal court in the Western District of New York was faced with the somewhat related question of whether a terminated employee can be required to seek retraining in order to properly mitigate his or her damages. In this case, the defendant terminated the plaintiff from his position as a machinist, allegedly in violation of Title VII. In arguing that the plaintiff had failed to mitigate his damages, the employer offered expert testimony that if plaintiff had obtained training to operate computer numerical controlled ("CNC") machines, which training would have entailed 13 credit hours of courses, he would have improved his employment prospects. In rejecting this argument, the court held that plaintiff's "failure to pursue CNC training is not relevant to show that he failed to mitigate his damages, since he was not under any obligation to seek such training."

Notwithstanding the fact that the employer's argument was unsuccessful in the *Dresser Rand Co.* case, given that so many of those who have not dropped out of the labor force entirely during the current economic slowdown have accepted employment and have sought job training that they would not have accepted or sought in a vibrant economy, courts should expect to hear more arguments similar to those in *Dresser Rand Co.* in the future. Just as it does not sound unreasonable for a terminated employee to claim that it would be futile to seek new employment in certain fields in the current job market, it does not seem unreasonable for employers to argue that, given the current economic situation, terminated employees should be required to take steps to make themselves more employable.

Conclusion

While the fundamentals of the law of mitigation of damages in employment discrimination cases are likely to remain unchanged, as courts are presented with litigation arising in the face of a prolonged period of high unemployment, the courts are likely to hear arguments that were not made in the past. Thus far, courts have appeared to be sensitive to the economic realities that exist. Counsel for employers and employees alike should be aware of the developing law coming from these decisions and should not hesitate in making creative arguments attuned to the present realities of the depressed job market.

Russell Penzer is a partner with Lazer, Aptheker, Rosella & Yedid, P.C., with offices in Melville, New York and West Palm Beach, Florida. He can be contacted at (631) 761-0848 or at penzer@larypc.com.

1. *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231 (1982).
2. *Dailey v. Societe Generale*, 108 F.3d 451, 456 (2d Cir. 1997) (citations and quotations omitted).
3. *Ford Motor Co.*, 458 U.S. at 231-32.
4. *Dailey*, 108 F.3d at 456.
5. *Greenway v. Buffalo Hilton Hotel*, 143 F.3d 47. 54 (2d Cir. 1998).
6. Phil Izzo, Why Did the Unemployment Rate Drop?, The Wall Street Journal, Jan. 7, 2011; Arthur Delaney, Since 2009, Unemployed More Likely to Drop Out of Labor Force than Get Jobs, HuffPost Politics, Sept. 20, 2010.
7. 2008 U.S. Dist. LEXIS 54976, 20-4 (E.D. Mich. July 15, 2008).
8. *Dailey*, 108 F.3d at 457.
9. 2011 U.S.Dist.LEXIS 888324 (D. ID Aug. 8, 2011)
10. 04-CV-6300 (W.D.N.Y. Aug. 10, 2011)

IN LIMINE ...

Continued From Page 5

prejudice that a late motion *in limine* can have.

The Honorable James V. Brands of the Dutchess County Supreme Court has a particularly expansive and equitable rule, that any motion *in limine* "addressing the preclusion of evidence, testimony or other trial related matters shall be brought to the attention of the court immediately upon counsel becoming aware of such matter to be addressed, it being the intent to avoid applications made on the eve of, or during trial of a matter."[10] This rule restricts a practitioner's ability to ambush the other side with a long known evidentiary issue that could have been addressed far in advance of trial.

Moreover, recent cases seem to emphasize the importance of bringing a motion *in limine* early. In *Drago v. Tishman Const. Corp. of New York*,[11] the Honorable Diane A. Leberdeff recognized that "there is an evolving preference for early presentation" of a motion *in limine* related to the admissibility of testimony about scientific data or opinion.[12]

In *People v. Min* the court was not presented with a motion *in limine*, but with a motion "filed moments before the People's opening address."[13] The court recognized that "[t]his motion is based upon facts of record fully known or knowable to the defendant well before trial" and that "Defendant could have filed the motion well in advance of trial."[14] As a result of the timing and prior knowledge, the court denied the motion, recognizing its prejudicial effect on the eve of trial. Motions *in limine* should be treated the same.

Solutions

The Rules of the Commercial Division of the Supreme Court currently provide a solution to this problem:

> The parties shall make all motions *in limine* no later than ten days prior to the scheduled pre-trial conference date, and the motions shall be returnable on the date of the pre-trial conference, unless otherwise directed by the court.[15]

Although this would certainly allow all counsel to be on notice of such a motion and permit sufficient time for counsel to oppose such a motion, these rules are currently applicable only to the branches of the Commercial Division located in Albany, Erie, Kings, Monroe, Nassau, New York, Onondaga, Queens, Suffolk and Westchester counties. As such, the entire Unified Court System would need to accept such a rule in order for it to have an impact on all cases tried in New York State.

Alternatively, the time for making a motion *in limine* should be set forth in the preliminary conference order, just as it is for a motion for summary judgment. The importance in restricting when such motions can be made has been highlighted by the Court of Appeals in *Brill v. City of New York*:

> In practice … the absence of an outside time limit for filing such motions became problematic, particularly when they were made on the eve of trial. Eleventh-hour summary judgment motions, sometimes used as a dilatory tactic, left inadequate time for reply or proper court consideration, and prejudiced litigants who had already devoted substantial resources to readying themselves for trial. [16]

Thus, because of the unfair tactics used in summary judgment motions, the Court of Appeals recognized the need by the legislature "to ameliorate the problem by amend[ing] CPLR § 3212(a)" to provide for an outside time restriction on when a litigant must make a summary judgment motion, while allowing the litigant to show good cause in order to extend that time limit when needed.[17]

Here, the courts should similarly set a date in the preliminary conference order for when a motion *in limine* must be made. Doing so will eliminate the prejudice faced by "litigants who had already devoted substantial resources to readying themselves for trial."[18] Moreover, there can still be a "good cause" exception if there is a "satisfactory explanation for the untimeliness."[19] Absent such statutory authorization, parties will continue to be unfairly confronted with late motions *in limine* that can end their lawsuit without giving them the opportunity to properly address the issues raised.

