Nassau Lawyer

THE JOURNAL OF THE NASSAU COUNTY BAR ASSOCIATION

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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.
May 3, 4 & 5 • 9 a.m.-4 p.m.

Notice of Nassau County Bar Association Annual Meeting
Tues., May 10, 2011 at 7 p.m. at Domus
Proxy Statement can be found on the insert inside this issue.

Events

Law Day
Thursday Evening, April 28, 2011 at Domus
See insert

112th Annual Dinner Dance
Sat., May 7, 2011
Long Island Marriott, Uniondale
William F. Levine, Esq., Distinguished Service Medallion Recipient
See page 6

Lunch with the Family & County Court Judges
Wed., May 11, 2011 at Domus
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WE CARE Rebuilding Together
Sat., May 14, 2011

Suddenly Solo Service Fair and CLE
Mon., May 16, 2011, 4 p.m. at Domus
See page 9

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

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

Domus Open
Mon., June 13, 2011
Eisenhower "The Red" Course
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Great New Member Benefit!

Join NCBA's New Domus Scholar Circle; Get CLE for One Low Fee!

By Valerie Zurblis

Yes, it's true! A brand new benefit exclusive to NCBA members. Now members can receive the Continuing Legal Education credits they need or want by joining the Domus Scholar Circle. Domus Scholars can attend 1, 5, 10, or even 50 CLE seminars in one year, all for one low annual fee! This unbelievable offer is open to NCBA members only – value added to your membership!

Membership in NCBA's Domus Scholar Circle includes:

- all 1, 2 and 3 CLE credit seminars
- all Dean's Hours (lunch not included)
- all committee meetings where CLE is offered
- Materials
- Snacks and beverages

A special task force appointed by NCBA President Marc Gann and chaired by NAL Dean Andrew Engel met over a series of months to review the viability of such an innovative idea. The Domus Scholar Circle then was fully endorsed by the Board of Trustees of the Nassau Academy of Law and the Board of Directors of the Bar Association.

"We were looking at ways to help our members in today's economy, and one way we can help is to provide unlimited CLE at a price much lower than anywhere else," said President Gann. "We anticipate many members will take advantage of becoming Domus Scholars."

Dean Engel agreed. "The best part of joining the Domus Scholar Circle is that, in addition to saving money while earning credits, members are taking advantage of the opportunity to learn from Nassau's leading legal minds," he said. "All seminars will be the same high quality members have come to expect from the Nassau Academy of Law."

So, what would you be willing to pay for all the Continuing Legal Education credits you need? How about just $189?

"With the most affordable and highest quality CLE available on Long Island, we know you will want to become a charter member of the Circle," NCBA Executive Director Dr. Deena Ehrlich said. "Watch for more details coming soon!"

– 2nd Anniversary –

We've Alleviated the Anxiety of Thousands Facing Mortgage Foreclosure in Nassau County

By Gale D. Berg

They usually come into Domus, head held low, uncomfortable. Often they bring unopened mail, afraid to read it, afraid of what it will mean. But after speaking with one of the pro bono attorneys, the situation may not be resolved but they often leave feeling much better and are truly grateful for the assistance. "Why don't more people come here?" they ask. "This service is fantastic!" One woman noted, "Now at least I can sleep at night."

The good news: It has been two years since the Nassau County Bar Association launched its innovative and eventually award-winning Mortgage Foreclosure Legal Consultation Clinics; a free service for any homeowners in Nassau County, who have concerns about losing their home. In that time, we have helped about 1,000 homeowners who come to the clinics downhearted but leave with theirs heads held high and a sense of determination.

Last year, I became NCBA's Director of Pro Bono Attorney Activities on a part time basis, through a grant from the Office of Court Administration. My role has expanded to also provide attorneys to represent homeowners in court mandated settlement hearings. I focus on mortgage foreclosures specifically, and helping homeowners face this problem which continues

See CLINIC, Page 13

Hofstra Team Takes Nassau Academy Moot Court XXVIII Title

By Valerie Zurblis

A distinguished panel of judges has ruled that three Hofstra third year law students argued the best case and pronounced the team winners of the 2011 Nassau Academy of Law Hon. Elaine Jackson Stack Moot Court XXVIII Competition, held last month at the Nassau County Bar Association's Great Hall in Mineola. Second place went to the Touro Law Center team of Steven Pollack and William Melofchik.

Two special awards were also presented. The Honorable Edward J. Hart Award for best oral argument was won by Rachel Vincent from the winning Hofstra team. The late Justice Hart was a Justice of the Supreme Court, Appellate Division, Second Division. The Eugene S.R. Pagano Esq. Award for best written brief went to the second Hofstra team composed of law students Sheila Ballato, George DellaRatta and Toby Latham. In all 6 teams competed, two each from CUNY, Hofstra and Touro.

Last year, the Nassau Academy of Law's

See MOOT COURT, Page 18

From left are NCBA President Marc Gann, Collins McDonald & Gann, Mineola; Hon. Ruth C. Balkin, Justice, Appellate Division, Second Department; A. Kathleen Tomlinson, Magistrate Judge; Hofstra law students Hanieh Hoshiaripour of Basking Ridge, New Jersey; Rachael Vincent of Jamaica, NY – who also won the Hon. Edward J. Hart Award for best oral argument – and Nicole Bayer of Selden, Long Island, NY; Hon. Andrew Engel, Judge, District Court, Nassau and Dean of the Nassau Academy of Law; and Hon. Elaine Jackson Stack, NYS Supreme Court (ret). (Photo by Hector Herrera)

Upcoming Publications Committee Meetings

Thurs., April 14, 2011 • Thurs., May 12, 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.

LITIGATION IN THE 21ST CENTURY

Impeaching Your Adversary Using Evidence From Social Websites

The use of social websites such as Facebook and MySpace has become a common way for people to socialize and share information about themselves and their activities. These websites offer members a way to create a profile to enter information. The information can be distributed on a public page available to everyone with Internet access or on private pages accessible only by "friends" that are linked to by permission of the member. The advent of social networking has created new ethical and legal challenges for attorneys.

James Fiorillo

Consider attorney Jack Hammer, representing a defendant in a slip and fall litigation case. The plaintiff maintains that the incident allegedly caused by the defendant's negligence has resulted in severe physical and mental injuries so that the plaintiff is unable to work or function so as to enjoy life to his fullest. As such, the plaintiff is asking for damages befitting a case for the Nassau Supreme Court. At the deposition, the plaintiff appeared in a full body cast and bemoaned how his injuries has caused him financial losses due to his loss of job and high medical bills and that his lust for life has been drained when his wife left him because he could no longer provide "services" expected from a husband.

While Jack is readying the case for trial and sitting at his computer, he impulsively googles the plaintiff's name, and a Facebook page is listed among the entries. Intrigued, Jack decides to "friend" the plaintiff, even though Jack only knows the plaintiff as the adversary on his case. Suddenly and surprisingly, the plaintiff accepts Jack's Facebook invitation and Jack gains access to the plaintiff's private pages which contain photos, videos and postings. Jack sees photos and videos of the plaintiff participating in baseball, football, basketball, hockey, golf, and ballroom dancing. All of these photos are of events that occurred after the incident that is subject to the trial. In none of these photos is the plaintiff wearing a body cast or appearing injured or disabled. Furthermore, the plaintiff posts that "recently life has never been better – I'm dating a lot of hot women, even my wife thinks I'm a better lover. I've got a great job off the books so I can keep collecting disability and I'm going to be coming into some big money soon. Keep it to yourselves; I only share this information with my good friends."

Jack can't wait to go to trial and use this online evidence to impeach the plaintiff. Envisioning himself to be the Perry Mason of the twenty-fist century, he begins to prepare his case using the Facebook evidence as the cornerstone for defending his client.

Can Jack use this evidence? Unfortunately for Jack, his act of "friending" the plaintiff most likely will make the evidence non-admissible and may make Jack subject to ethics violations. The Committee on Professional Ethics of the New York State Bar Association (herein "the Committee") recently issued an opinion concerning the use of Facebook pages as evidence in pending litigation. Committee On Professional Ethics – Opinion 843 (9/10/10) (available at http://www.nysba.org). The opinion makes clear that an attorney should not "friend" an adverse party in the litigation. If the party is represented by counsel, the attorney's action to "friend" runs afoul of Ethics Rule 4.2 (the "no-contact" rule) which prohibits a lawyer from communicating with the represented party about the subject of the representation absent prior consent from the represented party's attorney. If the party is unrepresented, the attorney's action to "friend" will likely violate Ethics Rule 4.3, which prohibits a lawyer from stating that he is disinterested and prohibits the lawyer from giving legal advice other than the advice to secure counsel if the party's interests are likely to conflict with those of the lawyer's client.

What if Jack used a third party to friend the plaintiff and gain the evidence? The Committee, using guidance from a Philadelphia ruling, concluded that an attorney should not propose that the third party friend the adverse party to obtain evidence while the third party concealed his or her association with the

See WEBSITES, Page 16

Preparer Tax ID Number 2011 Good News Update

Since addressing this topic last Novemberwe last 'spoke,' the Internal Revenue Service ("IRS") has registered more than 675,000[1] paid income tax preparers (a number still far below the 900,000-1.2 million tax preparers estimated by the IRS) and has issued clarifying information. It is especially relevant for those with tax-preparing employees.

Let's begin with a Frequently Asked Question ("FAQ") appearing on the IRS website.[2]

1. Who needs a Preparer Tax Identification Number (PTIN)?

A PTIN must be obtained by all tax return preparers who are compensated for preparing or assisting in the preparation of, all or substantially all of any U.S. federal tax return, claim for refund, or other tax form submitted to the IRS except the following:

The balance of the above FAQ lists 28 IRS forms that the IRS does not classify as requiring a tax preparer to have a PTIN in order to complete the form. Do you want to go to the list each time that you ask your employee(s) to complete a tax form? I don't. As I said in the November article "If in doubt, register." That hasn't changed in my opinion.

What you won't find in the FAQs is any reference to Notice 2011-6[3] released by the IRS on December 30, 2010. Here are the relevant new items of information.

First, here is the conclusion:

Non-signing tax preparers employed by a law or certified public accounting firm still need to obtain a PTIN – they just won't be subject to the examination and continuing education requirement. A non attorney/CPA employee who you permit to sign a client's "1040 series" tax return would not qualify under the new carved-out exception, and still would need to eventually take the IRS test and fulfill the continuing education requirement, because that employee is a "signing tax preparer." At the current time, however, a non attorney/CPA who signs tax returns other than "1040 series" tax returns (*e.g.*, a paraprofessional who prepares and signs clients' payroll tax returns) still may (and must) obtain a PTIN but is not currently subject to the testing and continuing education requirements.[4]

Alan E. Weiner

Here's the rest of the story.

In the following quote, from IRS Notice 2011-6, the author has added emphasis to key words and has deleted most of the references that are not pertinent to legal or certified public accounting firms.

> The IRS has decided to allow certain individuals who are not attorneys, certified public accountants, enrolled agents, or registered tax return preparers to obtain a PTIN and prepare, or assist in the preparation of, all or substantially all of a tax return in certain discrete circumstances.
>
> **a. Tax Return Preparers Supervised by Attorneys, Certified Public Accountants, Enrolled Agents, Enrolled Retirement Plan Agents, and Enrolled Actuaries**
>
> Until further guidance is issued, the IRS … will permit any individual eighteen years or older to pay the applicable user fee and obtain a PTIN permitting the individual to prepare, or assist in the preparation of, all or substantially all of a tax return or claim for refund for compensation if:
>
> (i) the individual is supervised by an attorney, certified public accountant, enrolled agent, enrolled retirement plan agent, or enrolled actuary authorized to practice before the IRS under Circular 230 §10.3(a) through (e);
>
> (ii) the supervising attorney, certified public accountant, enrolled agent, enrolled retirement plan agent, or enrolled actuary signs the tax returns or claims for refund prepared by the individual;
>
> (iii) the individual is employed at the law firm, certified public accounting firm, … of the tax return preparer who signs the tax return or claim for refund; and
>
> (iv) The individual passes the requisite tax compliance check and suitability check (when available).
>
> For purposes of this provision, a law firm is a law partnership, professional corporation, sole proprietorship, or any other association authorized to practice law in any state, territory, or possession of the United States, including a Commonwealth,

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The LLC: Beware of Statutory Defaults

The New York Limited Liability Company Law ("LLCL") was enacted to create a form of business entity, the limited liability company ("LLC"), which would provide partnership tax status under the Internal Revenue Code while affording its owners ("members") some of the protections comparable to those of a shareholder of a corporation. In order to accomplish these results, the LLCL granted the members of a limited liability company wide latitude to modify the statutory scheme through the use of an operating agreement. Numerous sections of the LLCL begin with or contain the phrase "except as provided in the Operating Agreement." The corollary to this is that, if the operating agreement does not provide for a specific result, the LLCL provides a "statutory default." The adoption of an operating agreement was considered so important to the functioning of a limited liability company that the LLCL requires every limited liability company to have a written operating agreement.[1] While the statute mandates the adoption of a written operating agreement, it does not provide a penalty for the failure to adopt one. The consequences for failing to adopt an operating agreement were a key issue in *Spires v. Casterline*.[2] The court in *Spires* held that the lack of an operating agreement did not permit an LLC member to negate the existence of the limited liability company so as to create a general partnership. The *Spires* court further noted that the LLCL did not provide for a penalty for failing to have an operating agreement.

Robert H. Groman

Barry C. Feldman

The statutory defaults in regard to the sharing of profits and losses, management of the LLC and distributions on dissolution may create a result not intended by the members of the LLC. The following example will aid in the analysis of this aspect of the LLCL.

Member 1 and Member 2 established

See LLC, Page 24

Your Help is Needed for Those Who Help Others!

From the President

Marc C. Gann

There is no doubt that everyone is feeling the long term effects of our "economic downturn." Businesses are downsizing, graduating students can't find jobs and people are able to meet their monthly expenses. While our new Governor and Legislators were able to pass a State budget on time for the first time in many, many years, it came at a stiff price. The State Court budget was slashed even further than anticipated. This will likely result in lay-offs in the Courts and has already resulted in program cuts that jeopardize two of our NCBA award winning programs; ones which are needed now more than ever.

First, our Lawyer's Assistance Program is one of the most outstanding, worthwhile services that we provide at Domus. For those of you who don't know, the LAP is made up of a significant number of volunteer lawyers who assist other attorneys in need. The need may be related to physical, mental, substance abuse issues. It may involve the death or disability of an attorney in which volunteer lawyers assist or take over the disabled lawyer's practice to ensure that the needs of his or her clients are not ignored or impaired by the condition of the disabled lawyer. The unsung heroes of LAP are people like Annabel Bazante, Chair and Vice Chairs Thomas A. Bucaria, M. Kathryn Meng, Leland S. Beck and the entire LAP Committee. These attorneys give substantially of their time and expertise to step into a void and professionally fill it, ensuring public confidence in the legal process, keeping innocent clients from being damaged. LAP has also employed the services of a man not unlike George Bailey from "It's a Wonderful Life;" a man who does for others before himself. If you are ever around the building you will see a giant of a man (in both stature and substance) with white hair and a moustache and always a smile. Peter Schwietzer is the backbone of LAP. He is a resource who is available 24 hours a day, 7 days a week. He immediately assists attorneys in crisis who may be in the throws of substance abuse or other harmful mental health issues and guides them through it.

