ALBANY COUNTY BAR ASSOCIATION NEWSLETTER

February 2017 | A Publication of the Albany County Bar Association

PRESIDENT'S MESSAGE

I am humbled to have the opportunity to serve as the 109th President of the Albany County Bar Association.

On October 12, 1900, the Hon. Alden Chester approved the Certificate of Incorporation of the Albany County Bar Association. Chester, originally from Otsego County, practiced law locally prior to being elected to the Third Judicial District Supreme Court in 1895. In addition to his judicial career, Chester served as President of the Albany Medical College, a Trustee of the Albany College of Pharmacy, a Governor of Union University, and a special lecturer on the federal judicial system at Albany Law School. He was also the president of the American Bar Association in 1919.

The original certificate was signed by 53 Albany County attorneys including Learned Hand, James Fenimore Cooper and Jacob L. Ten Eyck.

William P. Rudd was the Association's first President and spoke at the initial meeting. Rudd closed his remarks as follows:

"In conclusion, let me venture to express the hope that the foundation which we have here put in place will someday sustain a superstructure in the form of a Bar Association which will stand for all that is worthy in the esteem and regard of the lawyers at the bar, and the people in the community in which we have our homes."

117 years later the foundation these attorneys laid remains in place. The Association's mission remains unchanged:

"The purpose of the Association is to promote professional collegiality among the bench and bar; facilitate public service and access to justice for all; and, offer programs, benefits and services to enhance the skills of its members."

The current Board faces the challenge of keeping the Bar Association relevant to its members. We have over 1,200 members in a county where the number of registered attorneys is approximately 4,000. Over the last dozen years membership numbers have remained somewhat stagnant, even decreasing. Lawyers earn their CLE credits online and membership functions often do not fit into schedules and family obligations. People prefer to socialize outside their profession. Bar Associations largely subsist on membership dues. Costs continue to rise. We have seen other County Bar Associations fall into disuse. Other County Bar Associations have merged to combined resources and members.

The Albany County Bar Association remains financially strong. However, to continue to do so the Board must remain vigilant and make decisions which will ensure the long-term health of the organization.

In December, the Board unanimously made the financial decision to restructure its Pro Bono Department by discontinuing direct legal services. A financial analysis revealed the grants used to fund these services were not covering the actual cost. The Board plans to restructure the program by hiring one full-time attorney who will be tasked with grant administration and assisting citizens of the community in connecting with association members to coordinate pro bono representation.

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WHAT'S INSIDE:

EXECUTIVE DIRECTOR'S MESSAGE

Back by popular demand, ACBA's ladies golf clinics will begin on Saturday, April 29th, at 9:00 AM, running for four consecutive weeks (April 29 – May 20) at Capital Hills Golf Course. If you are interested in being included on the informational email chain for the clinics, please contact me | mrhodes@albanycountybar.com. The cost will be $80 for the four week session and is payable on the first morning. Please make your checks payable to "SVA Golf Shop."

The CLE Committee has been working diligently, developing some unique CLE offerings including a reunion of Court of Appeals alumni in late March, as well as a dynamic panel of mediation experts in April. Don't miss out and sign up today! These events will sell out. Check out the calendar online as new things are added weekly.

See you soon!

MARQUITA JO RHODES
Executive Director
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Think Greens

It might be February, but it's not too early to think about getting out and having fun after work in the Albany County Bar Association golf league. The league is only open to Albany County Bar Association members in good standing. Our plan is to play 14 weeks, starting in mid-May, on Thursday evenings at 5:30 PM at the Capital Hills Golf Course in Albany. We anticipate the cost will be the same as last year ($20 per night for non-residents of the City of Albany, $15 for city residents). You need not play every week, as this is a casual and informal league. A player can even "sponsor" a slot and assign someone from that player's firm to come and play. The number of players is limited, so the first 16 who RSVP will be registered. Please email Campbell Wallace at Campbell.Wallace.1@gmail.com for questions or to RSVP.

PRESIDENT'S MESSAGE (continued)

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The Bar Association will no longer provide direct legal services, however it will continue to abide by the Association's mission – to *facilitate public service.*

It is the Board's intention that this restructuring will result in the Bar Association's ability to provide greater opportunities to facilitate public service by its members and will provide a greater array of legal services for the community.

The Association has fostered and will continue to provide and support such services as the Albany County Family Court Help Desk and Help Center, the Pro Se Divorce Program and the Law Day Run against Domestic Violence. Our Lawyers Referral Services will continue to connect citizens in need of counsel with our membership.