Mr. Schwartz and Ms. Gatto are attorneys with Forchelli, Curto, Deegan, Schwartz, Mineo, Cohn & Terrana, LLP of Uniondale and are members of its litigation group, concentrating on state and federal commercial litigation.

1. *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 2010 NY Slip Op. 52239(U), 2010 WL 5186702, at *6 (Sup. Ct., N.Y. Co. Dec. 22, 2010) (citation omitted). *See also* William H. Voth, Structuring Complex Cases: From Motions *in Limine* to Issue-specific Trials, Defined Procedures Lead to Efficient Resolution, 6/16/2008 N.Y.L.J. S2, (col. 2).
2. Black's Law Dictionary 351 (2001).
3. 67 A.D.3d 429 (1st Dept. 2009).
4. *Id.* at 430.
5. *See Wilkinson v. British Airways*, 292 A.D.2d 263 (1st Dept. 2002).
6. *See Guilder v. Town of Fallsburgh*, 25 A.D.2d 338 (3d Dept. 1966).
7. 469 U.S. 38 (1984).
8. *Id.* at 41 n.4.
9. MBIA, *supra* n.1 (citing CPLR 4011). *See also* *Davis v. City of Stamford*, 3:95 CV 2518 (JGM), 1998 WL 849369, at *1 (D. Conn. Nov. 16, 1998), aff'd 216 F.3d 1071 (2d Cir. 2000); *People v. Michael M.*, 162 Misc.2d 803, 806, (Sup. Ct., Kings Co. 1994).
10. Justice Brand's Part Rules are available at <http://www.nycourts.gov/courts/9jd/dutchess/judgesrules.shtml>.
11. 4 Misc.3d 354 (Sup. Ct. 2004).
12. *Id.* at 361 (citations omitted).
13. 2011 NY Slip Op. 50477(U), 2011 WL 1136489, *1 (Crim. Ct., N.Y.C. Mar. 29, 2011).
14. *Id.* at *2.
15. 22 NYCRR 202.70, Rule 27.
16. 2 N.Y.3d 648, 651 (2004)(citations omitted).
17. *Id.*
18. *Id.* at 651.
19. *Id.* at 652.

DOMA ...

Continued From Page 11

er spouse, Tim will only receive social security based on his earnings and not based on his spouse's higher earnings.

As a practitioner, this is important to consider in terms of a maintenance award. In many instances, a non-working spouse may receive maintenance until the age when social security starts; however, if a same-sex spouse is not entitled to social security, negotiations should be tailored to attribute for that factor. These exclusions to same-sex spouses extend not only to Social Security spousal benefits but also to social security disability benefits, social security benefits for surviving spouses, social security one time death benefit, medicare benefits, and medicaid spousal protections for home, resources and allowances when a spouse qualifies for long term care.

Another category of federal laws that distinguish based on marital status are the federal tax laws. Under the current laws, a married same-sex couple cannot file federal income taxes as married. A divorcing same-sex couple will also not benefit from certain tax laws attributable to divorce, namely: that property transferred between spouses due to divorce is not taxable and the transfer of retirement funds to a spouse or former spouse incident to a divorce and pursuant to a divorce or separation instrument is not a taxable transfer.

For example, Thelma and Louise were married in the State of New York on August 1, 2011. The parties are married for 10 years before Louise decides to file for divorce. Thelma has an IRA with $100,000 and agrees to give Louise half of the amount via a roll-over. What will be the tax implications of this roll-over for both Thelma and Louise on their federal income tax returns? As practitioners, we will need to advise clients regarding these situations.

With respect to health insurance, many employers and labor organizations rely upon the federal government's definition of "marriage" to deny family health insurance policies to employees or members married to a spouse of the same sex. Therefore, in a state where same-sex couples may marry, an insurance policy which is regulated by the state must cover all married families equally. However, many large employers are self-insured and not regulated by the state, and under the federal law ERISA, they may choose whether or not to extend equal coverage to same-sex spouses under their plans.

For example, Fred and Barney enter into a prenuptial agreement. Barney works for a small company that does not provide health insurance. Fred works for a construction company, whose health insurance is not regulated by New York State. Currently, Fred's company does not extend coverage to same-sex spouses. When drafting a prenuptial agreement, it may be important to add a provision for whether one or both parties will be financially liable for Barney's health insurance in the event of divorce. It may also be important to discuss with the parties other options such as a separate policy for Barney, which cost will be shared equally by the parties and in the event DOMA is rendered unconstitutional or Fred's company decides to change their policy to extend to same-sex couples, the parties agree to place Barney on Fred's health insurance.

With respect to retirement benefits, similar to health insurance, when ERISA applies to an employer's pension program the statute provides substantive rights to spouses. Under the current law, these rights to spouses will not extend to same-sex spouses.

Bert and Ernie are getting divorced and have agreed that Bert will give Ernie half the marital portion of Bert's pension with the United States Postal Service. Bert and Ernie's attorneys, not aware of DOMA and federal laws, draft a provision that refers to the case of *Majauskas v. Majauskas*, 61 N.Y.2d 481 (hereinafter "Majauskas Formula"). Under the Majauskas formula, the actual accrued benefit is multiplied by a fraction. The numerator is the number of months of the marriage, and the denominator is the number of months of employment with pension credit upon retirement. The accrued benefit is the benefit received by the spouse upon his/her retirement. Finally the result is multiplied by the percentage to go to the other spouse. The agreement provides that in the event that Bert predeceases Ernie and neither party has commenced their benefits under the plan, Ernie shall be considered the designated beneficiary and/or the surviving spouse of Bert for purposes of establishing Ernie's entitlement to receipt of the pre-retirement surviving spouse benefit. The agreement also provides that Bert shall designate Ernie, as a beneficiary under his pension plan, so that upon the death of Bert, Ernie shall receive the full benefit under the 50% Joint and Survivor Option.

Bert and Ernie trusting their attorneys sign an agreement that includes the above provision. Bert dies before he retires. If DOMA is still in effect when Bert dies, under federal law, Ernie will not be entitled to his pro-rata share of the pre-retirement surviving spouse benefit, or his 50% Joint and Survivor Option, despite the parties' divorce agreement.