As a result of our economy and the budget cuts, funding for Peter's services is completely gone. Without him, I cannot imagine how many attorneys and their clients will suffer irreparable harm just by not having someone to whom to turn who can soothe and guide.

Second, our Mortgage Foreclosure Project has helped more Nassau County homeowners than you possibly imagine. I have in the past, described the scene at Domus once a month when our volunteer lawyers sit down with as many as 60-70 families in an afternoon to assist and guide them through the foreclosure process. These are the faces of your family members who are scared and vulnerable but who walk away from each session with a feeling of comfort learning that there are options and how to explore them. These same attorneys appear in Court regularly volunteering their time assisting in the mandatory conferences in Supreme Court. They represent the homeowners in Court in an effort to settle the foreclosure actions. This is an invaluable service to our community and the public; one which makes us all proud to be members of this profession.

The Mortgage Foreclosure Project is run by Gale Berg, Esq. who has given her heart and soul to this work for the last year. She coordinates the clinic, the court conferences and the training of the volunteer attorneys. Through an OCA grant, she was being paid to work 20 hours a week but this is not a 20 hour a week job. Gale has always worked until the job is done without measuring the hours. She has always worked more than 20 hours and on many occasions worked twice that. However, the current court budget does not provide for her services either. Our clinic, conferences and most importantly vulnerable members of the public will suffer greatly without Gale's services.

Our members have always stepped up but we need it more now than ever. Those who have always provided help now need our help. I pledge to make a substantial personal contribution to the Fund and am asking all of you to assist as well. If you donate even $25.00 immediately, we can ensure the continued work of these two fine programs. Think of the closing scene of "It's a Wonderful Life" and do what you can, a donation, any donation, to the NCBA Fund will potentially allow us to continue these vital services. Remember, no man (or woman) is a failure who has friends! Let's do what we can now, my friends!

Please send your tax deductible $25 donation made payable to NCBA Fund, to 15th & West Streets, Mineola, NY 11501 or log onto www.nassaubar.org and click on For Our Members – Donate to Support our Programs to charge your donation.

Battle of the Law Schools Basketball Tourney

NCBA's Terrence Tarver and Brian Sullivan go for the rebound during the Touro Law School game in the first Battle of the Law Schools Basketball Tournament. (Photo by Hector Herrera)

By Terrence Tarver

As March Madness concluded and a college basketball National Champion is crowned, the NCBA entered its own basketball tournament on Sunday against Hofstra, Touro, and St. Johns Law Schools in the first ever Battle of the Law Schools Basketball Tournament.

Hofstra Law, coming off its Battle of the Law Schools Softball Tournament win in the fall, would not be defeated in basketball either as they coasted through the Tournament winning with a record of 3-0. In contrast, the NCBA finished a dismal 0-3, although it lost all three games by four points or less thanks in large part to the exceptional play by Past President Christopher T. McGrath, Robert Schalk, and Gregory Beck.

St. John's Law School, playing the entire tournament with a mere five players, came in second place, losing only to Hofstra. Touro Law School finished third and was extremely close to beating Hofstra with the game tied 20-20 when Hofstra came on strong with the final bucket to seal its victory 22-20.

The NCBA team consisted of NCBA President Marc Gann, Past President, Christopher T. McGrath, Terrence Tarver, Brian Sullivan, Robert Schalk, Gregory Beck, Steve Rodway, Richard Rodriguez, and Kevin Kessler.

Terrence Tarver is the Co-Chair of the Young Lawyers Committee.

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Transference and Countertransference: A Psychoanalytic Perspective on the Attorney-Client Relationship

Robert M. Gordon

Gail Jacobs

Clients retain attorneys with myriad expectations, including unspoken emotions that may drive the success or failure of the legal representation. Through years of practice, attorneys develop experience and instincts that help them steer client relationships away from the shoals of misunderstanding. Yet even the most seasoned attorneys find themselves relating with certain clients, in ways that are counterproductive for reasons that are not purely logical.

In contrast to lawyers, psychologists and other mental health professionals dedicate much of their training to understanding the emotional dynamics of their relationships with clients or patients. One of the most important aspects of their education is learning how to handle the phenomenon known as transference as well as its counterpart, countertransference. The influence of transference on the professional relationship can be positive, contributing to a productive working relationship; on the other hand, if uncontrolled or misunderstood, its impact may be highly disruptive. This article introduces the theory of transference to attorneys in order to increase their understanding of a particularly challenging aspect of acting as Counselor at Law.

Transference/Countertransference in Psychoanalysis

At the beginning of the 20th century, Sigmund Freud originated the concepts of transference and countertransference in formulating his theory of psychoanalysis. Freud describ-ed transference as a patient's transfer of emotions from his or her own past onto the therapist, including feelings that are unconscious.[1] Transference is qualitatively different from the flow of empathy or other feelings that generally takes place between individuals in the course of a relationship. Transference, instead, is the emergence of the patient's repressed feelings about significant childhood figures, displaced onto the person of the therapist. Countertrans-ference refers to the treating professional's emotional re-sponse to the patient's transference feelings. Freud recognized that transference is not confined to psychotherapy; indeed, it can impact virtually any relationship.[2]

Freud and later theorists advocated that therapists advance a patient's treatment by using information that surfaces as a result of transference and countertransference.[3] According to a current variation of this idea put forth by the Relational school of psychoanalysis, transference and countertransference are mutual creations of the patient and therapist, not necessarily characterized by distortions of emotion. The client and therapist respond to each other, their reactions shaped by the internal dynamics of the treatment and their own pasts. Hoffman (1983) described transference as a "Geiger counter," sensitizing patients to notice things that might be unimportant to others and creating the impetus for patients to reenact relationships that have shaped them.[4] For example, a patient who expects the therapist to respond critically to their dependency needs might behave in ways that trigger such a response. According to this theory, the therapist will naturally respond in accordance with the patient's views of others, and eventually becomes a participant in the transference dynamic.

Racker (1968)[5] viewed countertransference as a therapeutically invaluable tool that affords the therapist access to unconscious and otherwise inexplicable aspects of the patient's inner world, as well as providing a window on real aspects of the therapist's personality. A patient with a trauma history may not be able to articulate his or her overwhelming feelings. Yet, that patient may unconsciously communicate feelings of helplessness and rage onto the therapist. The therapist's countertransference reactions in response can be used productively as a key to understanding how other significant people in the patient's life are reacting to similar behavior.

Kiesler (2001) viewed countertransference more narrowly, as the therapist's reactions to the patient that are "out of the ordinary," such as intense anger, a desire to retaliate or withdraw, or sudden experiences of self-doubt regarding clinical skills.[6] These reactions have the potential to heighten emotional reactivity by the therapist and can strain the working alliance. This dynamic is not uncommon for therapists working with patients exhibiting significant interpersonal and self-regulation difficulties (Shafranske & Falender, 2008).[7] Clients with Borderline Personality Disorder, for example, will

See TRANSFERENCE, Page 26

The Bar Association of Nassau County

requests the honor of your presence at the

One Hundred and Twelfth Annual

Dinner Dance of the Association

Marriott Hotel, Uniondale, Long Island

Saturday Evening, the Seventh of May

Two Thousand and Eleven

Honoring

William F. Levine Esq.

and

Our 50, 60 and 70 year Practitioners

Cocktails at Six-Thirty Dinner at Seven-Thirty

Complimentary Valet Parking at the Ballroom Entrance

Black Tie Optional

The Nassau County Bar Association
and
The Nassau Academy of Law

Cordially Invite
Members and Their Guests to Attend

Installation of Officers and Directors

Wednesday, June 1, 2011
6 p.m. at Domus

There is no fee for this event, however, reservations are required.

Invitations to this event will be emailed. Make sure we have a current email address.

Announcement: From the Nassau County Surrogate

Judge Edward W. McCarty III, the Surrogate of Nassau County, announces that effective June 1, 2011, the provisions of 22 NYCRR 202.7 (a),(b),(c),(d) and (f) shall hereinafter apply to all motions and orders to show cause filed in Surrogate's Court, Nassau County.

The application of these rules will essentially require that in all motions relating to disclosure or to a bill of particulars, counsel for the movant must include an affirmation that he or she has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion. The rules also require that any application for temporary injunctive relief must demonstrate that a good faith effort has been made to notify the party against whom the temporary restraining order is sought of the time, date and place that the application will be made in a manner sufficient to permit the party an opportunity to appear in response to the application, unless the movant demonstrates that the giving of notice will result in significant prejudice.

Encouragement for NCBA's Unemployed/Underemployed Group

The following is an excerpt from a letter sent to the Nassau County Bar Association's Unemployed/Underemployed Lawyers Group.

I was at the Unemployed/Underemployed Lawyers meetings in November 2010 (I missed the December meeting because of an interview). I was laid-off in June 2010 and was unemployed for about six months. I am happy to report that I have been working as in-house counsel since early January 2011.

I thought this news might be encouraging to some of the other attorneys who might be discouraged about their future prospects. It might also be worth noting that I obtained my position after blindly applying to a posting on a job posting board. I know people (including myself) sometimes feel as though the only way to land a job is through contacts, and it can be more discouraging when you feel you do not have the right contacts or have exhausted your contacts (not to discourage anyone from utilizing their network, which is obviously still the best source of leads).

Thank you for the support provided during my period of unemployment. Even though I only attended one meeting, it was helpful to speak with and commiserate with others who are in a similar situation. You and the group are providing a very valuable resource to those struggling through a very difficult time in our lives.

Thank you.

(name withheld)

The next Unemployed/Underemployed meeting is Wednesday, April 13, 12:30 at the Nassau Bar. All are welcome to attend.

On April 25, the Nassau Academy of Law is presenting a special CLE seminar on the opportunities available in today's legal environment, including firm mergers and consolidations, selling a practice, becoming "of counsel" at a larger firm and training a successor. Go to www.nassaubar.com to reserve your seat.

Check out the jobs, set a job alert and post your resume, free of charge, at the Nassau Bar's Career Center, http://www.jobtarget.com/home/index.cfm?site_id=10623

Domus • Scholar • Circle • Nassau Academy of Law

Join the Circle and Save!

Watch for Details

LAP, Courts Host Special Women's History Month Program

The Nassau County Bar Association Lawyer Assistance Program teamed up with the Nassau County Judicial Committee on Women in the Courts to host a special program in honor of Women's History Month, held last month at Supreme Court. Hofstra Law School Dean Nora Demleitner, who was honored for her invaluable service and leadership for women in the community, spoke about the challenges still facing women in the legal profession. Hon. Sarah Krauss, acting Supreme Court Justice, Kings County, explained the difficulties she had to overcome as a woman in the legal profession, as well as told her personal story on overcoming alcoholism. From left are Judge Krauss, Hon. Margaret Reilly, co-chair of the Nassau County Judicial Committee on Women in the Courts; Hon. Anthony Marano, Administrative Judge of Nassau County; Dean Demleitner; Steve Schlissel, co-chair of the Nassau County Judicial Committee on Women in the Courts; Annabel Bazante, chair of the NCBA LAP Committee; and NCBA President Marc Gann. (Photo by Mike Radigan)

Without Notice: 'Black Ice' Cases Against Municipalities After *San Marco v. Village of Mount Kisco*

By Christopher J. DelliCarpini and John M. DelliCarpini

The snows of winter have melted away, but the injuries sustained in those icy conditions – and the ensuing litigation – will linger for years to come. Where plaintiffs sue municipalities over such injuries, though, their burden just got significantly lighter.

In *San Marco v. Village of Mount Kisco*, 2010 N.Y. Slip Op. 09197 (Dec. 16, 2010), the Court of Appeals held that a plaintiff who sues a municipality for a slip-and-fall on "black ice" or other icy conditions need not prove prior written notice if the municipality's negligence created those conditions, no matter how long those conditions took to arise.

Christopher J. DelliCarpini

This is an exception to the general rule that to obviate the prior written notice requirement, a municipality's negligence must have immediately caused the hazardous condition. Counsel for plaintiffs and municipalities should note the implications of *San Marco*, for similar cases and for the future of the prior written notice requirement.

Prior Written Notice: The Rule and its Exceptions

To minimize municipalities' exposure to liability for every pothole or patch of ice, several statutes make prior written notice a prerequisite to liability. Among these is Village Law § 6-628, at issue in *San Marco*:

> No civil action shall be maintained against the village … for damages or injuries to person or property sustained solely in consequence of the existence of snow or ice upon any sidewalk, crosswalk, street, highway, bridge or culvert unless written notice … of the existence of the snow or ice, relating to the particular place, was actually given to the village clerk and there was a failure or neglect within a reasonable time after the receipt of such notice … to cause the snow or ice to be removed, or the place otherwise made reasonably safe.

CPLR § 9804 repeats this provision almost verbatim. Similar provisions appear in Town Law § 65-a, Second Class Cities Law § 244, New York City Administrative Code § 7-201 (the "Pothole Law"), and Highway Law § 139, as well as in the codes and charters of apparently every municipality in the State. The LIRR, however, appears to enjoy no such protection. *See Stallone v. Long Island Rail Road*, 69 A.D.3d 705 (2nd Dept. 2010).

The Court of Appeals has recognized two exceptions to the prior written notice requirement: where the locality created the defect or hazard through an affirmative act of negligence; and where a "special use" confers a particular benefit upon the locality. *See Amabile v. City of Buffalo*, 93 N.Y.2d 471, 474 (1999). *San Marco* turned on the former exception.

The Court of Appeals first recognized the affirmative-negligence exception in *Muszynski v. City of Buffalo*, 29 N.Y.2d 810 (1971). A wheelchair-bound girl fell along a sidewalk deteriorated by rock salt, which the city had been applying to make a safe path for pedestrians. The plaintiffs prevailed at trial, but the trial court set aside the verdict for lack of prior written notice, which the city charter required.

The Fourth Department reinstated the verdict, finding that the city had caused the sidewalk to deteriorate over time. *Muszynski v. City of Buffalo*, 33 A.D.2d 468 (4th Dept. 1969). The Court of Appeals affirmed on the opinion below, even the lone dissenter conceding the "apparent exception to the notice requirement which exists in cases where the city causes and maintains the defective condition." 29 N.Y.2d at 812 (Scileppi, J., dissenting).

Recently, the Court of Appeals had limited the affirmative-negligence exception to conduct that immediately results in a dangerous condition.

In *Oboler v. City of New York*, 8 N.Y.2d 888 (2007), the plaintiff had tripped on a depressed manhole cover on Madison Avenue, and sued under the Pothole Law. He could not prove prior written notice, however, and lost on summary judgment because he "presented no evidence of who last repaved this section of the roadway before the accident, when any such work may have been carried out, or the condition of the asphalt abutting the manhole cover immediately after any such resurfacing." *Id.* at 890.