I look forward to working with the Board and the membership in an effort to advance the goals and the mission of the ACBA in a thoughtful and responsible manner. We have many dedicated members but could always use more. I urge each of you to consider getting involved at some level. Do something to become active in your organization and in your profession. Participate in the Law Day Run, volunteer to take a pro bono case, join a committee — but do something.

Our first event in 2017 remains our most popular. The Albany County Bar Association Court of Appeals dinner is scheduled for February 8, 2016 at the Empire State Plaza Convention Center. New York Court of Appeals Judge Leslie E. Stein will be the evening's speaker and ACBA past President Robert T. Schofield will be honored with the President's Award. We have held the line on the cost and parking is free. There will be an after party immediately following the dinner. We hope to see you there.

MISSION STATEMENT

The purpose of the Albany County Bar Association is to promote professional collegiality among the bench and bar; facilitate public service and access to justice for all; and offer programs, benefits and services to enhance the skills of its members.

Fireside Chat with Court of Appeals Alumni

Please join us for a historic evening with four former judges of the New York State Court of Appeals. At this unprecedented event, moderated by the Hon. Ryan T. Donovan, esteemed Court of Appeals alumni will discuss firsthand the inner workings of New York State's highest court, sharing war stories and answering questions along the way.

Tuesday, March 28, 2017
4:30 PM | CLE Program
6:00 PM | Reception

Fort Orange Club

Featuring

Hon. Howard A. Levine
Judge Levine served on the Court of Appeals from 1993 to 2002, and is currently Senior Counsel to Whiteman Osterman & Hanna LLP.

Hon. C. Richard Wesley
Judge Wesley served on the Court of Appeals from 1997 to 2003, and now serves as Senior United States Circuit Judge for the United States Court of Appeals for the Second Circuit.

Hon. Victoria A. Graffeo
Judge Graffeo served on the Court of Appeals from 2000 to 2014, and is currently a Member with Harris Beach PLLC.

Hon. Susan Phillips Read
Judge Read served on the Court of Appeals from 2003-2015, and is currently Of Counsel to Greenberg Traurig, LLP.

Limited Space – Register TODAY!

RSVP albanycountybar.com
(518) 445-7691 x116

Member $60 | Non-Member $90 | Student $30

ALBANY COUNTY BAR ASSOCIATION • 1900 •

A Story of Redemption

In the fall of 1993, a 30-year old African-American male, Michael, came to my office for a consultation. Michael sustained a brain injury when he was struck by a motorcycle after exiting a bus at an unsafe and dangerous location in a busy intersection. I knew nothing about personal injury law, but I was convinced that Michael's case had merit and promised to help.

After immersing myself in the procedures of personal injury law and the medical and legal aspects of proving a traumatic brain injury, Michael's case settled for a modest sum after one week of trial. I was disappointed in the result, but I had found my calling. There was nothing that would ever be as fascinating and gratifying as catastrophic injury law, and I made a decision to devote the rest of my career to the most seriously injured.

My Big Chance

In 1996, I got my big chance. An associate's position opened at a nationally prominent catastrophic injury law firm and I jumped at the chance. I was thrown immediately into the fire with trials of complex injury and medical malpractice cases. There was no partner looking over my shoulder at the trials—I was the one and only lawyer for the injury victim in court and everything rested on my novice trial skills. Somehow I survived.

Truth be told, I had more than my share of defense verdicts. I found that juries are unpredictable, have little attention span and often render verdicts that have nothing to do with the evidence (or logic). Discouraged, but not beaten, I fought on.

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In 1999, I became a non-equity partner in the law firm and I thought my future was bright. In hindsight, I was extraordinarily naive.

A BIG Wake-Up Call

In the summer of 2007, I handled a complex case involving an extremely dangerous railroad grade crossing. The grade crossing had been the site of way too many collisions between trains and tractor-trailers, and I had been determined to do what I could to prevent another wreck. I was facing the best railroad defense lawyer in the business and the case involved complicated and novel issues of law and fact. Worse yet, I was learning railroad law on the fly.

After a week of trial, the case settled and I was happy with the result…but my bosses weren't. Shortly after the trial, I was asked to meet with the senior partners, and I was told that I was "*incompetent*." The assessment made by the senior partners was tough to swallow after years as a "partner", but this prompted a radical change in my mindset.