The above are just a few examples of the dangers involved for practitioners in the coming years if DOMA is not determined to be unconstitutional. When drafting marital agreements for same-sex couples, practitioners cannot merely rely on provisions of the agreements they have developed for heterosexual couples, but must tailor the marital agreements for same-sex couples based on the consequences of DOMA. Practitioners will certainly need to draft agreements cognizant of the fact that at least under Federal law married same-sex couples do not have the same rights as married heterosexual couples.

Mary Ann Aiello is the principal of the Law Firm of Mary Ann Aiello, P.C., Garden City, New York. Rebecca Szewczuk is an associate at the Law Firm of Mary Ann Aiello, P.C., and her blog can be found at www.aiellolaw.com/blog.

POST-DECISION ...

Continued From Page 11

ment pursuant to FRCP 54(d)(2)(B). If the motion for fees is combined with a timely motion to alter or amend the judgment under Rule 59(e), the district court need not make an order extending the time to appeal since the Rule 59(e) motion does this automatically. *Jones v. Unum Life Ins. Co. of America.*[11]

A claim for attorneys' fees must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages. These rules do not apply to claims for fees as sanctions for violation of the rules or as sanctions under 28 U.S.C. § 1927 (counsel's liability for excessive costs resulting from unreasonably and vexatiously multiplying proceedings).

Motion for a new trial under FRCP 59(a)

Like the motion to alter or amend the judgment, a motion for a new trial under FRCP 59(a) must be filed within 28 days of entry of the judgment. Where the judgment resulted from a nonjury trial, the court may open the judgment, take additional testimony, amend findings of fact and conclusions of law or make new ones and direct entry of a new judgment.

Motion for relief from a judgment under FRCP 60

If filed within 28 days after entry of the judgment, a motion for relief from a judgment under FRCP 60 will also defer the time to appeal. It is important to note that, while a Rule 60(b) motion by its terms is generally timely if made within a year of entry of the judgment, if made after the 28 day period, the motion does not defer the time to appeal the underlying judgment. *See Dresdner Bank AF v. M/V Olympia Voyager;*[12] *United States v. Grable.*[13] If no motion under Rule 60 has been made, the district court may on its own correct a clerical mistake. Such action by the court on its own does not, however, defer or restart the time for appeal.

Motions not listed in FRAP (4)(a)(4)(A)

Additionally, a motion not specifically listed in FRAP 4(a)(4)(A) may also toll the time to take an appeal under the long standing rule that a motion for reconsideration of an appealable judgment or order defers the time to take an appeal provided that the motion is filed within the time for an appeal. *See Blair v. Equifax Check Services, Inc.*[14] (motion to reconsider class certification tolls time for appeal if motion is made within time for seeking permission to appeal from such orders under FRCP 23(f)). It should be noted that FRAP 4(a)(4)(A) does not by its terms apply to appeals from orders.

In bankruptcy matters, Rule 8015 provides that a timely motion for rehearing of a final judgment, order, or decree of a District Court exercising jurisdiction in a bankruptcy case defers the time for appeal to the Circuit Court of Appeals for all parties until entry of the order denying rehearing or the entry of a subsequent judgment. The motion is timely if filed within 14 days after entry of the judgment, order or decree sought to be reheard. The method for computing the 14 day period is governed by Bankruptcy Rule 9006(a), not FRCP 6(a). *In Re Eichelberger*[15] FRAP 6 governs bankruptcy appeals.

Additional Considerations

It is the substance of the post-decisional motion, not its label, which determines whether or not the time to appeal is deferred. An improperly labeled motion will nevertheless defer the appeal time if the motion challenges the correctness of the judgment and does not raise issues that are merely collateral. In *Anderson v. Pasadena Independent & School District*,[16] the District Court entered an appealable order remanding the case to the state court and imposed sanctions on the defendant for improper removal. The post-decision motion for reconsideration which sought only to remove the sanctions was held to be collateral and did not defer the time to appeal. By the same token, an improperly labeled motion which nevertheless raises substantive claims will defer the time to appeal. *See, Osterneck v. Ernst & Whinney;*[17] *Harbarside Refrigerated Services, Inc. v. Vogel.*[18]

As always, local rules must be carefully reviewed for nuances to these general rules. For example, the Second Circuit's Local Rule 4.2 provides that when a FRAP 4(a)(4) motion is made after a notice of appeal has been filed, the party who has filed the appeal must "promptly" notify the Circuit of the filing of the motion and must notify the Circuit within 14 days after entry of the order disposing of the motion. Note that it is the party who filed the appeal who must advise the Circuit of the motion and its disposition regardless of whether another party has filed the FRAP 4(a)(4) motion. Local Rule 6.1 provides that all local rules and Internal Operating Procedures (IOPs) applicable to civil appeals are applicable in bankruptcy cases.

When making a motion in the Federal District Court, the individual judge's rules must also be consulted in addition to the local District Court's rules.

Dominic J. Sichenzia is a trial and appellate lawyer in Carle Place. He is a former Director of the Bar Association, former Chair of the Ethics Committee and is currently Mediation Coordinator for the NCBA Grievance Committee.

1. __F Supp 2d __, (SDNY, 2011)
2. 626 F 3d 143 (CA 2. 2010)
3. 171 F 3d 98, 101 (CA 2, 2010)
4. 47 F 3d 27, 32 (CA 2, 1995)
5. 530 U.S. 133 (2000)
6. 528 U.S. 440, 453-454 (2000)
7. 311 F 2d 439, 440 (CA 2, 1962)
8. 831 F. Supp. 167, 169 (SDNY, 1993)
9. 791 F 2d 1207, 1219 (CA 5, 1986)
10. 682 F 2d 37, 40 (CA 2, 1982)
11. 223 F 3d 130, 137-138 (CA 2, 2000)
12. 465 F 3d 1267, 1271-72 (CA 11, 2006)
13. 25 F 3d 298, 301 n. 3 (CA 6, 1994)
14. 181 F 3d 832, 837 (CA 7, 1999)
15. 943 F 2d 536 (CA 5, 1991)
16. 184 F 3d 439, 436 (CA 5, 1999)
17. 489 U.S. 169, 174 (1989)
18. 959 F. 2d 368, 372 (CA 2, 1992)

NCBA New Members

We welcome the following new members

Attorneys

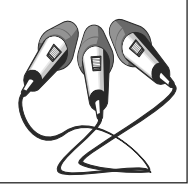
Richard A. Ain
Laura J. Burns
George J. Carpenter
Gregory Curry
Michael Gelfand
Nicholas G Kokis
Laura Lowenstein
Josephine M. Lupis
Matthew Minerva
Thomas Mullaney
Teresa Ombres
Bradley Polizzano
Dorothy Santos
Rachel Schulman
Gerasimia Stathatos-Fulgieri
Veronique Urban

Students

Lily Aminova

In Memoriam

Isa D. Kantor
Eugene J. O'Brien



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NCBA President Susan Katz Richman and Executive Director Deena Ehrlich are presented with a check payable to WE CARE from the Paralegal Society of Long Island, Inc.