In *Yarborough v. City of New York*, 10 N.Y.2d 726 (2008), the plaintiff also sued under the Pothole Law. He also could not prove prior written notice, but offered expert testimony that the city negligently patched the pothole to create the alleged tripping hazards. The Court of Appeals affirmed dismissal, finding that the deterioration of the patch "developed over time with environmental wear and tear." *Id.* at 728.

Oboler and *Yarborough* involved roadway defects, but courts had required immediacy in cases of negligent snow or ice removal as well. Just this past August, in *Lynch v.*

See NOTICE, Page 17

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.

Bar 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.

Nassau Lawyer

Our monthly newspaper for the membership features timely professional updates and news, as well as Association happenings and information.

"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.

NCBA Career Center

A section of our website (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 dsunger@nassaubar.org

In Brief

Member Activities

On March 10, 2011, at its annual dinner dance held at the Fox Hollow Inn, the Criminal Courts Bar Association of Nassau County presented the Honorable Peter B. Skelos, Associate Justice of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, with the Norman F. Lent Memorial Award. This award is given annually to a distinguished jurist in Nassau County who is known for their honesty, scholarship and humanity.

Hon. Stephen L. Ukeiley

Michael Cardello, a partner in the Garden City law firm of Moritt Hock & Hamroff LLP, has been recently elected to serve on the Board of Directors of the Long Island Council on Alcohol and Drug Dependence (LICADD). LICADD is a not-for-profit agency whose mission is to provide initial attention and referral services to individuals, families, and children suffering from alcohol and other drug-related problems. Mr. Cardello, who concentrates his practice in the areas of business and commercial litigation, is a former law clerk for the Honorable Arthur D. Spatt, United States District Court Judge for the Eastern District of New York, and currently serves on the Committee for Civil Litigation of The United States District Court for the Eastern District of New York. Mr. Cardello also serves as the Vice Chair of the Bar Association's Commercial Litigation Committee and as Chair of the Board of Directors for the Metro New York/Connecticut Chapter of the National Vehicle Leasing Association.

Daniel J. Baker, a partner in the firm of Sahn Ward Coschignano & Baker, PLLC, has been named a candidate in the Leukemia & Lymphoma Society (LLS), Long Island Chapter's 2011 "Man & Woman of the Year" campaign. Each "Man & Woman of the Year" commits to raising a minimum of $20,000 over a 10-week period. Mr. Baker's practice concentrates in the areas of real estate transactions, zoning and land use planning, corporate law and civil and criminal defense litigation. He also serves as co-chair of the Bar Association's Real Property Law Committee and is an appointed member of the State of New York Commission on Quality of Care for the Mentally Disabled's Surrogate Decision Making Committee Program.

Carolyn R. Wolf, a senior partner and director of the Mental Health Law Practice at the law firm of Abrams, Fensterman, Fensterman, Eisman, Greenberg, Formato & Einiger, LLP, will again be an adjunct professor at Hofstra University School of Law, teaching Law & Psychiatry.

Steven J. Kuperschmid, a partner in the Corporate/Securities Law Practice Group at Certilman Balin Adler & Hyman, LLP, has been appointed to the Board of Directors of The Marty Lyons Foundation (MLF). The foundation is a charitable organization that was established in 1982 to fulfill the special wishes of children, ages three (3) through seven-

See IN BRIEF, Page 19

Committee Reports

Construction Law

Meeting Date 3/24/11
Adam Browser & Edmond Farrell, Co-Chairs

The committee discussed issues that arise when construction precedes execution of the construction contracts, and several recent cases involving insurance coverage and mechanic's liens, with a focus on the decision from the United States Court of Appeals for the Second Circuit in *10 Ellicott Square v. Mountain Valley Indemnity Co.*

District Court (Civil)

Meeting Date 3/9/11
Jaime D. Ezratty, Chair

The committee had a standing room only crowd to hear the Hon. Scott Fairgrieve speak about trying a case in Landlord-Tenant Court. It was an interesting and interactive program.

District Court (Civil)

Meeting Date 3/30/11
Jaime D. Ezratty, Chair

The committee hosted the Honorable Fred J. Hirsh and Honorable Michael A. Ciaffa of the Nassau County District Court for a lecture entitled: The "Ins and Outs" of No Fault Cases.

Intellectual Property

Meeting Date 3/22/11
Aimee L. Kaplan, Chair

The committee was pleased to welcome Harold Kestenbaum, Esq., who delivered a lecture on franchise law. Mr. Kestenbaum is of counsel to Ruskin Moscou Faltischek, P.C., and has specialized in franchise law and other matters relating to franchising since 1977, representing both start-up and established franchisors. He has been voted one of the top 100 franchise lawyers in North America for seven consecutive years by the Franchise Times magazine, and is the author of the book "So You Want To Franchise Your Business" which is now in its second printing.

Michael J. Langer

Labor & Employment Law

Meeting Date 3/8/11
Rick Ostrove, Chair

The committee discussed *Staub v. Proctor Hospital*, a recent United States Supreme

See COMMITTEE REPORTS, Page 26

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Details Coming Soon

Recent Amendments to New York's Exemption Laws

By Joseph S. Maniscalco, Esq. and Rachel P. Corcoran, Esq.

In a surprise move, as one of his final acts as governor, David Paterson signed into law a number of significant changes to the New York's exemption laws. These changes will undoubtedly change the way in which consumer bankruptcy cases proceed in New York, with greater options and protections for debtors and reduced recourse for creditors and trustees in bankruptcy.

Historically, the foundations of New York's exemption laws begin in 1850. New York enacted its first homestead exemption, exempting from execution an occupied residence up to $1,000.[1] In *Robinson v. Wiley* the Court of Appeals explained the policies underlying the then recently enacted homestead exemption:

> The statute is founded upon considerations of public policy, and has introduced a new rule in regard to the extent of property which shall be liable for a man's debts. The legislature were of opinion, looking to the advantages belonging to the family state in the preservation of morals, the education of children, and possibly even, in the encouragement of hope in unfortunate debtors, that this degree of exemption would promote the public welfare, and perhaps in the end, benefit the creditor.[2]

Joseph S. Maniscalco

These policy considerations continue to be recognized to this day, as did the Second Circuit in *CFCU Community Credit Union v. Hayward*,[3] and serve to reinforce the importance of the homestead exemption under New York law. The personal property exemptions available in New York have existed even longer than the homestead exemption, and are similarly grounded in a policy of protecting debtors from complete destitution.[4]

In 1962, CPLR § 5206 and §5205 replaced earlier versions of New York's homestead and personal property exemption statutes.[5] Section 5205 lists what personal property is "exempt from application to the satisfaction of money judgments." This section has been amended numerous times, but the items listed as exempt, as well as the dollar value that may be exempted with respect to each item, have changed little.Section 5206, has, on the other hand, seen the dollar value of the homestead exemption raised since its enactment. The section was amended in 1969 to increase the exemption to $2,000,[6] and again in 1977 to $10,000.[7] The 1977 amendment contained an anti-retroactivity clause, barring its application to debts incurred prior to its enactment.[8]

In 2005 the homestead exemption was increased to $50,000.[9] This amendment did not contain an anti-retroactivity clause, and was interpreted by the Second Circuit to apply retroactively to debts incurred prior to the amendment's effective date.[10] In coming to this conclusion, the court relied heavily on the amendment's legislative history, highlighting the following notes from the legislative sponsor memo:

> This bill proposes to increase the homestead exemption to $50,000, a much more realistic figure. The current amount, which is 22 years old, is not at all realistic in today's economy. To have the figure so low is tantamount to having no exemption at all. ... This bill will help to provide some relief from the stringent bankruptcy law recently passed by Congress.[11]

According to the Second Circuit, "the State Legislature's action on the homestead exemption increase appears to have been partly precipitated by Congress's passage of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005."[12]

The federal Bankruptcy Code permits states to "opt out" of the federal scheme of bankruptcy exemptions.[13] In 1982, New York did just that, through enactment of Section 284 of the New York's Debtor & Creditor Law ("DCL").[14] This section states that New York debtors "are not authorized to exempt from the estate property that is specified under" Section 522(d) of the Bankruptcy Code.[15] That is, New York bankruptcy exemptions are governed by the CPLR and the DCL, rather than the Bankruptcy Code. DCL Section 282 was also enacted to enable a New York bankruptcy debtor to exempt the real and personal property described in CPLR Sections 5205 and 5206, insurance policies and annuity contracts, a car (up to $ 2,400), and certain rights to receive benefits and property.[16] DCL Section 283 was also added to permit the retention of some cash, subject to certain limitations.[17]

With the exception of the 2005 amendment to CPLR Section 5206, a New York domiciliary's exemptions in bankruptcy remained relatively unchanged until Governor Paterson signed into law Assembly Bill A08735A. The amended exemptions went into effect on January 21, 2011, and drastically change what a New York debtor may retain in bankruptcy and in collection suits generally. DCL Section 285 was also added to permit New York debtors to use the federal scheme of exemptions provided in the Bankruptcy Code.[18] Thus, New York debtors filing will now be permitted to apply the exemptions found under either New York law or the Bankruptcy Code, but will not be permitted to pick and choose exemptions among the two.[19] And, because the latest amendments do not contain an anti-retroactivity clause, they arguably apply retroactively in light of the Second Circuit's holding in *CFCU Community Credit*.

The chart below sets forth each exemption available under New York law, before and after these recent amendments, as

See EXEMPTION LAWS, Page 21

Pro Bono Attorney of the Month

Evelyn Kalenscher

By RHODA SELVIN

Evelyn Kalenscher, Pro Bono Attorney of the Month for April 2011, derives great satisfaction from her work with the Volunteer Lawyers Project's Landlord/Tenant Attorney of the Day Program to which she has devoted 244 hours since she joined last year. Ms. Kalenscher regularly comes to the Landlord/Tenant Part of the Nassau County District Court twice a week to aid unrepresented indigent people facing eviction.

Speaking of the advantages of this volunteer service, she said, "I work with a great group of people – all dedicated. Opposing attorneys understand what we do, and we work together. Both are looking out for the best interests of our clients and understand the limits on this commitment." Speaking of the cases she handles, she added, "Everyone of them is interesting and unique. Many people who don't have any idea what their rights are get taken advantage of by landlords. They are grateful that our organization is there to help them."

Ms. Kalenscher received a B.B.A. from Hofstra University in 1966 and a J.D. from Hofstra Law School in 1989. In 1995, she retired from her partnership in the firm of Genoa, Kalenscher & Noto, P.C. where the majority of her practice was in matrimonial and real estate law.

A member of the Nassau County Bar Association, she serves as chair of Ethics Committee. She is also a member of the New York State Bar Association and its Real Property Committee; the Theodore Roosevelt American Inn of Court; and a board member of Yashar, the attorneys' and judges' chapter of Hadassah.

Community service is an important part of Ms. Kalenscher's life. She has been a member of the Board of Managers in her condominium community for the past nine years and president for the past three years. When the local government in upstate New York, where she has a vacation home, began reevaluating properties in her community, she helped her neighbors retain an attorney to assure that the process was done properly, and then organized a group lawsuit to compel the town to comply with the law. She continues to help monitor this action, which has been ongoing for the past five years.

Both the indigent citizens of our county and Evelyn Kalenscher's colleagues in the profession are the beneficiaries of her volunteering in the Landlord/Tenant Attorney of the Day Project. The Volunteer Lawyers Project is pleased to honor her.

You're Safe With Us

EPSILON, the world's largest email provider, recently disclosed that the email database it manages had been breached and client email addresses were stolen. You may have received notices from a variety of merchants, including American Express, Best Buy, Citibank, Hilton Honors, LL Bean and Walgreens, among others.

Nassau County Bar Association does NOT use Epsilon for email distribution, so there is no direct risk for our members. However, since many members' business email addresses may have been affected by Epsilon's breach, we all need to be extra vigilant when responding to any unsolicited email.

Nassau County Bar Association staff will never ask you for your password, nor should any other legitimate company. Do not divulge your password or any other personal information as a result of an unsolicited email, from us or any other company, whether they are known to you or not. Do not open links in unsolicited email.

If you have any other questions regarding this issue, please feel free to contact Dede Unger at 516-747-4070 x226 or dsunger@nassaubar.org.

C'MON HOME TO DOMUS!!

Take Advantage of this Great Members-only Benefit:

New Member Orientation

If you've joined the Association since November 2010, or have never been to Domus, our beautiful home, and want to know more about your Bar Association, please join us at an Orientation Cocktail Party on

Monday, May 23, 2011 at 5:30 p.m.

Included that evening:

- *Tour of our traditional Tudor brick building*
- *Introductions to members of the Executive Committee, Board of Directors, Association Membership Committee and NCBA Staff*
- *Opportunity to network with attorneys new to the Association, as well as those with many years of NCBA experience*
- *Cocktails and hors d'oeuvres provided by our own Quartz Caterers*

There is no charge for this event. **Reservations are required.**

for more information or to join the Association.

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NY's Wage Theft Prevention Act Imposing Additional Requirements on Employers

On December 10, 2010, former governor David Patterson signed into law the Wage Theft Prevention Act ("WTPA"), a piece of legislation that comprehensively amends various sections of the New York Labor Law. Enacted as Chapter 564 of the Laws of 2010 and slated to take effect on April 9, 2011, The WTPA imposes additional notice and record-keeping requirements on employers. It also increases employee protections and establishes harsher penalties for non-compliance.

Christopher G. Gegwich

Annual and New Hire Notice Requirements

Currently, Section 195.1 of the Labor Law requires employers to notify, in writing, all new employees at the time of hiring of their regular rate of pay, regular pay day and overtime rate of pay if they will be eligible for overtime payments. The WTPA amends Section 195.1 to require every employer to provide written notice, both in English and in the primary language identified by the employee, of the following information: (1) the employee's rate or rates of pay (including overtime rate of pay for non-exempt employees); (2) the basis of that rate of pay, for example, by the hour, shift, day, week, salary, piece, commission, or otherwise; (3) any allowances claimed by the employer as part of the minimum wage, such as tip, meal or lodging allowances; and (4) the employer's established pay day. The written notice must also include the name of the employer, including any "doing business as" names used by the employer, the address of the employer's main office or principal place of business and mailing address (if different from the employer's physical address), as well as the employer's telephone number.

Ethan D. Balsam

This written notice must be provided to each employee at the time of their hire and on or before February 1st of each subsequent year of the employment. Moreover, employers must also notify an employee in writing of any changes to the information previously provided in the written notice at least seven calendar days prior to the change, unless the change is reflected on the wage statement furnished to the employee. Employers are obligated to obtain from the employee a signed and dated written acknowledgement of receipt of the written notice in both English and the primary language of the employee. The written notice and signed acknowledgement must be kept by the employer for a period of not less than six years.

The New York State Department of Labor is tasked with preparing template notices that comply with the amended Section 195.1 in both English and additional languages. However, if the Department of Labor has not created a template in the employee's primary language, an employer is only required to provide the employee with an English-language notice and acknowledgment form.