I realized that working for someone else had no security–I could be fired at any time, even as a partner with a history of multi-million $ results. I had to begin planning for my departure from the firm. To be ready for that day, I needed one thing more than anything else: CLIENTS.

A Long Overdue Epiphany

I realized—perhaps for the first time—that the practice of law involved a lot more than technical proficiency. Even the most gifted trial lawyers struggle to make a living and it finally dawned on me why: being a great trial lawyer means nothing WITHOUT CLIENTS.

I realized what few lawyers ever admit: getting clients is the most important thing lawyers do. While lawyers will begrudgingly admit that marketing is important, few ever do anything to improve their systems for getting clients. I was determined to avoid this mistake.

I began devoting my time and spare money to building marketing systems—online and offline. I immersed myself in books and seminars about marketing and learned everything I could. Slowly things began to change. New clients and referring lawyers began calling me from across the country and a little at a time, my marketing efforts were paying off.

The Best Thing that Ever Happened

On June 2, 2010, I was called into a meeting with the senior partners. At first, we made small talk and then one of the senior partners dropped a bomb, "*John, it's time we part ways*." I knew eventually the day would come where I would have to fend for myself, but I was the guy bringing the clients to the firm. As the guy bringing clients to the firm, I thought I had job security…I was wrong. I had no idea at that time that this would be the best thing that would ever happen for my career.

I had little to work with: no secretary, computer or office equipment. But I had one thing that counted more than anything: CLIENTS. Four months after being fired, I settled a case for $2 million and I was off to the races. Still making tons of mistakes and learning about law firm management on the fly, but having fun and kicking some butt.

A Struggle that Ends on a Good Note

Fast forward to the summer of 2016. Following a deposition, a long-time adversary/defense lawyer pulls me aside and volunteers, "I must say, you're happier than I've ever seen you." Wow, didn't expect that! But the defense lawyer was spot on, I was never really happy working for someone else. My life was comfortable and I paid my bills, but that isn't what life is really about.

Life is about taking a chance (sometimes an extreme risk) to live the life of

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ATTORNEY MARKETING AND BUSINESS (continued)

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your dreams. There are many more ups and downs in solo practice than I ever could have imagined, but with small, incremental improvements that are made on a daily basis, anything is possible. Taking a risk is not really risking anything at all—*failing to take the chance is the real risk*.

> "Playing it safe is the most dangerous thing you can do."
>
> Grant Cardone, *Be Obsessed or Be Average*

Only you can control your future. No law firm will take care of you—you can't expect your boss to look out for you. Even if you are an equity partner at a prominent law firm, one day you will eventually be on your own without a safety net. Once you confront this reality and begin taking steps to build the law firm of your dreams, the better off you will be.

Learn from My Mistakes and Failures

I my next book, *The Law Firm of Your Dreams* (available on March 15, 2017), to help show you the mistakes that I've made and the policies and systems that have made a big difference. I hope you can implement some of them to build the law firm of your dreams. You may not agree with everything, but take what you can and start building the systems and policies that will give you the law firm–and life–that you've always dreamt of.

And just maybe one day, you'll thank your lucky stars that your bosses fired you.

Your Takeaway from this Story

Without this backstory, you would not be able to relate to me. I'd just be another boring lawyer. You share your backstory because you want prospective clients to know about your weaknesses and vulnerabilities. If they can relate to where you came from, they will follow you. This is how you become a leader.

Redemption stories are powerful because they show the benefits of going through hardship and meeting challenges. Most lawyers never use this tool.

> "The degree of success you achieve in life is directly proportional to the amount of pain you can tolerate."
>
> – Jon Morrow

No one wants to hear about the perfect lawyer. Yet most of us try to put on a perfect façade and alienate the prospective clients we are trying to reach. Once your clients know you're not perfect—that you have flaws—they will empathize with you because you are just like them: imperfect.

A Lawyer's Brilliant Backstory

Florida injury lawyer, Craig Goldenfarb, Esq., uses his backstory in his TV ads. Craig's most effective TV ad tells the story of his parents and how their experiences as lawyers made him want to become a lawyer.

The story does not scream, "*Hire me. I'm the best lawyer on the planet.*" The story mentions nothing about settlements, verdicts or Craig's skills, but rather tells his backstory, namely, why he became a lawyer. This is powerful stuff and turns out, is very effective in generating new clients. Why? Because no other lawyers are doing this and the prospective clients can empathize with Craig's story.