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IN BRIEF ...

Continued From Page 8

Legal Writing and Appellate Advocacy and was selected to its National Moot Court Team.

Linda Oliva of Pegalis & Erickson, LLC was recently honored by the Nassau County Women's Bar Foundation with the honorary Courage Award. The award commemorates Ms. Oliva's efforts in the fight against breast cancer.

Marc L. Hamroff, managing partner of Moritt Hock & Hamroff LLP and a member of the American Heart Association's Long Island Board of Directors, has been appointed the Board's Vice Chairman. Mr. Hamroff currently heads up Moritt Hock & Hamroff's Financial Services Practice which includes the Bankruptcy, Equipment Leasing, Secured Lending and Creditors' Rights Groups. Mr. Hamroff earned his Juris Doctor at Hofstra University School of Law. He regularly provides educational and strategic seminars on issues affecting the leasing and secured lending community. Mr. Hamroff is the recipient of the Equipment Leasing and Finance Association's Distinguished Service Award and also serves as an adjunct professor at Hofstra Law School where he teaches Secured Transactions: UCC Article 9 and related matters.

Jaime D. Ezratty, a partner at Ezratty, Ezratty & Levine, recently spoke to the Great Neck Lawyer's Association on "What Every General Practitioner Should Know About Landlord/Tenant Law."

Jennifer Cona and **Jack Genser**, partners at Genser Dubow Genser & Cona, will be honored by the Long Island Alzheimer's Foundation (LIAF) at their 24th Annual Remembrance Ball at the Garden City Hotel. Ms. Cona has served on LIAF's Legal Advisory Board for the past twelve years and is presently on the Board of Trustees. Mr. Genser was the keynote speaker at LIAF's Coping and Caring Conference in 2004.

Steven E. Pegalis and **Annamarie Bondi-Stoddard**, partners at Pegalis & Erickson, LLC, were recently selected for inclusion in "The Best Lawyers in America® 2012."

Joy Watson, **Jeanne Schieck**, **Irene Villacci** and **Rita Stein** recently participated in a free legal seminar at Nassau Community College. The seminar was presented by The Women's Bar Association of Nassau County and the Nassau Community College Paralegal Studies Program. Ms. Watson was the moderator on a discussion titled "Legal Issues Affecting You". Ms. Schieck spoke on Matrimonial Law; Ms. Villacci spoke about estate taxes; and Ms. Stein discussed Elder Law, Estates & Trusts.

Deborah Berger has been appointed as an Adjunct Professor at the Hofstra School of Law. Ms. Berger will be assisting in the Juvenile Justice Clinic.

Penny Kassel of Penny B. Kassel, P.C. will be giving a presentation on "How to Protect Your Assets as You Age" at Pathways Women's Health in Manhasset.

The Honorable Stephen L. Ukeiley, Suffolk County District Court Judge and editor of this column, has authored *The Bench Guide to Landlord & Tenant Disputes in New York©*. Judge Ukeiley is also an adjunct professor at the New York Institute of Technology and an Officer of the Suffolk County Bar Association's Academy of Law.

New Partners, Of Counsel and Associates

Juan Luis Garcia has joined Moritt Hock & Hamroff LLP as an associate in its Commercial Litigation and Creditors' Rights practice areas. Prior to joining the firm, Mr. Garcia served as a Law Clerk to the Honorable Ira B. Warshawsky of the New York State Supreme Court Commercial Division. Mr. Garcia earned his Juris Doctor from Columbia University School of Law where he also served on the Columbia Human Rights Law Review.

Christopher M. Petillo has joined Hauppauge-based Feldman, Kramer & Monaco, P.C. as an elder law and estate planning attorney. Mr. Petillo is certified in elder law by the National Elder Law Foundation and is also a Certified Public Accountant. He earned his Juris Doctor from St. John's Law School.

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

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

Theodore Roosevelt American Inn of Court Installation. L-R: Lois Carter Schlissel, Andrew M. Thaler, Hon. Steven M. Jaeger, Hon. Theodore T. Jones, NYS Court of Appeals, Marilyn K. Genoa. Photo by Bob Giglione.

AGREEMENTS ...

Continued From Page 9

§ 236B(8), the Court has the authority to require a spouse to secure his/her support obligation with life insurance. Typically, the insurance benefits will terminate at the emancipation of all the children or in the case of a spouse, termination of maintenance. However, the death benefit may continue beyond emancipation of the child by agreement of the parties. Be aware of the tax consequences to the estate of the payor spouse if as in the case of minor children, the death benefit exceeds the support obligation. The death benefit is not taxable to the recipient. The death benefit is included in the decedent's estate for which he will also receive a tax deduction but only to the extent it satisfies a support obligation.[3]

Agreements frequently provide that the benefits for the children be paid to the spouse as "trustee" or "irrevocable beneficiary" or "guardian." If benefits are to be paid to a spouse as a trustee, it behooves the drafter to insure that there is in fact a "trust" established or will be established to receive payment of the proceeds of the policy at death. In addition, it is important to specify that the "current spouse" be the trustee lest a trust established for the children of the first family find their financial well-being in the charge of the "second" or "third" spouse as the case may be.