Wage Statements

The WTPA also amends Labor Law § 195.3, requiring employers to provide to employees a more comprehensive wage statement on the employer's established pay day that contains the following information: (1) the dates of work covered by the wage statement; (2) the employee's rate or rates of pay; (3) the basis for the rate of pay, for example, by the hour, shift, day, week, salary, piece, commission, or otherwise; (4) the employee's gross wages; (5) deductions from such wages; (6) allowances, if any, that the employer claims as part of the minimum wage; and (7) the employee's net wages. With respect to employees who are entitled to overtime, the wage statement must also include the employee's overtime pay rate and the number of regular and overtime hours worked. For employees paid a piece rate, which is defined as a rate of pay per item produced, the wage statement must include the applicable piece rate or rates of pay and number of pieces completed at each piece rate.

Like the aforementioned written notice and signed acknowledgement, employers are required to maintain employee wage statements containing the above-information for a period of not less than six years.

Enhanced Civil and Criminal Penalties for Non-Compliance

The WTPA imposes harsh penalties for non-compliance with respect to its notice and wage statement provisions. For example, employers who do not provide proper written notice to their employees, under Section 195.1, within ten business days of the employee's initial date of employment or annually thereafter, will

See WAGE THEFT, Page 25

Indy-Mac Bank, F.S.B. v. Yano-Horoski

Is the toothpaste back in the tube for equitable remedies in foreclosure cases?

In 2009, Justice Jeffrey A. Spinner of the Suffolk County Supreme Court became somewhat of a folk hero when, in *Indy Mac Bank F.S.B. v. Yano-Horoski*, 26 Misc.3d 717 (Sup. Ct. Suffolk Co. 2009), a mortgage foreclosure action, he invoked the Court's equitable powers to cancel the underlying mortgage and note. Recently, however, the Second Department reversed Justice Spinner. Does that reversal now limit a Judge's ability to fashion an equitable remedy in foreclosure cases?

The original mortgage foreclosure action was commenced in 2005. A Judgment of Foreclosure and Sale was granted on January 12, 2009. In accordance with CPLR 3408, as the underlying loan was deemed to be "sub-prime" or "high cost," Ms. Yano-Horoski requested a settlement conference. The conference, originally scheduled in February, 2009, was continued five times while the Court attempted "to obtain meaningful cooperation" from Indy Mac. As a result of Indy Mac's "intransigence in its continuing failure and refusal to cooperate," the Court directed Indy Mac to produce a bank officer at a conference scheduled for September, 2009.[1]

At that conference, "it was celeritously made clear to the Court that Plaintiff had no good faith intention whatsoever of resolving this matter in any manner other than a complete and forcible devolution of title from Defendant."[2] Further, it was made "abundantly clear" to the Court that "no form of mediation, resolution or settlement would be acceptable to" Indy Mac.[3] Indy Mac conceded that the amount due on the Mortgage exceeded the relevant real property's value by more than $250,000.00. Indy Mac also claimed that Yano-Horoski was offered a Forebearance Agreement, but "after substantial prodding by the Court" Indy Mac "conceded, with great reluctance," that the agreement was sent after the first payment was due under its terms, making it impossible for Yano-Horoski to comply with the agreement's terms.[4] Indy Mac rejected an offer by Yano-Horoski's daughter to purchase the property for its fair market value in a short sale and would not consider a loan modification using income from Yano-Horoski's husband and daughter, both of whom reside at the property. An offer by Yano-Horoski's husband and daughter to obligate themselves to pay the loan indebtedness was also rejected by Indy Mac. "In short, each and every proposal by Defendant, no matter how reasonable, was soundly rebuffed by plaintiff."[5]

Douglas M. Lieberman

The Court ordered a hearing to be held to explore various issues. At that hearing, Indy Mac was unable to advise the Court of the principal balance owed by Yano-Horoski. Two letters from Indy Mac to Yano-Horoski some eight months apart indicated that the principal balance owed decreased, though no additional payments were made. Indy Mac claimed that it has extended two modification offers to Yano-Horoski which were not accepted and that Yano-Horoski was ineligible for a modification under the Federal HAMP guidelines.[6]

The Court found it troubling that the amount claimed to be due was some $80,000.00 more than the amount calculated to be due based on the Judgment of Foreclosure and Sale. The Court was "astounded" that Indy Mac claimed an escrow advance $34,611.22 more than what was previously claimed under oath to be due for the very same advance. The amount of the principal balance due was also not clear.[7]

Finding that it had an obligation to assess and determine the parties' credibility, the trial court found Yano-Horoski credible and Indy Mac not. Indeed, "the Court has been unable to find so much as a scintilla of good faith on the part of" Indy Mac, also finding that Indy Mac had "unclean hands."[8] The trial court went on to find that as the case was a mortgage foreclosure action, the court's equity jurisdiction was invoked. This allowed the trial court to determine whether equity would allow the court to intervene or to permit the foreclosure of the underlying mortgage.[9]

A review of all of the facts and circumstances lead the trial court to conclude that Indy Mac's actions were "inequitable, unconscionable, vexatious and opprobrious." It further found Indy Mac's conduct was not only unsupported, but "greatly egregious and so completely devoid of good faith that equity cannot intervene on its behalf. Indeed, [Indy Mac's] actions toward [Yano-Horoski] in this matter have been harsh, repugnant, shocking and repulsive to the extent that it must be appropriately sanctioned so as to deter it from imposing further mortifying abuse against [Yano-Horoski]."[10]

In determining what the appropriate remedy should be, Justice Spinner was not assured that a dismissal of the action would stop Indy Mac from engaging in the very same conduct in the future. Justice Spinner also did not believe that the imposition of monetary sanctions would result in Indy Mac changing its conduct or would benefit Horoski. So, the trial court determined that the "appropriate equitable disposition under the

See FORECLOSURE, Page 23

CLINIC ...

Continued From Page 1

to increase daily on Long Island.

The bad news: Nassau County continues to have the third largest number of foreclosure cases in New York State, more than 10,000, and it looks like the mortgage foreclosure crisis isn't going away soon. In fact, it seems to be getting worse.

When I retired from being Chief Prosecutor of the Nassau County Traffic and Parking Violations Agency and came to the Nassau Bar, I thought I was changing to the side of the angels. What I did not realize, is that I would have at least one homeowner cry in front of me or on the telephone daily and thus would need a huge supply of tissues. These homeowners are from all walks of life, every income, every town in Nassau. They are in all stages of foreclosure, from fear of missing a payment due to job loss, to being behind and not paying anything for more than two years. They look like your parents, grandparents, neighbors and yourself. They are doctors, lawyers, mechanics, have children in college, or young babies. Granted, some have lived beyond their means, but the majority did not expect the current fiscal crisis or to lose their jobs or businesses or face major medical problems or see their homes' values diminish to less than their mortgage.

"A day doesn't go by that I don't deal with someone apprehensive about losing their home. Moreover, there is no sign of letting up. Our March clinic had the largest attendance to date, 60 homeowners."

For those of you not familiar with the Bar program, our mortgage foreclosure clinics are offered once a month to advise homeowners on the various alternatives available to them, free of charge. After first meeting one-on-one with an attorney, the client may be advised to try loan modification and speak with HUD certified housing counselors from the Nassau County Homeownership Center or Long Island Community Development Center, who are available at our clinic along with a volunteer bankruptcy attorney. It is my job to recruit volunteer attorneys for the clinic, usually 8-10, and at least one bankruptcy attorney. Additionally, we have expanded our outreach through BOLD (Bridge Over Language Divides) to those homeowners who prefer their native language. We now have at least one attorney who speaks Spanish fluently at each clinic, and for the last three months we have had an attorney who speaks Haitian Creole. We have between 2 to 10 non-English speaking residents at each clinic who are grateful for assistance in their own language. This month at our April 14 clinic, we are adding an attorney who speaks Russian.

In addition to the clinics, last year the Bar was asked to provide pro bono attorneys at all court-mandated foreclosure sessions (eight sessions a week, once on Tuesday and Friday and twice a day on Monday, Wednesday and Thursday) which are conducted in Supreme Court. To date, we have helped more than 4,000 families. Many have never been to court before and are fearful of just showing up. Before we became involved, often the bank attorney would advise the client, not an ideal situation. With our help, these people are not Strangers in a Strange Land without a guide. I recruit at least one attorney for each session to represent the homeowner in the meeting with the bank attorney. These wonderful volunteers not only help the homeowners but also do something for themselves. Some are retired, some out of work and some just want to do the right thing. I have a solid core of dedicated lawyers who willingly provide the needed legal support for these homeowners in these uncertain times.

In addition to the clinics and conferences, every day I answer homeowner telephone calls and advise occasional homeowners who just appear at the Bar and are desperate for help. On one such occasion, a couple who did not speak English came to the Bar two days before Christmas. They had been served with foreclosure papers and were terrified that they and their children would be locked out of their house for Christmas. When I assured them that it was a lengthy process, certainly it would take more than 72 hours, they broke down. I explained the process, helped them complete documents for the court, and told them to come to our next clinic, which they did. I wish I could say this is an uncommon occurrence, but over the last year a day doesn't go by that I don't deal with someone apprehensive about losing their home. Moreover, there is no sign of letting up. Our March clinic had the largest attendance to date, 60 homeowners.

We wouldn't be able to help calm these distressed residents without the commitment and caring of our volunteer lawyers. In the past two years, our NCBA attorneys have helped more than 1,000 homeowners at the clinics and more than 4,000 families in court of the approximately 14,000 foreclosures filed in just 2010 alone. We now have more than 200 volunteer lawyers on our roster.

Why do we do it? Because if lawyers do not help look out for the interests of these homeowners, our friends and neighbors, who will? We are the only ones who can step in this crisis situation and make an instant impact. Once I meet with someone who is deathly afraid of losing their home and can tell them exactly what is going on and what to expect, abating their fears, I see the relief on their faces. I have actually helped someone, not in theory, but in reality. This feeling of closure is something many lawyers don't get to see when working on a case for a client. Sure, I feel depressed seeing how many people in Nassau are fearful of their future, but I am grateful that I am able to give back and make such an important difference in their lives.

How can one not be moved by the relief and gratitude of those you have helped? Isn't that what our profession is based on, helping those who cannot help themselves? Any member of the Nassau County Bar Association can volunteer to help. Training is provided. For more information, contact Gale Berg at gberg@nassaubar.org or 516-747-4070.

In addition to her NCBA duties, Gale D. Berg private practice focuses on traffic, litigation and real estate matters.

Gale D. Berg is the Director of Pro Bono Attorney Activities for the Nassau County Bar Association.

NASSAU ACADEMY OF LAW

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GETTING THE DEAL CLOSED
BUSINESS ACQUISITION AND SALE CONSIDERATIONS
Monday, May 9, 2011
5:30-8:30 PM *Light Supper*

This presentation will provide a discussion of the "key" elements of a business acquisition or sale. The panel will describe both legal and financial considerations to buyers and sellers.

Learn how to protect your clients from litigation. Tax traps and strategies will be covered along with New York Bulk Sale requirements.

GET TO THE FINISH LINE AND BE A DEAL MAKER
- Overview: Participants and Roles
- Flow of the Transaction-The Process
- Price and Structure
- LOI/Offer to Purchase
- Financing
- Representations + Warranties
- Employee Retention
- Real Estate
- Negotiating & Drafting Documents & Select Partnership Issues

Panelists
Robert S. Barnett, Esq.
Capell, Barnett, Matalon & Schoenfeld, Jericho

Yvonne R. Cort, Esq.
Chair, NCBA Tax Law Committee
Karen J. Tenenbaum PC, Melville

Jeffrey A. Miller, Esq., Westerman Ball Ederer Miller & Sharfstein, LLP, Uniondale

Stuart H. Schoenfeld, Esq.
Capell, Barnett, Matalon & Schoenfeld, Jericho

Anthony J. Citrolo, CPA
NY Business Brokerage, Inc., Melville

Moderator
Robert S. Barnett, Esq.

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Wednesday, April 13, 2011
Sign-In 5 pm; Program 5:30-7:30

Learn how to challenge the things one used to take for granted.

Guest Speaker
Marvin E. Schechter, Esq., New York City
A well-known attorney specializing in criminal defense, he recently completed a term on the Board of the National Association of Criminal Defense Attorneys and is a past president of the New York State Association of Criminal Defense Attorneys. He co-authored "Strengthening Forensic Science in the United States: A Path Forward," issued by the National Research Council and was recently appointed to the New York State Forensic Science Commission. He is the Chair-elect of the NYS Bar Association's Criminal Justice Section for 2011-2013.

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William J. Kephart, Esq.
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Mary Ann Aiello, Esq.
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Abraham B. Krieger, Esq.
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Chris G. McDonough, Esq., Westbury

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Continued From Page 3

attorney and the real purpose for the "friending." Such activity would violate Ethics Rule 8.4 (c) (which prohibits a lawyer from engaging in conduct involving "dishonesty, fraud, deceit or misrepresentation") and Ethics Rule 5.3(b)(1) (which holds a lawyer responsible for the conduct of a non-lawyer employed by the lawyer if the lawyer directs, or ratifies conduct that would violate ethics rules if engaged by a lawyer. Finally, the "friending" through a third party violates Ethics Rule 4.1 which prohibits a lawyer from making a false statement of fact or law to a third person. Additionally these ethics rules extend to all parties and witnesses involved in the litigation with the exception of the attorney's own client.

However, the Committee agreed that there is no violation of the ethics rules if the attorney accesses and reviews the public pages of the adverse party's Facebook or other social network site to search for impeachment material. The ethics rules are not implicated because the attorney is not engaging in deception by accessing a public website that is available to anyone in the network, provided that the attorney did not employ deception in any other way (for example, employing deception to become a member of the network). The Committee observed that obtaining information about a party available in the Facebook (or other social website) profile is similar to obtaining information that is available in publically accessible online or print media, or through a subscription research service, and that is plainly permitted.

Nonetheless, what if Jack Hammer really wants to use material from the plaintiff's private pages? He may have a reasonable good chance through a motion to the court to compel the plaintiff to produce the material. In the recent case, *Romano v. Steelcase Inc.* 907 N.Y.S.2d 650 (NY SUPP, Suffolk County, 2010), the Suffolk County Supreme Court allowed information found on the plaintiff's private Facebook and MySpace pages to be used as impeachment material by the defendant. In this case, the plaintiff was suing the defendant over injuries sustained in an incident. The plaintiff claimed she was entitled to damages due to injuries that did not allow her to participate in certain activities and had affected her enjoyment of life. When the defendant reviewed the public portions of the plaintiff's MySpace and Facebook pages, it showed that the plaintiff had an active lifestyle and traveled to Florida and Pennsylvania during the time period she claimed that her injuries prohibited such activity. Thus, the defendant sought to question the plaintiff at her deposition regarding information on her social networking sites. When the plaintiff refused to disclose the information, the defendant served on the plaintiff a Notice for Discovery and Inspection requesting the authorization to obtain full access to the information on all of the plaintiff's private pages.