Does this work? Craig has 50 employees and is one of the premier injury lawyers in the ultra-competitive market of south Florida. You can be the judge.

A Special Offer for You

My second book, *The Law Firm of Your Dreams*, is being published as I write this, and will be ready by March 15th. If you send an email to the world's great paralegal, Corina Skidmore (cskidmore@fishermalpracticelaw.com), we will make sure you are one of the first to get a free copy. ●

Photo Quiz

Can you guess the names of any members shown in this photo? How about the location? Email your responses to acba@albanycountybar.com

Thank you to Kevin P. Maney for sharing this photograph and taking us down memory lane.

Agreements – Interpretation – Residence Sale

In *Allard (Sheffer) v. Alllard*, 2016 Westlaw 7129129 (3d Dept. Dec. 8, 2016), Supreme Court's August 2015 order denied as moot the former husband's motion seeking a sale of the former marital residence, or the wife's satisfaction of all mortgages. A 1989 incorporated agreement granted the wife "sole and exclusive possession, use and ownership of the marital residence," which the husband conveyed to her and she refinanced the debt. The parties would equally share the proceeds "when and if the house is sold." The wife entered into additional mortgages between 1989 and 2007. The Third Department affirmed, holding: Supreme Court correctly found that the husband was seeking an opinion with regard to a possible future event which has not occurred; the husband's claim was not justiciable; and his cause of action was time-barred under the 6 year statute of limitations provided by CPLR 213(2).

Child Support – CSSA – Capped at $141,000; Actual Needs; Custodial Time; Other Child

In *Matter of Peddycoart v. MacKay*, 2016 Westlaw 7479458 (2d Dept. Dec. 30, 2016), the Second Department reduced a Support Magistrate's child support award for one child born in 2009 from $542 per week to $378 per week. The Appellate Division held that it was error to apply the CSSA to all of the combined parental income of $202,208 (mother $36,112 and father $166,096). The Second Department found that the Support Magistrate did not consider: the father's girlfriend had stayed home to care for their newborn child and the father was having trouble meeting household expenses; the father provided health insurance coverage and college savings contributions; and the "unrefuted testimony that the child was with the father approximately 100 days per year, and that he pays for all of her expenses when she is with him." As to "actual needs," the Appellate Division concluded: the child attends public school and has no special needs or learning disabilities; the mother testified that she had no childcare expenses and lives rent-free at her parent's house; the mother spent about $50-70 per week on food for the child; and there were no extraordinary expenses.

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Child Support – CSSA – Capped at $141,000; Counsel Fees; Equitable Distribution – Marital Residence Sale; Maintenance – Durational

In *Sprole v. Sprole*, 2016 Westlaw 7469547 (3d Dept. Dec. 29, 2016), the parties were married in 1994, have two daughters (born in 1996 and 2005), and the husband commenced the divorce action in 2009. A March 2013 consent order provided for joint legal custody of the older daughter (physical custody to the mother) and sole legal and physical custody of the younger daughter to the father, with a waiver of child support payable by the mother. The husband's income was $415,000 and the wife had no income since 1996. Supreme Court awarded maintenance of $8,000 per month for 5 years; capped CSSA child support at $141,000 and directed the husband to pay $1,997.50 per month; and directed the husband to pay $200,000 of the wife's counsel fees. Marital assets were distributed equally, including a sale of the marital residence. The wife was awarded 30% of the stipulated value of the husband's business interest, in 5 annual installments of $60,000 plus a balloon payment of $600,000 in the 6th year. The Third Department affirmed the maintenance award, noting the $1,240,000 in property distributions due to the wife, and finding that she "was relatively young, in good health, has a Bachelor's degree and could return to full-time employment given that the child in her custody was 18 years old and attending college, yet she had made no effort to secure employment throughout the six-year period during which this divorce action was pending." The Appellate Division upheld the child support award based upon: the husband's payment of all of the younger daughter's expenses; the older child's college attendance and access to an $85,000 college savings account; and the husband's agreement to pay the children's remaining college costs, health insurance premiums and uninsured expenses. The Third Department affirmed the counsel fee award.