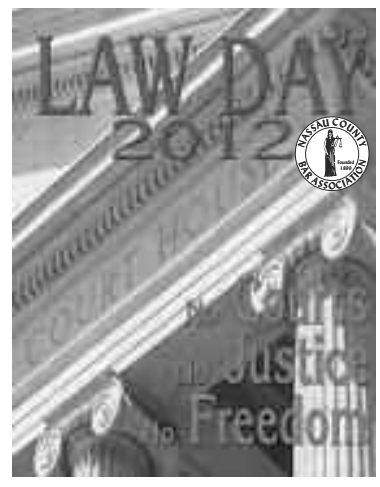
"It's the practice, not the 'perfect' of law"

The genesis of this article is a seminar presented recently at the Nassau County Bar Association entitled "Till Death or Divorce Do Us Part." For more on this topic, you may obtain materials from the NCBA Academy of Law. Credit and thanks to my co-presenters: Mary Ann Aiello, Tricia Marcin and Frank Santoro and our host Dee Barcham, Dean of the Academy in providing insight and research support.

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 former editor of the Nassau Lawyer.

1. Matter of Henken, 150 AD2d447, 448;Rogers v Pell,154 NY 518;Matterof Severoli, 9 Misc.3d 116(A),aff'd 44 AD2d 962. Note Thomas O. Rice, Esq. of Albanese & Albanese LLP represented litigants in *Matter of Severoli*.
2. *Matter of Cerrito*, N.Y.L.J., June 12, 1995 at 36, col 6.
3. Internal Revenue Code § 2053.

Nominations Requested



Liberty Bell Award

The Liberty Bell Award will be presented at the Association's Law Day 2012 celebration. Nominations with supporting materials must be submitted by December 1, 2011 for consideration.

Do you know someone in Nassau County whose efforts on behalf of law and justice deserve the recognition symbolized by the Nassau County Bar Association's prestigious Liberty Bell Award? The Award honors an individual or organization outside the legal profession whose community service advances and strengthens the American system of freedom under law. With this award, the Association recognizes efforts and achievements which meet some or all of the following criteria:

- promoting better understanding of the Constitution and the Bill of Rights;
- encouraging greater respect for law and the courts;
- stimulating a deeper sense of individual responsibility so that citizens recognize their duties as well as their rights;
- contributing to the effective functioning of institutions of government; and,
- fostering a better understanding and appreciation of the rule of law.

Please direct submissions to Hon. Ira B. Warshawsky, Law Day Committee Chair, Nassau County Bar Association, 15th & West Streets, Mineola, NY 11501 or fax (516) 747-4147 or email: ckatz@nassaubar.org

PITFALLS ...

Continued From Page 3

ating unjustified expectations in the mind of the website visitor.[6]

For lawyers who have blogs or who post articles on their websites, it may be wise to date the post or article and post a notice that the legal information was accurate as of the date of the writing, but that the law changes frequently, and that readers should not rely on the online information, but rather that they should consult a lawyer who can discuss their specific factual situation. Outdated or inaccurate information should be removed.

New York Rule 7.1 specifically permits lawyers to develop websites which include biographical information about lawyers and the firm, information about practice areas, clients, matters and results obtained. Lawyers who include names of clients "regularly represented" in their websites or other advertising materials must have the client's prior written consent for any such disclosure.[7] Attorneys are prohibited from including "an endorsement of, or testimonial about, a lawyer or law firm from a client with respect to a matter still pending."[8] Although testimonials from former clients are permitted, those received from current clients on ongoing matters may not be used. Presumably, endorsements or testimonials from current clients on completed matters would be permissible based on the wording of the Rule.

Since websites and other online activities cross jurisdictional boundaries, it is also wise for lawyers to be careful to mention that any legal information provided by them pertains to their jurisdiction only, (and to name that jurisdiction) but that the rules may be different if a reader is located elsewhere.

Questions About the Law and Communication with Prospective Clients

Website inquiries posed through online contact forms, email inquiries, and participation in social media and online networking sites create additional issues. One major area of concern is a lawyer's obligation to avoid creating an inadvertent lawyer-client relationship, and to preserve the confidentiality of communications with prospective clients. The Rules and opinions place a great deal of importance upon who controls the flow of information and whether that information is provided unilaterally or whether it is part of a bilateral discussion, as well as the subsequent actions of the lawyer or firm once the communication is received.

For example, lawyers who answer questions on the Internet, whether on social or professional networking sites such as LinkedIn and other social media outlets or on legal sites such as Avvo or Justia should always be careful not to mislead or to create an inadvertent lawyer-client relationship with those posing questions or reading the lawyer's answers. The ABA Opinion cites several cases from a variety of states noting that since lawyers cannot screen for conflicts of interest when answering questions posted on the internet, lawyers should refrain from answering specific legal questions unless the advice given is not fact-specific.[9]

New York Rule 1.18 governs duties to prospective clients. Rule 1.18(a) defines a prospective client as a "person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter." The term 'discuss' is clarified somewhat upon a reading of Rule 1.18(e) (1), which provides that a person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship; or (2) communicates with a lawyer for the purpose of disqualifying the lawyer from handling a materially adverse representation on the same or a substantially related matter, is not a prospective client with the meaning of paragraph (a).

The determination of whether an individual communicating with a lawyer is considered a "prospective client" is important because Rule 1.18(b) states that even when no client-lawyer relationship ensues, a lawyer is required to keep information learned during such discussions confidential. In addition, this information may disqualify a lawyer from representing another individual in the same or substantially related matter.[10]

For lawyers who have blogs or who post articles on their websites, it may be wise to date the post or article and post a notice that the legal information was accurate as of the date of the writing.

Opinions which have considered the nature of 'unilateral' communications from prospective clients make a distinction between specifically inviting prospective clients or web visitors to contact the attorney about their legal matter and simply making contact information available to the prospective client or visitor. Where the contact is specifically invited, lawyers are cautioned to make every attempt to restrict the flow of information as one would in an initial consultation with a client, by advising them of the lawyer's obligations regarding conflicts and the dangers of revealing confidential information.

It should be noted that lawyers may usually be permitted to pose and answer hypothetical questions without being considered to have given personal legal advice (such as in posting "Frequently Asked Questions" on a website).[11] In the case of contact forms or answers to questions, lawyers may also wish to include a statement that no specific legal advice may be offered by the lawyer until a conflicts check is undertaken, and that information sent through a web form or via email may not be treated as confidential.[12]

In all cases, lawyers should clearly state that the information they post or questions they answer is general advice based on the rules of their own jurisdiction and should not be a substitute for personal legal advice.