The Court noted that pursuant to the NY CPLR scope of permissible discovery, plaintiffs who place their physical condition in controversy may not shield from disclosure material which is necessary to the defense of the action. Accordingly, in an action seeking damages for personal injuries, discovery is generally permitted with respect to materials that may be relevant both to the issue of damages and to the extent of a plaintiff's injury, including a plaintiff's claim for loss of enjoyment of life. The Court found that the social website information sought by the defendant was both material and necessary to the defense of the action and/or could lead to admissible evidence. The Court observed that because the public portions of the plaintiff's social networking sites contained material that was contrary to her claims and deposition testimony, there was a reasonable likelihood that the private portions of her sites may contain further evidence such as information with regard to her activities and enjoyment of life, all of which the Court believed to be material and relevant to the defense of the action. The Court further noted that to permit a party claiming very substantial damages for loss of enjoyment of life to hide behind self-set privacy controls on a website, the primary purpose of which is to enable people to share information about how to lead their social lives, risks depriving the opposite party of access to material that may be ensuring a fair trial. Thus, the Court held that preventing the defendant from accessing the plaintiff's private postings on Facebook and MySpace would be in direct contravention to the liberal disclosure policy in New York State.

However, the Appellate Division, 4th Department upheld a lower court decision to deny a defendant's motion to compel a plaintiff to disclose photographs and allow access to the plaintiff's Facebook account in *McCann v. Harleysville Ins. Co. of N.Y.*, 910 N.Y.S 2d 614 (4th Dept. 2010). In this case, as distinguished from the *Romano* case, the defendant failed to establish a factual predicate with respect to the relevancy of the evidence, *i.e.*, there was no indication from the public pages on Facebook that the private pages would offer any evidence as to whether the plaintiff sustained a serious injury. The Court ruled that the defendant essentially sought permission to conduct a "fishing expedition" into the plaintiff's Facebook account based on the mere hope of finding relevant evidence.

Could the *Romano v. Steelcase* case be overturned by the higher courts? The Suffolk County Supreme Court noted that New York courts have yet to address whether there exists a right to privacy regarding what one posts on their on-line social networking pages such as Facebook and MySpace. However, whether one has a reasonable expectation of privacy in internet postings or e-mails that have reached the recipients has been addressed by the Second Circuit, which has held that individuals may not enjoy such an expectation of privacy. *See U.S. v. Lifshitz*, 369 F.3d 173 (2nd Cir. 2004). One may logically extend that ruling to social websites, in that the forums are websites where participants voluntarily disclose the information that they post. It is unlikely that courts will rule that a party has a reasonable expectation of privacy on his or her private pages since neither Facebook nor MySpace guarantee complete privacy on their privacy disclosures, which a party agrees to when they join the social site. For example, the Facebook security policy warns members "You post User Content ... on the Site at your own risk. Although we allow you to set privacy options that limit access to your pages, please be aware that no security measures are perfect or impenetrable." The security policy goes on to explain that when one uses Facebook, information may be shared with others in accordance with the privacy settings that are selected. All such sharing of information is done at the user's risk and the information may become publically available.

To summarize, the emergence of social websites presents ethical and legal challenges for attorneys. It is hoped that this article highlighted some of these challenges and helps guide attorneys (with cases similar to Jack Hammer) to make the right decisions as to the best methods to gather evidence that may be needed for litigation.

James Fiorillo is an associate at Bee Ready Fishbein Hatter & Donovan LLP. Comments or questions concerning this article can be emailed to jfiorillo@beereadylaw.com or jimfiorillo@optonline.net. He can be linked to through LinkedIn.

NOTICE ...

Continued From Page 7

Village of Monroe, 29 Misc.2d 683, 687 (2010), the court relied on a litany of opinions – including the Second Department's opinion in *San Marco* – to dismiss the complaint for lack of prior written notice. But by reversing the Second Department in *San Marco* and finding that prior written notice was not required the Court of Appeals has departed from precedent.

San Marco: The Exception to the Exception

On Saturday, February 5, 2005 at 8:15 a.m., Dale San Marco slipped and fell on black ice in a parking lot owned by the Village of Mount Kisco. She and her husband sued for negligence and Mount Kisco moved to dismiss, under Village Law § 6-628 and an identical provision in the village's own code, for lack of prior written notice.

The San Marcos argued that prior written notice was not necessary since Mount Kisco created the hazardous condition. The Supreme Court found this a triable issue and denied the motion. *San Marco v. Village of Mount Kisco*, 57 A.D.3d 874, 875 (2nd Dept. 2008).

The Second Department reversed. Applying *Yarborough* and *Oboler*, it held that the San Marcos would have to prove that Mount Kisco's negligence immediately created the hazardous condition. Based on the undisputed evidence as to the weather, the court held: "Such facts do not rise to immediate creation, as it was the environmental factors of time and temperature fluctuations that caused the allegedly hazardous condition, not the allegedly negligent creation of snow piles." 57 A.D.3d at 876–77.

The Court of Appeals reversed in a 4-3 decision, holding "that the immediacy requirement for 'pothole cases' should not be extended to cases involving hazards related to negligent snow removal." 2010 N.Y. Slip Op. 09197 at 3.

The Court reached this decision by shifting focus from the statutes themselves to "the general underlying purpose of prior written notice statutes," which is "to exempt the villages from liability for holes and breaks of a kind which do not immediately come to the attention of the village officers unless they are given actual notice thereof." 2010 N.Y. Slip Op. 09197 at 3 (quoting *Doremus v. Incorporated Vil. of Lynbrook*, 18 N.Y.2d 362, 378 (1966)).

The Court then justified the affirmative-negligence exception and the immediacy requirement as having "merely reinforced the object of prior written notice statutes," and held:

> [W]e find these statutes were never intended to and ought not to exempt a municipality from liability as a matter of law where a municipality's negligence in the maintenance of a municipally owned parking facility triggers the foreseeable development of black ice as soon as the temperature shifts.

2010 N.Y. Slip Op. 09197 at 3-4.

In dissent, Judge Smith conceded the affirmative-negligence exception, as well as the immediacy requirement. Replacing immediacy with foreseeability, however, "confuses the issue of written notice with the issue of negligence," he added, and found "no logical distinction between pavement-defect cases like *Oboler* and *Yarborough* and snow-and-ice cases like this one," noting that "The written notice requirements here apply by their terms to the "accumulation of snow and ice." 2010 N.Y. Slip Op. 09197 at 8 (Smith, J., dissenting).

Going Forward

San Marco is a departure from precedent, but does confine itself "to cases involving hazards related to negligent snow removal." 2010 N.Y. Slip Op. 09197 at 3. For now, the immediacy requirement still applies as before to other defects, including potholes.

For plaintiffs, this decision ensures that cases involving negligent snow removal will not be dismissed for lack of prior written notice. Of course, plaintiffs still must prove all the elements of a negligence case, and defendants can still assert comparative negligence or other available defenses.

The negligence issue might someday prove the more significant impact of this case. The San Marcos have alleged that Mount Kisco was negligent in piling snow alongside active parking spaces rather than removing snow from the lot entirely. If they prevail, then municipalities may face the dilemma of either paying to have snow carted away or risking increased exposure to injury litigation.

It is worth noting that *San Marco* involved the Village Law, which like the Pothole Law requires prior written notice of any hazardous condition. Contrast the Town Law, Second Class Cities Law, and Highway Law, which generally accept constructive notice but expressly require prior written notice where the injuries are "solely in consequence of the existence of snow or ice."

It is therefore at least possible that the Court of Appeals would hold differently in cases under those other laws. This seems doubtful, though, given the Court's emphasis on the general purpose of all such statutes as the Court defines it.

Judge Smith's concern about the confusion of immediacy and foreseeability may presage future developments. Is the weather really foreseeable, even enough to moot the requirement of immediacy? Are other precipitation-related hazards, like a rain-soaked boardwalk or a slush-covered lobby, less foreseeable than an iced-over parking lot? Is it any less foreseeable that a tree will one day grow to crack the adjacent sidewalk, or that a negligently patched pothole will reopen? Future litigants arguing from *San Marco* might lead the Court of Appeals one day to broaden its holding – or reconsider it altogether.

The affirmative-negligence exception is a settled doctrine. It is a judicial one, however, and therefore open to modification. *San Marco* significantly affects black ice cases against municipalities, but it might also lead to further expansion or contraction of liability. Counsel for all parties should tread cautiously; unlike black ice, the future of this doctrine is not foreseeable.

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

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We welcome the following new members

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Bernard C. Kass

VIEW from the BENCH

The Law of E-Discovery, Part II

By Hon. Arthur M. Diamond

As most of you movie goers know, the challenging part of doing a sequel is that it is usually hard to top the original. I promise I am going to do my best in Part II of the law of e-discovery after *Victor Stanley v. Creative Pipe Inc.* 250 FRD 251 (US Dist. Ct., D. Md., 2008). We left off pointing out that when lawyers supervise discovery in this era of electronic discovery, they are often placed in the dual role of attorney and witness; and when there is inadvertent waiver of the work product and attorney-client privilege during discovery under their watch, the results can be disastrous for both client and counsel.

Prior to *Victor Stanley*, Judge Grimm had decided the case of *Continental Casualty Co v. Under Armour*, 537 F. Supp. 2d 761 (U.S. Dist. Ct. D. Md. 2008). This was a declaratory judgment case where three insurance companies (known as CNA) sued their insured, the Under Armour Corp., seeking a ruling that under a series of insurance policies issued to the corporation they were under no obligation to defend or indemnify the company in a litigation brought by two companies against Under Armour. Judge Grimm had a series of discovery motions to decide in the case, and in one of them Under Armour asked for a ruling on what use it could make of a "pdf" file it received from its independent insurance broker which contained copies of claim notes which allegedly contained attorney-client and work product privileged information from CNA's counsel. The file had erroneously been posted in the wrong location by a CNA claims specialist assigned to Under Armour claims on a CNA central website. Here, the court held that when documents in question qualified as both attorney-client privileged and work product protected, the court must conduct a separate analysis under each theory to determine when inadvertent production constitutes a waiver. In *CNA* Judge Grimm held that by disclosing the content of what was protected opinion work product to its adversary CNA had waived the privilege. "As a practical matter, no other result makes sense... Neither Under Armour nor its counsel can purge from their consciousness this information that they received not through any wrongdoing of their own but, rather, as a result of the voluntary, though inadvertent, action of CNA." (*Continental Casualty Co v. Under Armour Inc.*, at 773)

Last column, I mentioned that there had developed three approaches to deciding "inadvertent waiver" cases-one strict, one liberal and one intermediate. Not surprisingly, the intermediate approach has gained the most traction in the districts. Under this test, Grimm wrote in *Victor Stanley II*, the court must balance the following five factors in determining whether inadvertent production of attorney-client privileged materials waives the privilege. They are:1) the reasonableness of the precautions taken; 2) the number of such inadvertent disclosures; 3) the extent of the disclosures; 4) any delay in measures taken to rectify the disclosures and 5) the ever popular interests of justice. (*Victor Stanley v. Creative Pipe, Inc.*, at 259). Recall that in *Victor Stanley* during discovery defense counsel had conducted a keyword search using seventy key words chosen by defendant and two attorneys. That search led to the creation of a several hundred documents, 165 of which were then inadvertently turned over during document exchange. At the hearing, the burden was on the defendant to persuade the court that the documents were protected by privilege and that privilege should not be deemed waiver by the mistake. Grimm began his inquiry with the first factor- the reasonableness of the precautions taken by the creator of the documents. According to his decision, the defendants failed to provide the court with the keywords that were used; why they were chosen; the credentials of the attorneys and client in terms of creating and executing the search; whether or not they analyzed the results of the search in order to determine its reliability, appropriateness and quality. As you read the decision you it will become clear that the decision in this case was not a difficult one for the judge. He held that the defendants had failed to demonstrate that the keyword search they utilized was reasonable, that the persons who conducted the search were qualified, and that there was any quality assurance testing. It was also significant that they had waived the court protection of a *Hopson* agreement as discussed above.

There is another aspect of *Victor Stanley II* that is important for attorneys who consider supervising discovery in cases such as this and that is the analysis Judge Grimm used in determining when the attorney-client privilege is properly asserted. The factors he considered are that the holder of the privilege is about to become a client; that the client communicated with a member of the bar and was acting as an attorney at the time; the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client. (*Victor Stanley v. Creative Pipe Inc.*, at 256).

After this decision, it is my view that an attorney who participates in electronic discovery to the extent that the attorney would be able to invoke the attorney-client privilege must be extremely careful about the manner in which that discovery is conducted. Be aware of the reasonableness test that Judge Grimm described. If you or your subordinates cannot meet that test, it is clear that the inadvertent dissemination of privileged materials will waive that privilege. See you next column.

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.

MOOT COURT ...

Continued From Page 1

annual Moot Court Competition was named in honor of Hon. Elaine Jackson Stack in recognition of her years of leadership, advice, and always reliable guidance in presenting the competition each year.

This year the law students argued a problem involving the validity of licensing statutes prohibiting employment of undocumented workers, whether or not citizenship can be granted to a child born abroad to parents, one of whom is a U.S. citizen and one of whom is a foreign national. The problem was written by Donna-Marie Korth, Stacey Ramis Nigro and Candace Gladston, all attorneys at Certilman Balin LLP.

Coordinated by Nassau Academy of Law staff Barbara Kraut and Patti Anderson, the Moot Court Competition involves dozens of volunteer judges, timekeepers and brief scorers during the two-day event. Traditionally, the final two teams face off in the Great Hall before a distinguished panel of sitting judges as well as the current NCBA president and current Dean of NAL.

Writing the problem for this year's Moot Court were Candace Gladston, Donna-Marie Korth and Stacey Ramis Nigro.

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Timekeepers

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Linda Dalton
Heather Martino

Special Thanks

Amy Hsu
Chandra Ortiz

IN BRIEF ...

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teen (17), who have been diagnosed with terminal or life threatening illnesses. The foundation has granted over 6,000 special wishes for boys and girls in eleven (11) states. Mr. Kuperschmid is active in the community and supports several charitable causes. An avid equestrian, he has been involved with Pal-O-Mine Equestrian, a therapeutic horseback riding program dedicated to teaching riding to individuals with disabilities. He is also involved with the LIKE (Lawyers Involved with Kids Education) program, which is affiliated with the Mentoring Partnership of Long Island. He mentors at-risk children at Walnut Elementary School in Uniondale. Mr. Kuperschmid earned his Juris Doctor from Fordham University School of Law.

Thomas D. Glascock, a real estate and corporate attorney at the Uniondale-based law firm of Forchelli, Curto, Deegan, Schwartz, Mineo, Cohn & Terrana, LLP, has been appointed to the Molloy College Business Advisory Council.

Reaz Jafri, a partner at Abrams, Fensterman, Fensterman, Eisman, Greenberg, Formato & Einiger, LLP and head of the Immigration & Nationality law practice, recently spoke at a conference on The Theology of Work and the Dignity of Workers at St. John's University School of Law. Mr. Jafri concentrates his practice on all aspects of immigration law and regulatory compliance.

Howard M. Tollin was recently appointed to Aon's Global Environmental Practice Executive Committee. Mr. Tollin is also the company's Northeast Managing Director for providing environmental risk management programs. He will serve as the NYSBA Environmental Section Delegate to the NYSBA House of Delegates and also serves on the NYSBA Committee on Membership, Board of Directors for non-profit New Partners for Community Revitalization, the Editorial Advisory Board for the Environmental Claims Journal and the Advisory Board for the WISE Program at Stony Brook University.