Child Support – CSSA Over $143,000; Counsel Fees – Denied; Maintenance – Durational

In *Macaluso v. Macaluso*, 2016 Westlaw 7234697 (3d Dept. Dec. 15, 2016), the parties were married in 2004, have 2 children born in 2007 and 2010, separated in 2010, and the wife commenced her action in 2014. Following trial, Supreme Court directed the husband to pay the wife $1,500 bi-weekly for maintenance through December 31, 2015, denied counsel fees and set child support at $1,333 bi-weekly until maintenance ends, to then increase to $1,646 bi-weekly. The Third Department accepted Supreme Court's CSSA income findings of $156,215 (husband) and $86,000 (wife), consisting of $36,000 in maintenance and $50,000 in imputed income. The Appellate Division upheld application of the CSSA to the first $200,000 of combined parental income. As to maintenance, the Third Department noted that both parties were in their 30s and in good health, and "even though both children were attending school or preschool at the time of trial, [the wife] had yet to make any effort to secure employment." The wife has a doctorate in biology and the Appellate Division found: "a vocational expert testified that she could secure local employment with an annual salary of $50,000 and could earn up to $180,000 a year with additional work experience." The Third Department affirmed the denial of counsel fees (2 justices dissenting), noting: the "temporary support payments *** allowed the wife to amass several thousand dollars in savings."

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Matrimonial law Update (continued)

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Child Support – Imputed Income

In *Matter of Scheppy v. Kelly-Scheppy*, 2016 Westlaw 7380749 (2d Dept. Dec. 21, 2016), a December 2015 Family Court order upheld a Support Magistrate order directing the mother to pay $139 weekly in child support. The Second Department found that the Support Magistrate "properly imputed income to the mother based upon her prior and current income, and her savings account assets," and noted that her monthly expenses were more than 3 times greater than her stated monthly income and "she did not submit any evidence to show that these monthly expenses were not being paid in a timely manner."

Custody – Modification – No Hearing – Reversed

In *Matter of Pollock v. Wakefield*, 2016 Westlaw 7234781 (3d Dept. Dec. 15, 2016), without a hearing upon the mother's modification petition, an October 2015 Supreme Court order altered a May 2015 consent order (joint legal custody and shared placement of a child born in 2009), by appointing the father's girlfriend to transport the child and setting a schedule for Thanksgiving and Christmas, but otherwise continued the May 2015 order. The Third Department reversed and remitted for a hearing, holding that the mother "raised sufficient allegations against the father [that he had become intoxicated and threatened to kill her and take the child] to warrant an evidentiary hearing," which "could support granting the relief sought."

Disclosure – Non-Party – Granted

In *Kozel v. Kozel*, 2016 Westlaw 7191530 (1st Dept. Dec. 13, 2016), a February 2016 Supreme Court order denied a non-party attorney's motion for a protective order and to quash a subpoena by the former wife, a judgment creditor of the former husband. On appeal, the First Department affirmed, holding that the non-party "failed to establish conclusively that he lacks" relevant information, given that the attorney handled the closing on a condominium unit "controlled by the former husband and paid for with marital property."

Enforcement – Automatic Orders – Contempt

In *S.M.S. v. D.S.*, 2016 Westlaw 6908356 (Sup. Ct. Richmond Co., DiDomenico, J., Nov. 18, 2016), the defendant former husband was held in contempt of the automatic orders, based upon, among other proof, his admission that during the divorce action's trial, he sold a parcel of marital property and used $300,000 in proceeds for his own benefit. The Court set the purge amount at $150,000.

Equitable Distribution – Converted to Partition; Separate Property

In *Cohen v. Cohen*, 2017 Westlaw 52833 (3d Dept. Jan. 5, 2017), the parties were married in 2007 and the wife commenced the action in 2009. Supreme Court converted the equitable distribution of the parties' pre-marital home into a claim for partition. The Third Department upheld Supreme Court's judgment, which awarded the home to the wife, with no monies due to the husband, given that his $18,403 in equity was less than his 50% share of associated expenses the wife paid from her separate account commencing in June 2009. The Appellate Division reversed the award to the wife of an ATV, finding that the same was a pre-marital gift by her to the husband and thus constitutes his separate property.

Family Offense – Disorderly Conduct & Harassment 2d – Dismissed

In *Matter of Thelma U. v. Miko U.*, 2016 Westlaw 7191613 (1st Dept. Dec. 13, 2016), the First Department affirmed the dismissal of the petition, holding that as to disorderly conduct, "none of the acts alleged occurred in public, were intended to cause a public inconvenience, annoyance or alarm, or recklessly created such a risk." With respect to harassment in the second degree, the Appellate Division determined that respondent's act of banging on the door because he was locked out "did not establish conduct that served no legitimate purpose," and that his use of foul language did not "rise to the level of harassment."