Mandatory Disclaimers and Warnings

Rule 7.1 (d) permits lawyers to include in their advertising: (1) statements reasonably likely to create an expectation about results the lawyer can achieve; (2) statements comparing lawyer's services with services of others; (3) testimonials or endorsements or clients or former clients; and (4) statements describing or characterizing the quality of the lawyer's or law firm's services as long as those statements are not misleading, can be factually supported by the lawyer or firm as of the date of the advertisement and are accompanied by the following mandatory disclaimer: "Prior results do not guarantee a similar outcome."[13]

Rule 7.1 also requires advertisements other than radio, television or billboard, directory, newspaper, magazine or other periodical to be labeled, "Attorney Advertising." This notation must be contained on the first page of an advertising piece or on the home page of a lawyer or law firm's website. Self-mailing brochures or postcards must contain the notation, and any email that qualifies as 'advertising' (see below) must include "Attorney Advertising" in the subject line.

For example, if a firm produces a newsletter that qualifies as 'advertising,[14] and it contains information such as statements reasonably likely to create an expectation about results the lawyer can achieve or statements comparing the lawyer's services with the services of other lawyers, it must also include the disclaimer, "Prior results do not guarantee a similar outcome," and it must also include the "Attorney Advertising" notice.

If that same firm newsletter is sent via email, the subject line must contain "Attorney Advertising" pursuant to 7.1(e)(3).[15]

What Constitutes Advertising

New York State Bar Association Committee on Professional Ethics Opinion 848 is instructive, as it provides insight into the analysis used to determine whether an attorney newsletter is an advertisement, which can be applied to other activities which may raise questions for lawyers. The definition of "advertisement" is contained in Rule 1.0(a): "Any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm. It does not include communications to existing clients or other lawyers." (emphasis added)

To determine whether an educational newsletter qualifies as an 'advertisement' the Committee considered three factors: the intent of the communication, the content of the communication, and the targeted audience of the communication.

According to the opinion, merely including biographical or contact information with a link back to the attorney's website is not sufficient to transform an otherwise educational newsletter into an advertisement. Further, if the primary purpose (intent) of the communication is general awareness and branding rather than retention of a law firm for a particular matter, that alone will not be sufficient to consider the communication advertising.

The second prong of the test reviews the content itself. If the newsletter provides information or news primarily about the lawyer or law firm, its cases, personnel, clients or achievements, it will generally be considered advertising. If it contains primarily information about the law or legal process, it may not be considered advertising.

Finally, the audience for the communication must be considered. Communications to lawyers or existing or former clients are not considered advertising, regardless of their intent or content. If the newsletter or information is sent to a prospective client or individual who has expressed an interest in and specifically requested information about the lawyer's services, it will also not be considered advertising. But if the newsletter is available on the firm's website or mailed to the general public, or where the audience who receives/views the newsletter is unknown, the advertising rules must be complied with and the communication must conform to the requirements of Rule 7.1.

Internet Website Directories

As competition increases in the legal community, more attorneys graduate without jobs or open their own law offices, and Internet attorney directories increase in popularity. The New York State Bar Association Committee on Professional Ethics Opinion 799 deals with the question of whether a lawyer may use the services of a website that forwards inquiries from potential clients, where the lawyer

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(and it's not spam!!)

In our continued effort to be greener, much of our past "snail" mail is now sent as email. Most of what we need to communicate will be included in our "e-bulletin" which is sent regularly to the entire membership.

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- *committee notices*
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1. Make sure we have your current email address on file (*send inquiries or updates to membership@nassaubar.org*).

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3. If you do not want to receive our informative emails, just let us know (*send opt-out to webmaster@nassaubar.org*). Please **DO NOT MARK OUR EMAIL AS SPAM.** When you do, it impacts the entire membership. **Don't** click the spam button!

4. If you are not receiving our emails, and we have your proper email address on file, you need to contact your Internet Service Provider (aol, yahoo, hotmail, optonline etc.) and request that they unblock our domain name (nassaubar.org).

5. If you have any comments, suggestions or questions, we are happy to hear from you! (*contact dsunger@nassaubar.org*)

pays a fee to participate in the service.

The opinion distinguishes between payment for a listing in a traditional directory such as the yellow pages, and a service which is involved in "analyzing" the prospective client's problem and selecting an appropriate lawyer for the matter. The former does not violate the ethical rules prohibiting payment for 'recommendations' because it simply provides the prospective client with "tools by which a potential client can filter a list of attorneys by geography and/or practice area."[16] However, when the site purports to recommend a particular lawyer or lawyers for the prospective client's problem based on an analysis of that problem (whether this analysis is performed by a person or by computer, based upon inputs by the prospective client), that activity is prohibited by other than a qualified lawyer referral service.[17]

Opinion 799 outlines specific guidelines for lawyers interested in using these kinds of web directories at page 5, including ensuring that the site does not recommend subscribing lawyers or make claims about their competence or character, does not claim it will analyze the problem to find a suitable lawyer, and that it allows prospective clients an opportunity to screen the list of lawyers shown the posting and remove some lawyers from the list, among others. It is also recommended that both the service and lawyer minimize communication of confidential information between the lawyer and the prospective client until the lawyer is retained and completed conflicts check, and that prospective clients be cautioned that information provided may not be protected by the attorney client privilege.

Use of the Internet to disseminate information about the law and about a lawyer's services, qualifications and clients is becoming standard practice and makes good business sense. But lawyers must be vigilant about how they use these technologies in order to avoid ethical mis-steps.

Allison C. Shields, Esq. founder of Legal Ease Consulting Inc. More information can be obtained on her website, www.Lawyer Meltdown.com or blog at www.LegalEase Consulting.com.