Steven A. Horowitz, a partner at Moritt Hock & Hamroff LLP, has been named the honoree at the upcoming Family Service League's 15th Annual Golf Classic to be held on Monday, June 27, 2011 at the Huntington Crescent Club. Mr. Horowitz has long been active with the Huntington-based Family Service League, one of Long Island's leading social services agencies. The Family Service League was founded in 1926 and is a not-for-profit, community based human service agency that assists more than 47,000 people each year.

Adam E. Small, was recently recognized by the Touro Law Center as one of the 2011 Public Interest Attorneys of the Year for the public interest legal work he does for the Suffolk County Coalition Against Domestic Violence. Mr. Small has been a consultant for that agency since 2000.

Alan E. Weiner, partner emeritus at Holtz Rubenstein Reminick, will be honored with The New York State Society of Certified Public Accountants' Distinguished Service Award at the Society's 114th Annual Election Meeting and Dinner at the Marriott Marquis in New York City. The award recognizes certified public accountants for their outstanding and dedicated service. Mr. Weiner served as the Society's president, treasurer and as a member of its Board of Directors and Executive Committee and has also chaired the Society's Tax Division Oversight, Partnerships and LLCs and Awards committees and its Tax Simplification task force. Mr. Weiner is the founder of the Long Island Accountants Blood Bank Drive.

David S. Feather, of the Law Offices of David S. Feather located in Garden City, recently lectured to the Staten Island BUCKS Business Network about federal and state employment and labor laws as applied to small- and medium-sized employers.

Stephen J. Ginsberg, an associate at Moritt Hock & Hamroff LLP, was recently elected to serve on the Board of Directors of the Multiple Sclerosis Research Center of New York. The Center is an independent, private, not-for-profit research entity dedicated exclusively to research into the cause, treatment and remedy of MS. The Center grew out of the former MS Research and Treatment Center at New York's St. Luke's-Roosevelt Hospital Center. Mr. Ginsberg concentrates his practice in commercial litigation. In addition to his practice, Mr. Ginsberg, who earned his Juris Doctor, cum laude, from New York Law School and his M.B.A. from Florida Atlantic University, serves on the Board of Trustees of the Multiple Sclerosis Society, Long Island Chapter.

Thomas A. Telesca, an associate at Ruskin Moscou Faltischek, P.C., has been named an adjunct professor at the Molloy College campus in Rockville Centre. Mr. Telesca, who concentrates his practice on general commercial litigation and construction and real estate-related matters, will be teaching an introductory civil litigation course.

Vishnick McGovern Milizio LLP recently hosted a Dinner Dance & Auction to support the National Multiple Sclerosis Society – Long Island Chapter. The event raised $12,000 that will be used to help underwrite programs for people on Long Island who suffer from the debilitating effects of Multiple Sclerosis. The firm's managing partner **Joseph G. Milizio** is the Chapter's most recent past Chairman of the Board and current board member.

New Partners, Of Counsel and Associates

Stephen P. Scaring has been named Of Counsel to the firm Meyer, Suozzi, English & Klein, P.C. Mr. Scaring, who earned his Juris Doctor from The Catholic University of America School of Law, served as an Assistant District Attorney and Chief of the Homicide Bureau in Nassau County, as well as a Special Prosecutor in Suffolk County. He also has served as an Associate Professor of Law and Psychiatry at C. W. Post College. In addition, Mr. Scaring has been selected by the New York Times to its top 100 List of Super Lawyers in the New York Metropolitan area for the past four (4) years and was the 2008 selection of the New York State Bar Association for the Charles F. Crimi Memorial Award for Outstanding Defense Practitioner. Mr. Scaring is also a Fellow of the American College of Trial Lawyers.

Michael P. Pasternack has joined Farrell Fritz, P.C. as healthcare counsel. Mr. Pasternack is former General Counsel and Compliance Officer at St. Mary's Healthcare System for Children in Bayside and Associate General Counsel at Catholic Health Services of Long Island. He also serves as a Volunteer Attorney Panelist for the Surrogate Decision-Making Committee of the New York State Commission on Quality of Care and Advocacy for Persons with Disabilities. Mr. Pasternack earned his Juris Doctor from Touro College Jacob D. Fuchsberg Law Center.

Claudio A. De Vellis has joined Smith, Gambrell & Russell as a partner in the firm's Estate Planning and Wealth Protection Practice. Mr. De Vellis concentrates his practice on estate, gift and generation skipping transfer tax planning for individuals, closely held business owners and charitable organizations. Prior to becoming an attorney, Mr. De Vellis, who earned his BBA from Hofstra University and his J.D. from Brooklyn Law School, practiced in New York City as a certified public accountant.

Andrew M. Roth has become associated with the firm of Sahn Ward Coschignano & Baker. Mr. Roth concentrates his practice in complex commercial litigation. Mr. Roth earned his Juris Doctor from the University of Bridgeport.

Justin B. Lieberman has joined the firm DePinto Nornes & Associates, LLP as an associate.

New Firms and Locations

Erik M. Bashian and **Andreas Papantoniou** recently established the boutique firm of Bashian & Papantoniou, P.C., located at 500 Old Country Road, Suite 302, Garden City. Mr. Bashian concentrates his practice in business disputes and real estate matters. Mr. Papantoniou concentrates his practice in the areas of real estate and commercial transactions.

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

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TAX ID ...

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or the District of Columbia. A certified public accounting firm is a partnership, professional corporation, sole proprietorship, or any other association that is registered, permitted, or licensed to practice as a certified public accounting firm in any state, territory, or possession of the United States, including a Commonwealth, or the District of Columbia.

Individuals applying for a PTIN under this provision will be required to certify on the PTIN application that they are supervised by an attorney, certified public accountant, enrolled agent, enrolled retirement plan agent, or enrolled actuary who signs the tax return or claim for refund prepared by the individual and provide a supervising individual's PTIN or other number if prescribed by the IRS. If at any point

the individual is no longer supervised by the signing attorney, certified public accountant, enrolled agent, enrolled retirement plan agent, or enrolled actuary, the individual must notify the IRS as prescribed in forms, instructions, or other appropriate guidance and will not be permitted to prepare, or assist in preparing, all or substantially all of a tax return or claim for refund for compensation under this provision. Individuals who obtain a PTIN under this provision and prepare, or assist in preparing, all or substantially all of a tax return or claim for refund for compensation will not be subject to a competency examination or continuing education requirements. These individuals, however, may not sign any tax return they prepare or assist in preparing for compensation, represent taxpayers before the IRS in any capacity, or represent to the IRS, their clients, or the general public that they are a registered tax return preparer or a Circular 230 practitioner.

Although individuals who obtain a PTIN under this provision are not practitioners under Circular 230, they are, by preparing, or assisting in the preparation of, a tax return for compensation, acknowledging that they are subject to the duties and restrictions relating to practice in subpart B of Circular 230."[5]

Note that the employee who is eligible under the above rule will be subject to a compliance check sometime in the future. As a matter of fairness, the employer-law/certified public accounting firm should notify the tax return preparing employee of this.

New York State recently conformed its tax preparer registration[6] rules to the IRS rules described above, at least as to legal and certified public accounting firms.

This article is limited to what it says. It has been designed to be of use to legal and certified public accounting firms and is limited to the content contained therein. Other tax return preparers should refer to the Notice 2011-6 for information that would be of use to them.

Some miscellaneous notes:

a. The IRS is considering a calendar-year renewal schedule (instead of using the anniversary date of the preparer's initial registration) for the annual PTIN renewals and, for those preparers who will be required to take IRS-approved continuing education courses, it is expected that it will take effect January 1, 2012.[7]

b. On January 24th, the IRS announced guidance[8] for tax preparers who have made a good faith effort to obtain or renew a PTIN and have been unsuccessful. According to the notice, the IRS will notify these tax preparers and allow them to either use an old PTIN or a social security number (if the preparer has not previously had a PTIN) as an identifying number on returns they prepare. Once the preparer receives his/her new PTIN, he/she must commence to use the new number. Preparers using the aforementioned alternative method must retain any correspondence received from the IRS as evidence of their good faith compliance.

c. The report of the Treasury Inspector General for Tax Administration (informally known as TIGTA) determined that it will take at least three years for the PTIN program to become fully functional.[9]

"And now you know … the rest of the story." (as Paul Harvey always would say).

Alan E. Weiner, CPA, JD, LL.M. is Partner Emeritus of the CPA firm of Holtz Rubenstein Reminick LLP, with offices in New York City and Melville, Long Island. He is active on the tax committees of the Nassau and Suffolk County Bar Associations, and the New York State Society of CPAs.

1. Shelley Dockstader, IRS National Account Manager for Electronic Administration, March 3, 2011, during a conference call with payroll industry professionals. Tax Notes, March 7, 2011, page 1138.
2. http://www.irs.gov/taxpros/article/0,,id=218611,00.html This is current as of March 4, 2011. It also can be found at www.irs.gov under the Tax Professionals tab.
3. http://www.irs.gov/irb/2011-03_IRB/ar11.html Internal Revenue Bulletin 2011-3, January 17, 2011.
4. *Ibid*, Section 1.02 (a)
5. *Ibid*, Section 1.02
6. http://www.tax.ny.gov/pdf/publications/income/pub58.pdf New York State Information for Income Tax Preparers, Publication 58, January 2011 edition, pages 5-6.
7. *See* footnote 1, *supra*.
8. Notice 2011-11, http://www.irs.gov/pub/irs-irbs/irb11-07.pdf Internal Revenue Bulletin 2011-7, February 14, 2011
9. http://www.treasury.gov/tigta/auditreports/2010reports/201040127fr.html Audit Report No. 2010-40-127, September 30, 2010, released February 2, 2011.

EXEMPTION LAW ...

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well as the corresponding or related Bankruptcy Code exemption in light of DCL section 285. Certain provisions list numerous exempt items, therefore where there has been no change with respect to a particular item it was omitted from the chart, *e.g.*, CPLR § 5205(a)(1)'s exemption of a sewing machine.

It is important for attorneys practicing in the area of bankruptcy to be fully knowledgeable of these recent changes, their effect and their proper use. In representing debtors, it is crucial to provide for the debtors maximum available exemptions. Having to compare and contrast the federal exemptions with the applicable exemptions allowed under New York State law will add an extra layer of attorney review when representing debtors. Trustees will undoubtedly be more watchful of these changes and the exemptions available.

Joseph S. Maniscalco is a Partner at LaMonica Herbst & Maniscalco, LLP concentrating in bankruptcy litigation and commercial business transactions. Rachel Corcoran is an associate in the bankruptcy department.

1. 1850 N.Y. Laws Ch. 260.
2. 15 N.Y. 489, 494 (1857).
3. 552 F.3d 253, 260 (2d Cir. 2009) (quoting *Robinson* and noting that "[c]ourts have long recognized the strong policy considerations underlying New York's exemption statute").
4. *See Morse v. Goold*, 11 N.Y. 281, 289 (1854) ("The propriety of exempting certain articles of small value, but which were considered important to the comfort of the family of the debtor, was engrafted upon the law of the state from before the revision of 1813, and the list of exempt articles has been from time to time increased down to the passage of the act of 1842[.]"); *see also New York v. Avco Financial Service, Inc.*, 50 N.Y.2d 383, 387-88 (1980) (discussing New York's personal property exemption law, noting that "[f]rom its inception, this statute – along with its venerable antecedents – has embodied the humanitarian policy that the law should not permit the enforcement of judgment to such a point that debtors and their families are left in a state of abject deprivation").
5. 1962 N.Y. Laws ch. 308 (effective Sept. 1, 1963).
6. 1969 N.Y. Laws ch. 961 (effective Jan. 1, 1970).
7. 1977 N.Y. Laws ch. 181 (effective Aug. 22, 1977).
8. *Id.* at § 2.
9. 2005 N.Y. Laws ch. 623 (effective Aug. 30, 2005).
10. CFCU Community Credit, 552 F.3d at 263.
11. *Id.* at 263 (quoting N.Y. Spons. Memo., 2005 A.B. A8479).
12. *Id.* at 265.
13. 11 U.S.C. § 522(b).
14. 1982 N.Y. Laws ch. 540 (effective Sept. 1, 1982).
15. N.Y. Debtor & Cred. L. § 284.
16. 1982 N.Y. Laws ch. 540.
17. *Id.*
18. N.Y. Debtor & Cred. L. § 285 (effective January 21, 2011).
19. 11 U.S.C. § 522(b)(1) (permitting an individual debtor to exempt property listed under section 522(d) "or, in the alternative," property exempt under applicable state law); *see In re* Applebaum, 422 B.R. 684 (B.A.P. 9th Cir. 2009) ("A debtor cannot pick or choose among these option: he or she must elect the exemptions authorized by state law, or elect those afforded in § 522(d).").

NY Statute	Pre-January 21, 2011	Post-January 21, 2011	Bankruptcy Code
DCL § 282(1)	Exempting one motor vehicle less than $2,400 in value.	Increasing exemption to $4,000, unless vehicle is equipped for use by disabled debtor, in which case, increased to $10,000.	§ 522(d)(2), exempting vehicle up to $3,225.
DCL § 282 (2), (3)	Exempting right to receive certain benefits and property, including payment on account of personal injury up to $7,500.	No change.	§ 522(d)(10) and (11), exempting similar list of rights to receive benefits and property, but permitting exemption of $20,200 payment on account of personal injury.
DCL § 283(1)	Capping aggregate total of exemptions claimed under CPLR § 5205 at $5,000.	Increasing cap to $10,000.	§ 522(d)(3), exempting household goods, clothing, appliances, books, animals, etc., at $525 per item or $10,775 total.
DCL § 238(2)	Permitting a debtor that does not avail himself of the homestead exemption, but uses Section 5205 exemptions to the fullest extent without reaching the 283(1) cap, to exempt cash in the amount by which $5,000 exceeds the aggregate of the 5205 exemptions claimed.	Increasing cash exemption to amount by which $10,000 exceeds claimed § 5205 exemptions.	§ 522(d)(5), exempting interest in any property up to $1,075 plus up to $10,125 of any unused amount of homestead exemption under 522(d)(1).
DCL § 284	Opting out of federal bankruptcy scheme of exemptions.	N/A	§ 522(b)(2), permitting states to opt out of federal scheme.
DCL § 285	N/A	Permitting NY debtors to use federal scheme of exemptions, in place of NY exemption scheme.	–
CPLR § 5205(a)(1)	Exempting all stoves and necessary fuel for 60 days.	Exempting all stoves and necessary fuel for 120 days.	§ 522(d)(3).
CPLR § 5205(a)(2)	Exempting the "family bible" and various pictures and books used by the debtor and his family, not to exceed $50.	Exempting "religious texts" and various pictures and books used by the debtor and his family, not to exceed $500.	§ 522(d)(3).
CPLR § 5205(a)(3)	Exempting a seat or pew at debtor's house of worship.	No change.	§ 522(d)(3) possibly applicable.
CPLR § 5205(a)(4)	Exempting domestic animals with necessary food for 60 days, not to exceed $450, and all necessary food for debtor and his family for 60 days.	Exempting domestic animals with necessary food for 120 days, not to exceed $1,000, and all necessary food for debtor and his family for 120 days.	§ 522(d)(3).
CPLR § 5205(a)(5)	Exempting wearing apparel and various appliances.	Adding to list one cellphone, one computer and associated equipment, and prescribed health aids.	§ 522(d)(3).
CPLR § 5205(a)(6)	Exempting a wedding ring; and a watch not to exceed $35.	Exempting a wedding ring; and a watch, jewelry and art not to exceed $1,000.	§ 522(d)(4), exempting aggregate interest in jewelry up to $1,350.
CPLR § 5205(a)(7)	Exempting working tools and implements, not to exceed $600, together with necessary food for a team of horses for 60 days.	Increasing tools of the trade exemption to $1,000 and necessary food for a team to 120 days.	§ 522(d)(6), exempting implements, professional books and tools of the trade up to $2,025.
CPLR § 5205(a)(8)	N/A	Exempting one vehicle up to $4,000 unless vehicle is equipped for use by disable debtor, in which case increased to $10,000. No exemption if debt enforced is for alimony, maintenance, child or spousal support.	§ 522(d)(2), exempting vehicle up to $3,225.
CPLR § 5205(a)(9)	N/A	Providing that if no homestead exemption is claimed, may exempt $1,000 in cash.	§ 522(d)(5), exempting interest in any property up to $1,075 plus up to $10,125 of any unused amount of homestead exemption under 522(d)(1).
CPLR §§ 5205(b)–(o)	Exempting variety of personal property.	No change.	–
CPLR § 5206	Exempting homestead up to $50,000 for the following types of property: "1. a lot of land with a dwelling thereon, 2. shares of stock in a cooperative apartment corporation, 3. units of a condominium apartment, or 4. a mobile home."	Increasing homestead exemption for same 4 types of property as follows: $150,000 – Kings, Queens, New York, Bronx, Richmond, Nassau, Suffolk, Rockland, Westchester, and Putnam. $125,000 – Dutchess, Albany, Columbia, Orange, Saratoga, and Ulster. $75,000 – All remaining counties.	§ 522(d)(1), exempting personal residence up to $20,200.