Procedure – Service – Facebook – Denied

In *Qaza v. Alshalabi*, 2016 Westlaw 7109698 (Sup. Ct. Kings Co., Sunshine, J., Dec. 5, 2016), the wife commenced an action for divorce in October 2016 and sought substituted service by Facebook, alleging: the husband was deported and living in Saudi Arabia; she had no contact information for him since his September 2011 departure from the US; and his New York driver's license was suspended in 2012. Saudi Arabia is not a signatory to the Hague Convention on Service and the wife argued that publication would cost in excess of $3,000. The Court denied the request, given that the husband had not used the Facebook profile since April 2014, and the parties had not communicated through the same at any particular time.

Procedure – Withdrawal and Dismissal of Petition Reversed

In *Matter of Gabriel v. Morse*, 2016 Westlaw 7469484 (3d Dept. Dec. 29, 2016), a January 2016 Family Court order granted the father's motion to withdraw his petition for modification of a 2013 custody order pertaining to the parties' son born in 2008. The 2013 order provided for sole legal and primary physical custody to the mother, suspended the father's visitation and directed him to submit to a substance abuse evaluation. The father completed an in-patient rehabilitation program and then filed a petition for modification, seeking joint legal custody and scheduled visitation. The mother sought the father's treatment records, and moved to dismiss when he failed to fully respond. The father faxed a letter to Family Court and counsel withdrawing his petition. Family Court dismissed the father's petition and denied the mother's motion as moot. The Third Department reversed and remitted, finding lack of consent to service by fax and that the father did not also serve mother's counsel by mail. The Appellate Division held that the father's letter must be treated as a motion for voluntary discontinuance, and given the lack of proper service, Family Court did not have jurisdiction to entertain the motion. ●

Administrative Appeals Office Revises the National Interest Waiver Standard

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In a seemingly unnoticed yet incredibly important decision, on December 27, 2016, the Administrative Appeals Office ("AAO"), which exercises appellate jurisdiction over approximately 50 different immigration case types for U.S. Citizenship and Immigration Services ("USCIS"), issued a precedent decision, *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016) ("*Dhanasar*"), which vacated *Matter of New York State Dep't of Transp.*, 22 I&N Dec. 215 (Acting Assoc. Comm'r 1998) ("*NYSDOT*"), and revised the analytical framework for assessing eligibility for what are called "national interest waivers" under INA §203(b)(2)(B)(i).

A little background is probably appropriate here. The second employment-based immigrant (or "Green Card") preference category covers workers with advanced degrees in professional fields and persons of exceptional ability in the sciences, arts, or business. In addition, the labor certification requirement generally applies to this preference,[1] and job offers from U.S. employers are usually required. In some cases, however, foreign workers may seek an exemption from the job offer requirement, in which case the foreign worker or any person on his or her behalf may file the petition. To be exempt from the job offer requirement, USCIS must first determine that an exemption would be in the "national interest." A labor certification is not required if the job offer requirement is waived.

In 1998, legacy Immigration and Naturalization Service ("INS") designated its first precedent decision discussing the standards governing national interest waiver requests. *NYSDOT* established strict standards for obtaining national interest waivers. To qualify for a national interest waiver under the *NYSDOT* standard, an applicant had to show (1) that he or she planned on working in the United States in an area of substantial intrinsic merit, (2) that the proposed impact of his or her work was national in scope, and (3) that waiving the labor certification requirement would benefit the national interests of the United States.

Satisfying the first two prongs of the test was, for the most part, relatively straightforward. However, the third prong created many issues. First, the third prong was explained in the *NYSDOT* decision at least three and perhaps even four different ways. This in and of itself created a lot of confusion. However, the more important source of confusion, as the AAO recognized in *Dhanasar*, is that *NYSDOT's* third prong can be misinterpreted to require the petitioner to submit, and the USCIS adjudicator to evaluate, evidence relevant to the very labor market test that the waiver is intended to forego." *Dhanasar*, 26 I&N Dec. at 888. This is what typically drove me crazy when working with this standard.

Under the new framework, USCIS may now grant a national interest waiver if the petitioner demonstrates (1) that the foreign national's proposed endeavor has both substantial merit and national importance, (2) that he or she is well positioned to advance the proposed endeavor, and (3) that, on balance, it would be beneficial to the United States to waive the requirement of a job offer and thus of a labor certification. *Dhanasar*, 26 I&N Dec. at 889.