1. The Rules of the New York State Unified Court System, Part 1200, Rules of Professional Conduct (hereinafter, "New York State Rules"), contains the ethical rules with which lawyers in New York State must comply.
2. *See* Rule 5.1, Responsibilities of Law Firms, Partners, Managers and Supervisory Lawyers
3. See Rule 5.3, Lawyer's Responsibility for Conduct of Non-Lawyers
4. ABA Formal Opinion 10-457, Lawyer Websites, August 5, 2010
5. ABA Formal Opinion 10-457, page 2.
6. ABA Formal Opinion 10-457, page 2.
7. Rule 7.1(b)(2)
8. Rule 7.1 (c)(1)
9. ABA Formal Opinion 10-457, page 2.
10. *See* NYS Rule 1.18(c).
11. ABA Formal Opinion 10-457, page 3.
12. ABA Formal Opinion 10-457, page 2, footnotes 10-14; Association of the Bar of the City of New York, Formal Opinion 2001-01(2001). Lawyers should also review ABA Formal Opinion11-459, August 4, 2011, regarding the duty to protect the confidentiality of email communications with a client and consider whether warnings to prospective clients about sending confidential information via email where there is a likelihood that it will be seen by a third party would be appropriate.
13. Rule 7.1(d) and (e)
14. According to NYSBA Committee on Professional Ethics Opinion 848, December 22, 2010, the determination about whether a firm newsletter is considered advertising depends upon three things: the intent of the communication, the content of the communication, and the targeted audience of the communication.
15. Opinion 848 also notes that an attorney may include additional language in the disclaimer as long as it does not undermine or contradict the mandated language and is not false, deceptive or misleading.
16. New York State Bar Association Committee on Professional Ethics Opinion 799, September 29, 2006, page 2.
17. Note, this opinion refers to the old Disciplinary Rules, rather than the new (2009) rules of professional conduct.

SOCIAL MEDIA ...

Continued From Page 7

New York's Privacy Laws and Application to Social Media Advertising

Under New York's Privacy Laws, a person, firm, or corporation using for advertising or trade purposes the name, portrait or picture of any living person without having first obtained that person's written consent, or if a minor the consent of said minor's parent or guardian, is guilty of a misdemeanor.[13] Any person whose name, portrait, picture or voice is used within New York for advertising or trade purposes without written consent may maintain an action in state supreme court against anyone using the person's name, portrait, picture to prevent or restrain such use.[14] An aggrieved person may obtain injunctive relief and may also sue and recover damages for injuries sustained by such use.[15] A jury may also award exemplary damages for knowing use of a person's name, portrait or picture in violation of the statute.[16]

Privacy Law violations may occur from a business or advertiser using a person's picture or name in advertisements. For example, posting a picture of someone wearing particular clothing on a Facebook page or posting text on a Facebook wall or sending a Tweet on Twitter about the individual wearing the clothing violates the New York Privacy Laws if the subject individual does not consent in writing to their name or picture being used for the advertising purpose. A business may also violate the Privacy Laws by instead hyperlinking – for advertising purposes – from a Facebook page or profile to a third-party website containing an individual's name or picture as part of a news story. The aggrieved individual whose name or picture was used without consent may sue to enjoin any further advertising and for damages. This liability underscores the importance of knowing what exactly qualifies as an advertisement and of first obtaining written consent from an individual before using their name or picture in any social media ad.

A. The Newsworthy Exception

The Privacy Laws, applicable to "advertising purposes or for trade," generally do not apply to reports of newsworthy events or matters of public interest containing an individual's name or picture.[17] The newsworthy exception is broadly construed and includes social trends or any subject of public interest.[18] Further, the newsworthiness exception applies "regardless of any false implication that might be reasonably drawn from the use [of plaintiff's name or image]."[19] For example, the use of a celebrity's name or picture in a magazine or a newspaper would not violate the New York Privacy Laws because the celebrity name or picture is presumably being used in the context of a newsworthy event or matter of public interest.

On the surface, this appears to take pictures or names out of the realm of the Privacy Laws when considering social media advertising. A clothing company could argue that their picture of a celebrity wearing their jeans is exempt from the Privacy Law if, instead of directly uploading the celebrity's picture onto their Facebook page, the clothing company instead hyperlinks the picture from a newspaper article on a third-party website for example a gossip column. The clothing company's argument would be that since the original article and any pictures it contains are protected from the Privacy Laws by the newsworthy exception, simply re-posting the article but merely pointing out that a picture in the article includes a celebrity wearing their product does not remove the newsworthy protection.

B. The Newsworthy Exception Will Not Apply to an Advertisement in Disguise

The aforementioned argument, however, fails where an article is found to either be an advertisement in disguise or the use of an individual's identity or photograph is found to bear no real relationship to the article – in that case the newsworthy exception is removed and the Privacy Law will apply.[20] Placing a picture initially protected by the newsworthy exception in a pure advertisement likely removes the newsworthy exception. Thus, for example, an article about fashion may use an individual's image where the individual is modeling apparel, "but the identical photo would not have been newsworthy if circulated by a clothier."[21] In one case, a defendant's dissemination of materials with the plaintiff's name and likeness was not interpreted as reporting on a social trend or matter of public interest where the purpose was to entice prospective customers.[22]

The "newsworthy" exception is also inapplicable if the republication of an article is used in an advertising context which conveys or reasonably suggests the subject endorses the publication or product in question.[23] Commentary on the Privacy Laws suggests that the use of an advertisement juxtaposed with a republished news story featuring a celebrity's name and likeness would be for trade purposes if the republication was solely designed to sell the advertiser's product.[24] Such a use would not fall under the newsworthy exception since it is a republication of outdated news no longer of general public interest,[25] as opposed to a simultaneous reporting by a public medium of the actions of a person who voluntarily entered the public eye.[26] Thus, a business or advertiser may not use the newsworthy exception as a shield against New York's Privacy Laws by posting a picture of or hyperlinking to a news article when in reality the purpose of using the picture or the individual's name is to advertise a product.

One way to avoid Privacy Laws application may be for a business or advertiser to focus on the apparel or product rather than the individual using it or emphasizing the product as a fashion trend or news item. An advertisement used to promote sales that includes a celebrity's name or likeness may constitute a privileged use not subject to the Privacy Laws if the use of the celebrity's name is incidental to the use for which the reproduced material was originally generated.[27] For example, a newspaper could use a past cover page that includes the picture of a celebrity in renewal subscription advertisements to its subscribers; such a use likely does not violate the Privacy Laws because the use of the celebrity's image is incidental to the original intended use – dissemination of news. However, this strategy has not been well-tested in social media case law and obtaining written consent from the individual beforehand is still the preferred practice. If the prior protected use and the latter use is not the same, a business or advertiser could still be liable under the Privacy Laws.