WE CARE

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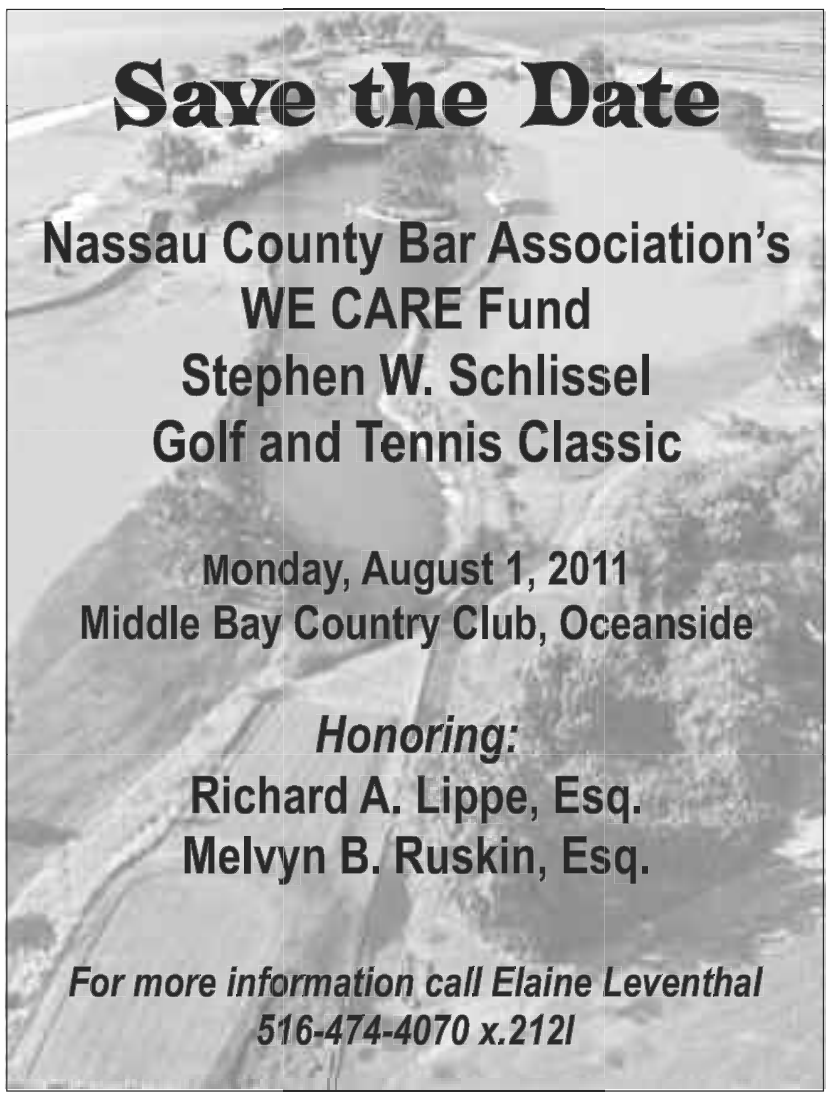

FORECLOSURE ...

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unique facts and circumstances presented" was the cancellation of the indebtedness and a discharge of the underlying mortgage, as well as prohibiting Indy Mac from enforcing the Mortgage or Note and vacating the Judgment of Foreclosure and Sale, which was ordered to be done.[11]

According to the New York Post, this was a "bombshell" decision which cancelled the mortgage debt owed to the "ruthless" bankers.[12] Judge Spinner was called a hero and praised by commenters on the Internet.[13] The decision was said to offer possible relief to the millions of others behind in their mortgages,[14] a harbinger of "the changing tide against mortgagees, lenders and banks" which demonstrated that judges would no longer tolerate improprieties in the mortgage foreclosure process.[15]

Nearly a year to the day after Justice Spinner's decision in *Yano-Horoski*, the Second Department issued an unsigned opinion on Indy Mac's appeal in *IndyMac Bank F.S.B. v. Yano-Horoski*, 78 A.D.3d 895 (2d Dep't 2010). In the decision, the Appellate Division reversed Justice Spinner, stating that the "severe sanction" of cancelling the mortgage and note "was not authorized by any statute or rule," and that Indy Mac was not given "fair warning that such a sanction was even under consideration." Going to the heart of the lower court's ruling, the Second Department further held that the lower court was wrong in claiming that its equitable powers allowed it to cancel the mortgage and note as "there was no acceptable basis for relieving the homeowner of her contractual obligations to the bank," especially after the judgment of foreclosure and sale had already been issued. Two cases were cited as support for this holding, *First Natl. Stores Inc. v. Yellowstone Shopping Center, Inc.*[16] and *Levine v. Infidelity, Inc.*[17] Yellowstone makes it clear that contractual rights trump equitable ones. "Stability of contract obligations must not be undermined by judicial sympathy."[18] Applying this to *Yano-Horoski*, the fact that Ms. Yano-Horoski had a contractual obligation to repay Indy Mac cannot be undermined by her personal issues and her plight in attempting to work out her debt. *Levine* reiterates the long standing principle that a mortgagor can only be

relieved of its default in limited circumstances. Such circumstances, however, include bad faith and oppressive or unconscionable conduct on the part of the mortgagee. Despite Justice Spinner detailing Indy Mac's failings throughout the foreclosure process, the Second Department was not persuaded that such actions warranted cancellation of the underlying debt. As a result, the mortgage, note, judgment of foreclosure and sale and the notice of pendency were all reinstated.

By focusing on the remedy of cancellation of the mortgage, note and judgment of foreclosure and sale as ordered by Justice Spinner, the Appellate Division left the door open for other remedies to withstand scrutiny. In *Emigrant Mortgage Co. v. Corcione*,[19] Justice Spinner canceled all interest and imposed punitive damages against the lender of $100,000.00. Justice Spinner also awarded punitive damages against the lender in *Wells Fargo v. Tyson*.[20] In *BAC Home Loans Servicing v. Westervelt*,[21] after the lender failed to appear for a conference, the court barred the lender's collection of interest and arrears from the date the homeowner received correspondence she was not qualified for a loan modification and the lender refused to consider the basis for the homeowner's objection that denial. As each of these cases leaves the underlying contractual obligation intact, they would likely not be reversed on the basis of the Appellate Division's holding in *Yano-Horoski*. The same could be said for any remedy fashioned by a judge against a lender which leaves the mortgage and note intact, even if that remedy strikes hard at the lender's pocketbook. As such, the Second Department has simply removed one weapon from a Judge's arsenal to keep lenders in line when dealing with homeowners during the foreclosure process.

Douglas M. Lieberman is a partner in the general practice firm of Markotsis & Lieberman, P.C., located in Hicksville, whose particular practice focuses on litigation and transactional work.

1. *Yano-Horoski* at 718.
2. *Id.* at 718.
3. *Id.* at 718-19.
4. *Id.* at 719.
5. *Id.* at 719.
6. *Id.* at 720.
7. *Id.* at 720-21.
8. *Id.* at 721.
9. *Id.* at 722.
10. *Id.* at 724.
11. *Id.* at 724-25.
12. "Judge Blasts Bad Bank, Erases 525G Debt," New York Post, November 25, 2009.
13. NYJudges ROCK!!Indymac Bank F.S.B. v. Yano-Horoski, http://livinglies.wordpress.com/2009/11/20/ny judges rock indymac bank f s b v yano horoski/, November 20, 2009; Cracking Down on Destructive Lenders, http://blogs.reuters.com/felix salmon/2009/11/27/cracking down on destructive lenders/, November 27, 2009.
14. Judge Wipes Out $500,000 Debt to Punish "Repulsive" Bank, http://www.timesonline.co.uk/tol/news/world/us_and_americas/article6932535.ece, November 26, 2009.
15. Judge Cancels Mortgage Due to Mortgagee's Shocking Behavior in Long Island Foreclosure Action, http://longislandbankruptcyblog.com/judge cancels mortgage due mortgagees shocking behavior long island foreclosure action/, November 24, 2009.
16. 21 N.Y.2d 630 (1968).
17. 285 A.D.2d 629 (2d Dep't 2001).
18. *Yellowstone* at 638, citing, *Graf v. Hope Bldg. Corp.*, 254 N.Y. 1, 4 (1930).
19. 28 Misc.3d 717 (Sup. Ct. Suffolk Co. 2010)
20. 27 Misc.3d 684 (Sup. Ct. Suffolk Co. 2010).
21. 29 Misc.3d 1224(A), 2010 WL 4702276 (Sup. Ct. Dutchess Co. 11/18/10).

LLC ...

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a limited liability company. The Articles of Organization contained the statutory minimum requirements.[3] This entity was therefore a member-managed LLC, which is the statutory default if the Articles of Organization do not state that it is to be manager-managed.[4] The members never adopted an operating agreement. Each of the two members contributed $100,000 to the LLC. The LLC purchased a vacant parcel of real property with the intent to obtain zoning approval for the construction of a commercial building on the property. Two and a half years later, after the expenditure of considerable time and talent, the parcel was ready for development. In order to obtain capital to continue the project, the LLC took in Member 3, who contributed $300,000 to the LLC. The three LLC members signed a one page agreement stating that they were equal (1/3) owners of the LLC. Members 1 and 2 assumed that distribution of profits, distribution upon dissolution, and control of the LLC would be based on ownership, *i.e.*, each Member with an equal share.

When the construction of the commercial building was halted due to the economy, reality set in. Member 3 advised the other members that he had sought the advice of counsel and was advised that his $300,000 contribution to the LLC – compared to the combined $200,000 in contributions from the other two Members – entitled him to sixty percent (60%) of the voting power and sixty percent (60%) of the distributions of profits and sixty percent (60%) of any residuary distributions upon dissolution of the LLC. To everyone's chagrin (except perhaps Member 3), he may be right. The rights of the members are far from clear. This lack of clarity is due to the permissive language of the LLCL, its default provisions and the dearth of court opinions interpreting these aspects of the LLCL.

Under LLCL §503, except as provided in the operating agreement, profits and losses are allocated on the basis of the value of the contributions (not necessarily the capital account) of each member to the LLC (as reflected in the records of the LLC if so stated). Identical language is used for the apportionment of distributions under LLCL §504.

LLCL §704 provides for the order of distribution of assets upon liquidation of an LLC. Pursuant to this statute, except as set forth in the operating agreement, distributions will first be made to creditors of the LLC other than members, then to members of the LLC in satisfaction of certain liabilities and the balance is to then be distributed among the members first to return unreturned capital contributions and then in proportion to their distributions, as determined in LLCL §504. Finally, according to LLCL §402, the voting rights of the members in a member-managed LLC are exercised in proportion to each member's share of the current profits of the LLC, as set forth in §503, unless the operating agreement provides otherwise.

The result of these statutory defaults is that voting rights, profits (and losses), and distributions are all based on the proportion of each member's contributions, as stated in the records of the LLC, if so stated. The statutory defaults are not based on a member's ownership percentage. LLCL §102(f) defines "Contribution" as "any cash, property, services rendered, or a promissory note or other binding obligation to contribute cash or property or to render services that a member contributes to a limited liability company in his or her capacity as a member." Of further interest is LLCL §501, which states "the contribution of a member to the capital of a limited liability company may be in cash, property or services rendered …." While these provisions authorizing services to be included as a contribution suggest that Members 1 and 2 may have a valid claim that the services they provided in finding and purchasing the property and shepherding the parcel through the zoning process should be valued as contributions such that each of their contributions to the company is greater than the cash contributed, the reality is that unless the contribution is valued and is so stated in LLC's records, there is no clear answer whether this argument will be successful. The LLCL does not provide any guidance (or penalty) if the contributions to the LLC are not stated on LLC's records as required by LLCL §1102(a) (2).[5] If the LLC's current records only reflect contributions in terms of cash and not the value of prior services, the position of Members 1 and 2 may be significantly weakened. The members have "bought" litigation.

There are no current cases dealing with this specific issue, *i.e.*, the interpretation of "contributions" as set forth in LLCL §§ 503, 504, and 102(f) in the absence of an operating agreement. The one case which decided somewhat similar issues is *KSI Rockville, Inc. v. Eichengrun*.[6] In *KSI Rockville*, the managing member of an LLC argued that because he was entitled to payment for his services on behalf of the LLC, a portion of what would be due to him for his services fulfilled his initial capital contribution requirements (which were required to be in cash) such that he should be entitled to distributions under LLCL §704 upon the dissolution of the company. The company at issue in KSI Rockville had an operating agreement, but it was unclear as to whether services were an acceptable way to fulfill the contribution requirements. The court found that the operating agreement was ambiguous: one section stated that contributions could be made in the form of cash, property and/or services while another section stated that only cash and/or the fair market value of property was acceptable as his initial capital contribution. The court noted that the record contained no evidence that the members had consented to the payment for the services, or that such a potential payment could be used to satisfy his contribution requirement. Since the managing member had drafted the agreement, the court construed the ambiguity against him, and held that the services he provided did not constitute a contribution.

While this case is not directly on point with the situation facing Members 1 and 2, the decision does help to define what a court will look to in determining the contributions of members of an LLC. In *KSI Rockville*, the managing member had assumed that the payment for his services would be credited to his capital account, yet the records of the limited liability company did not reflect that the services provided by the managing member constituted a contribution of the member to the LLC. Using *KSI Rockville* as a cautionary tale, if members intend that services are to be included in the determination of contributions or capital, it is crucial that the operating agreement be clear on this point and the value of such services be memorialized on the records of the LLC. If an LLC does not have an operating agreement or the operating agreement is such that the LLCL statutory default provisions are applicable so that services rendered could be one of the measures of contributions to the LLC, it is strongly recommended that any such services be valued and recorded in the records of the LLC. It is in this way that the records of the LLC will accurately reflect the contributions of the various members and the results intended will be the results.

If the statutory default provision in regard to any of the sections of the LLCL referred to above is not to govern an LLC's operations, then the operating agreement must clearly provide otherwise. If the operating agreement provides that management, distribution of profits and losses and/or distribution in liquidation are to be governed by the members' percentage of ownership of the LLC, then that language will govern the operation of the LLC since it overrides the statutory default.

One lesson to be learned from this all too common business arrangement is that Members 1 and 2 will be forced to litigate to determine their rights, the result of which is uncertain. By forming an LLC and failing to adopt a written operating agreement which could have overridden the statutory defaults, they may be in a position where Member 3 will be entitled to sixty percent (60%) of the profits, sixty percent (60%) of any distributions upon dissolution and, perhaps more importantly, sixty percent (60%) of the voting rights. This result was never envisioned by Members 1 and 2.

The drafting of an operating agreement is extremely important and requires more care than many practitioners give to it. The practitioner must understand the statutory defaults contained in the LLCL and, in particular, those defaults that his clients do not intend to govern their limited liability company. A carefully constructed operating agreement is the cornerstone for carrying out the intent of the members establishing the LLC.

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1. N.Y. LLCL §417.
2. *Spires v. Casterline*, 4 Misc. 3d 428 (Sup. Ct., N.Y. Co. 2004).
3. N.Y. LLCL §203(e).
4. N.Y. LLCL 401(a)
5. LLCL 1102 (a)(2) a current list of the full name set forth in alphabetical order and last known mailing address of each member together with the contribution and the share of profits and losses of each member or information from which such share can be readily derived;
6. *KSI Rockville, Inc. v. Eichengrun*, 305 A.D.2d 681 (2d Dept. 2003).

WAGE THEFT ...

Continued From Page 11

be liable for damages equaling $50 for each work week during which the violation occurred, up to a maximum of $2,500, in addition to injunctive relief, costs and attorney's fees. Similarly, an employer who fails to provide their employees with compliant wage statements, under Section 195.3, will be liable for damages in the amount of $100 per week for the duration of the violation, up to a maximum of $2,500, plus costs and attorney's fees. However, an employer may avoid liability if it can establish that (1) it furnished complete and timely payment of all wages due to its employees or (2) it reasonably believed in good faith that it was not required to comply with the annual and new hire notice requirements and/or provide its employees with wage statements.

The WTPA also amends Labor Law § 198(1)(a) to increase the potential liquidated damages available to an employee for a violation of various provisions of the Labor Law. In particular, the WTPA authorizes liquidated damages of up to 100% of the total amount of wages due, unless an employer can affirmatively prove that it had a good faith basis for not complying with the law.

The WTPA enhances the criminal penalties that may be imposed on an employer, or the officer or agent of any corporation, partnership, or limited liability company who knowingly fail to abide by the State's minimum wage and overtime laws. Indeed, an employer may be guilty of a misdemeanor and, if convicted, may be fined between $500 and $20,000 or face one year imprisonment. In the event that a second offense occurs within six years of the date of conviction for a prior offense, the employer may be guilty of a felony and, if convicted, may face fines between $500 and $20,000 or imprisoned for not more than one year plus one day.

In addition, the WTPA increases the penalties assessed against employers who retaliate against employees who reasonably and in good faith file a complaint concerning a violation of the State's wage laws. An employee who is retaliated against for filing a complaint may be entitled to reinstatement, back pay and front pay. The employer may also be fined $10,000 for engaging in retaliation.

Next Step for Employers

Since the penalties for non-compliance are severe, employers should start reviewing their internal practices and polices now in order to take the affirmative steps necessary to ensure future compliance.

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TRANSFERENCE ...

Continued From Page 5

have rapidly fluctuating and self-destructive behaviors, changing their views of the therapist as "all-good" or "all-bad" on a frequent basis. Clients exhibiting narcissistic features may initially idealize therapists as all-knowing, but later respond with rage or in a highly critical manner to the clinician's comments. When working with these patients, therapists need to contain their own strong reactions and reflect on the underlying meaning and context of the communications.

In a therapeutic model that stresses the reenactment of maladaptive interpersonal patterns, the therapist's very presence and stability can help the patient perceive new ways of relating to others. The therapist must fully enter the patient's world to engage in transference-countertransference reenactments. Then the therapist must disengage from that dynamic in order to observe, process, and interpret what has taken place. The effective therapist balances active participation in the treatment dialogue with observation of the passionate undercurrent of the countertransference (Gordon, Aron, Mitchell, & Davis, 1998).[8] Ultimately, the therapist should present the information back to the patient in ways he or she can understand, opening a dialogue towards the development of insight and behavioral change.

Lawyers, Clients and the Transference of Emotion

While attorneys and clients do not enter attorney-client relationships with the intention of engaging in psychotherapy, the dynamic can invite transference and countertransference feelings.[9] Clients approach attorneys with high stakes problems and reveal confidential information, at times of a personal or disturbing nature. The client presumes that the attorney is the repository of special and valuable information, *i.e.*, "the law." The client may feel responsible for having caused the "legal problem" that the attorney undertakes to solve. The legal representation inevitably requires that the client fully express his or her view of the world to the attorney, who then wages the battles necessary to achieve the client's goals.

On the attorney's side, unconscious emotions may be evoked by the client's decision to retain the particular lawyer, to the exclusion of all others. This may cause the attorney to feel particularly competent and grateful. A client may treat the attorney as an all-knowing protector in a hostile world, eliciting parental feelings or rescue fantasies on the attorney's part. Countertransference feelings may cause the attorney to give advice on matters outside his or her area of expertise. More dangerously, the attorney may be tempted to behave in ways that cross personal boundaries, jeopardizing the professional status of the relationship. On the other hand, if a client treats the attorney in an unduly critical manner, the attorney may relive unpleasant childhood feelings and develop a wish to retaliate or avoid the client.

Vicarious trauma is a countertransference-like response that attorneys may experience if they work with traumatized clients. Symptoms of vicarious trauma include intrusive thoughts, hypersensitivity and avoidance or numbing of feelings. To use the vernacular, vicarious trauma can lead to burnout. One study found a higher rate of vicarious trauma reactions in attorneys when compared with mental health professionals working with the same populations.[10] Possible explanations include the high volume of clients or cases handled by attorneys and judges working in trauma-oriented fields. Making matters worse, attorneys lack training on how to handle the emotions generated by these matters. Moreover, attorneys may feel they have no venues to express the feelings these difficult cases generate.

Productive Attorney Responses to Negative Transference

Attorneys rarely complain about clients who idealize them or display outsized affection due to positive transference; the good feelings usually facilitate productive working relationships, so long as the client's trust is not exploited. Attorneys worry instead about clients who are unduly hostile or who evoke negative or troubling reactions, causing the attorney-client relationship to reach an impasse or worse.

There are warning signs that transference/countertransference reactions are interfering with the professional goals of the legal representation. Attorneys should ask themselves the following questions regarding such cases:

- Are my responses disproportional or out of character?
- Am I over-identifying with or feeling hostile toward the client?
- Has the client evoked difficult feelings from my own history or in response to the client's experience?
- Can I reflect on and control my behavior with the client and other attorneys involved in the matter?
- Do I spend an unusual amount of my time/energy/emotion on the case or avoid working on the matter?
- Am I tempted to act differently with this client or to cross ethical boundaries?

There are a number of possible responses when transference/countertransference issues threaten to derail the attorney-client relationship. Taking a lead from therapists, attorneys should observe the transference and consider the context of their own reactions. This requires that the attorney "disengage" from the transference dynamic and evaluate the situation from a more objective stance. If the attorney can observe and handle what has taken place in a professional manner, the time may be ripe for a conversation with the client that corrects the course of the relationship. The transference/countertransference may provide the attorney with a window into the client's world. That information may be helpful to the attorney in assessing how a jury or judge will respond to the client. It also gives the attorney deeper insight into how the client may have behaved in the past or will act in the future, invaluable information in determining a legal strategy for the case.

If the working relationship becomes unduly difficult, the attorney should consider consulting with a mental health professional. Psychotherapists regularly seek supervision themselves when working with challenging patients; attorneys have no less need for insight from an expert. Aside from helping the client at issue, the consultation may assist the attorney in determining whether counterproductive patterns have developed in the manner he or she interacts with clients generally. Professional guidance and the input of legal colleagues should help the attorney to make the ultimate decision: whether to end the legal representation. For younger attorneys in particular, it may be hard to recognize the moment when continuing the attorney-client relationship becomes untenable.

Attorneys do not "treat" psychological problems. Yet, lawyers do need to handle the emotions that arise during the course of their interactions with clients. By remaining cognizant of interpersonal dynamics as feelings emerge, attorneys will further the goals of their professional relationships and reduce their own stress as they shoulder the legal problems of their clients.

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Gail Jacobs, Esq., is an attorney specializing in family, criminal and appellate law, with an office in Great Neck.

1. Freud, S., Five Lectures on Psycho-Analysis, Leonardo da Vinci, and other Works, Fifth Lecture, 11 Standard Edition, The Complete Psychological Works of Sigmund Freud 51 (James Stachey ed., 1957) (1910).
2. *Id.* at 51-52.
3. Jacobs, T.J. (1986). On Countertransference Enactments, 34 J. Amer. Psychoanalytic Assn. 289-307.
4. Hoffman, I.Z. (1983). The Patient as Interpreter of the Analyst's Experience, 34 Contemporary Psychoanalysis 389-422.
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9. *See* Love, Hate, and Other Emotional Interference in the Lawyer/Client Relationship, Silver, M., 6 Clinical L. Rev. 259 (1999).
10. Levin and Greisberg, Vicarious Trauma in Attorneys, 24 Pace L. Rev. 245; Gift from Within – PTSD Resources for Survivors and Caregivers, http:www.giftfromwithin.org/html/vtrauma.html

COMMITTEE REPORTS ...

Continued From Page 8

Court case holding that if a supervisor recommends adverse employment action, and the recommendation leads to the adverse action, the employer may be liable if the supervisor had a discriminatory animus, even if the decision made had no such animus. The committee also heard a lecture from Debbie Lanin, Esq., former law clerk to Judge Denis Hurley of the United States District Court of the Eastern District of New York, regarding drafting complaints, Supreme Court standards covering pleadings as well as drafting motions for summary judgment and motions to dismiss.

Senior Attorneys

Meeting Date 2/24/11
Joseph Canzoneri, Chair

The presence of Hon. Edward W. McCarty III, Surrogate of Nassau County, resulted in a larger than normal attendance at the meeting. Judge McCarty possesses an interesting and diverse background, as he not only is an accomplished attorney but holds a medical degree from NYU Medical School in forensic science and is on the teaching staff of many institutions, including Hofstra University School of Law where he teaches a course on medical malpractice. Judge McCarty's military service ran parallel with his legal career, with crossovers; such as having been recalled into active service to implement legal procedures in Kuwait during and after the Gulf War, and also later in Haiti and New Orleans. Judge McCarty was awarded the Legion of Merit and Bronze Star for assisting in saving the life of an Iraqi soldier about to be lynched by a mob in Kuwait. His legal background is stellar and exemplary, as an Assistant District Attorney, Supreme Court Justice and now Surrogate. Judge McCarty's presentation was insightful and compelling, and he praised the Surrogate Court staff regarding their knowledge and willingness to assist attorneys in all matters.

Prior to Judge McCarty's address, the regular business of the committee was discussed. NCBA President Marc Gann greeted the committee and advised he will be attending a future meeting. The committee discussed the possibility of a joint project the Young Lawyers Committee regarding a mentoring program, and suggestions on how such a program could be implemented were requested.

Young Lawyers

Meeting Date 2/22/11
Brian P. Sullivan & Terrence Tarver, Co-Chairs

For the first time in committee history, beer, wine and snacks were provided at the meeting and it was a huge success with 18 members attending. The committee discussed the following subjects and projects: (i) a tour of the Appellate Division, Second Department with the Honorable Justice Leonard B. Austin, (ii) Battle of the Law Schools Basketball on April 3, 2011, (iii) Rebuilding Together, (iv) Happy Hour with NCBA's Young Lawyers Committee and NYSBA's Young Lawyers Committee, (v) NCBA's Mentoring Program, and (vi) optional CLE's such as Conducting an EBT, the Basics of Business Organizations, and information on Bankruptcy/Foreclosure/Tax. Also discussed was the idea of potential participation in programs such as Homes for Heroes and Habitat for Humanity.

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

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Special Events - Meet your colleagues in casual, social settings for networking.

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Member Directory - Information on court personnel, legal organizations, committees, etc. Free listing.
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Sponsorship opportunities - Promote your name and your services by sponsoring Bar events.

Grow Your Community

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Mock Trial - Coach or judge high school teams arguing a case in a real courtroom in this annual competition.
Mortgage Foreclosure Pro Bono Project - Provide legal guidance for Nassau residents facing foreclosure issues.
Pro Bono- Volunteer legal assistance to those who cannot afford it, in landlord/tenant, bankruptcy, etc
Senior Citizen Legal Consultation Clinics - Volunteer legal guidance for seniors
Speakers Bureau - Address community groups, professional organizations, business groups.
Student Mentoring Project - Guide at-risk middle school students, one-on-one.
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Lunch with Bar Leaders - During the lunch hours NCBA leadership and staff will be at the Barrister's Table in the Domus Dining Room to learn more about your benefits and how to help you become more involved at the Bar. No reservations required.

Monday, May 16, 4 - 8 p.m.
Suddenly Solo - What Do I Need?
Free, 2-CLE credit program and service fair to help understand the basics of what you need to operate your own business, and meet some of the vendors who can help you get started or get to the next step. Reservations: events@nassaubar.org.

Monday, May 23, 5:30 - 7 p.m.
New Member Orientation
Learn about all the benefits of membership, get a personal tour of Domus, and share a cocktail with your colleagues. NCBA members only. Reservations: events@nassaubar.org.

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Association Membership - Develops strategies to increase membership as well as to expand member services and benefits.
By - Laws - Reviews and suggests changes in the current by-laws of the NCBA, NCBA Fund, Assigned Counsel Defender Plan and Academy of Law.
Community Relations & Public Education - Plans and implements Mock Trial competition, public education seminars, annual Law Day, Speakers Bureau and other community outreach programs.
Domus Open - Oversees the annual NCBA golf tournament and dinner.
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