C. Hyperlinking Issues Under the New York Privacy Laws

It is not clear if posting a hyperlink from a business' Facebook page or website to a third-party website - such as a news website – containing the newsworthy article in its original form but for the purposes of utilizing an individual's picture and/or name also violates the Privacy Laws. All indications are, however, that this too would be a violation of the Privacy Laws, despite the article's original newsworthy status. There are no Privacy Law cases yet directly discussing this kind of hyperlinking, but it would appear that that this practice conflicts with the broad terms of the statute which prohibit the use of any person's name, portrait, picture or voice for advertising purposes or for trade without written consent.[28]

A company must therefore proceed cautiously in hyperlinking to or republishing an article containing an individual's name or picture on a social media website. As a practical matter, many companies appear to engage in the practice of linking or even posting pictures of celebrities or individuals wearing their apparel; some individuals may take no issue or be flattered by the publication. While there is a lack of case law addressing the violation of Privacy Laws by hyperlinking from a social media website to third-party websites containing celebrity pictures or names, it is advisable to first contact the individual and ask for approval to post his or her picture or, in the absence of such, simply reprint the company's own ads.

Privacy rights and New York's Privacy Laws in particular are a very real consideration for anyone or any company deciding to advertise on Facebook. As Facebook continues to grow and online advertising is utilized more, privacy and publicity rights law suits will increase. Thus social media users should be aware of New York's Privacy Laws in conducting their business and advertising activities on social media websites such as Facebook and Twitter. Republication of an individual's name, portrait or picture onto a business or advertiser website or social media webpage without consent likely violates the New York Privacy Laws and subjects the infringing party to civil liability including injunctive relief and damages. Obtaining written consent from an individual before using his or her name, portrait or picture can help avoid costly legal pitfalls in online social media marketing and advertising.

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5. Statistics, http://www.facebook.com/press/info.php?statistics (last accessed August 22, 2011).
6. Facebook Statement of Rights and Responsibilities, http://www.facebook.com/terms.php?ref=pf (last accessed August 22, 2011).
7. *Id.* at section 5(1).
8. *Id.* at section 10.
9. According to Facebook's SR&R, a user agrees to the following: (i) the user may use his or her privacy settings to limit how his or her name and profile picture may be associated with commercial, sponsored, or related content served or enhanced by Facebook; (ii) the user gives Facebook permission to use the user's name and profile picture in connection with that content, subject to the limits the user places; (iii) Facebook does not give a user's content or information to advertisers without consent; and (iv) the user understands that Facebook may not always identify paid services and communications as such.
10. In *J.N. v. Facebook, Inc.*, No. 11-cv-2128 (E.D.N.Y. 2011), the plaintiff brought a Privacy Law § 51 class action for misappropriation of the names and likenesses of minors such as himself. The suit sought compensatory damages, injunctive relief and exemplary damages due to alleged violation by Facebook of New York Civil Rights Law § 50. *Id.* Facebook argued the complaint should be dismissed and that it failed to state a claim for violation of the Privacy Laws because Facebook's alleged republication of users' "Likes" to express their political interests, consumer preferences and other interests on Facebook falls within the newsworthy exception and thus does not violation the Privacy Laws. *Id.* The plaintiff countered that there is no such exception where it is determined that the primary use of the name or likeness is advertisement or commercial gain, which occurs in Facebook's case. *Id.* The plaintiff voluntarily dismissed the action without prejudice while Facebook moved for an order transferring the action and four other similar actions to the Northern District of California District Court. *Id.*
11. Facebook Advertising Guidelines, http://www.facebook.com/ad_guidelines.php (last accessed August 22, 2011).
12. *Id.* at section 3(a)(ii).
13. McKinney's New York Civil Rights Law § 50 (West, 2011).
14. McKinney's New York Civil Rights Law § 51 (West, 2011).
15. *Id.*
16. *Id.*
17. *See*, Messenger ex rel. *Messenger v. Gruner + Jahr Printing and Pub.*, 94 N.Y.2d 436, 706 N.Y.S.2d 52 (2000); *Velez v. VV Pub. Corp.*, 135 A.D.2d 47, 51, 524 N.Y.S.2d 186, 189 (1st Dept. 1988)("As long as the article involves a matter of public interest, the publication is protected.").
18. Messenger ex rel. *Messenger v. Gruner + Jahr Printing and Pub.*, 94 N.Y.2d at 441-42.
19. *Bement v. N.Y.P. Holdings, Inc.*, 307 A.D.2d 86, 90, 760 N.Y.S.2d 133 (1st Dept. 2003) (citing Messenger, 94 N.Y.2d at 444).
20. *Bement v. N.Y.P. Holdings, Inc.*, 307 A.D.2d at 90 (citing Messenger, 94 N.Y.2d at 442-443).
21. *Pearce v. Manhattan Ensemble Theater, Inc.*, 528 F. Supp. 2d 175, 182-83 (S.D.N.Y. 2007).
22. *Id.*
23. *Velez v. VV Pub. Corp.*, 135 A.D.2d at 52.
24. Pollyana Kwok, The Use of a Celebrity's Name and Likeness in News Stories in Conjunction With Advertisements – Celebrities Seeking Broader Protections, 32 Sw. U. L. Rev. 761, 765-66 (2003).
25. Kwok, *supra* note 24, at 766. Consumers would buy the advertiser's product, believing the celebrity was endorsing the product, indicating the advertiser used the celebrity's name and likeness to generate business. *Id.* at 765. *See also, Flores v. Mosler Safe Co.*, 7 N.Y.2d 276 (1959).
26. *Beverly v. Choices Women's Medical Center, Inc.*, 78 N.Y.2d 745, 753 (1991). Further, a commercial advertiser may not neutralize the Privacy Laws "by wrapping its advertising message in a cloak of public interest," regardless of the message's educational or informational value. *Id.*
27. *Stern v. Delphi Internet Services Corp.*, 165 Misc.2d 21, 30-31, 626 N.Y.S.2d 694, 700-01 (Sup. Ct. New York Co. 1995) (An online electronic bulletin board which used Howard Stern's picture without his permission to advertise its online news service in a debate about Stern's campaign for governor of New York was a protected incidental use. Delphi and its service was a news disseminator entitled to First Amendment protection.).
28. *See* note 14.

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