While the framework under *Dhanasar* is different than that in *NYSDOT* in several ways, the most important in my view is the elimination of the requirement to show the U.S. national interest would be adversely affected if a labor certification process were to be required. In discussing this prong, the AAO stated "that this new prong, unlike the third prong of *NYSDOT*, does not require a showing of harm to the national interest or a comparison against U.S. workers in the petitioner's field." *Dhanasar*, 26 I&N Dec. at 890.

A second important change is no longer having to show that the benefits of a petitioner's prospective work will be geographically national in scope; rather now, all that needs to be shown is that the benefits will be of "national importance." In the day and age that we currently live in, *Dhanasar* has made clear that "substantial merit" and "national importance" applies not only to scientific endeavors, but also to endeavors in business, entrepreneurialism, technology, culture, health, and education. Further, while "substantial merit" may be demonstrated through economic impact, that is not required; "substantial merit" may be demonstrated in other ways, including by showing advances in pure science and research that may not (yet) have measurable economic impact.

Phrases such as "substantial merit," "national importance," "well-positioned to advance," and "on balance would be beneficial" may not mean much to the lay person, but they are incredibly important for purposes of establishing a foreign national's eligibility for a "national interest waiver." *Dhanasar* still involves somewhat subjective determinations by USCIS adjudicators, so the documentation and expert support letters submitted with a petition need to be persuasive and very much tailored to the foreign national's academic and personal credentials, and career objec-

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LABOR AND EMPLOYMENT PRACTICE

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On December 29, 2016, the Court handed down TMR Security Consultants, Inc. v. Commissioner of Labor (522848), a decision that will hopefully remind the New York State Department of Labor and its Unemployment Insurance Appeal Board that it is still possible for a worker to be an independent contractor – and not an employee.

TMR Security Consultants, Inc. ("TMR") provides security services for a variety of clients. In so doing it solicited the services of licensed security officers, many of whom are former police officers, military personnel or firefighters or otherwise have law enforcement experience. Following an audit by the Department of Labor ("Department") for the years 2008 and 2009, TMR was assessed unemployment insurance contributions on behalf of the security officers who performed services for its clients. TMR objected, contending that its security officers were independent contractors, rather than employees. Following a hearing, an Administrative Law Judge ("ALJ") sustained TMR's objection and overruled the Department's determination. Upon administrative review, the Unemployment Insurance Appeal Board ("Board"), finding that an employment relationship existed between TMR and its security officers, reversed the decision of the ALJ and upheld the Department's initial determination. TMR appealed.

In reversing the Board, the Appellate Division initially noted that whether there exists an employment relationship is a factual issue for resolution by the Board, and its decision will not be disturbed when supported by substantial evidence. "Although no single factor is determinative, the relevant inquiry is whether the purported employer exercised control over the results produced or the means used to achieve those results, with control over the latter being the more important factor." Following its statement of the "relevant inquiry," the Court went on to expressly hold that it will no longer apply the "overall control test" to determine whether an employer-employee relationship exists in unemployment insurance cases involving individuals providing security services.

With a new test clearly stated, the Court went on to find insufficient control over the results or means. Specifically, the Appellate Division found that TMR posted security-related jobs on a secure website for its clients, who dictated the hours to be worked, as well as the scope of services that were needed. The security officers, after browsing through these postings, would request to work on any particular job, which TMR ultimately awarded on a "first come, first serve" basis. The security officers were free to select a job that they wanted, and were not prohibited from seeking jobs from TMR's competitors. TMR did not provide the security officers with training or equipment nor did TMR pay the security officers a set hourly rate.

The Court further found that, following placement of a security officer with a client, TMR did not enter into a contract with the security officer. While a security officer could be in the middle of a continuing job for a client, he or she was nonetheless free to leave at any point and work elsewhere. In addition, if an issue arose with the security officer's performance, the client dealt with the security officer directly, and TMR would be notified if it needed to provide a substitute security officer.

Finally, the Court deemed the "control" relied on by the Board to be "incidental," meaning that such control did "not support the conclusion that the security officers were employees." Given the foregoing, the Court reversed the Board, and remitted for further proceedings. ●

IMMIGRATION LAW UPDATE (continued)

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tive. On balance, the new standard set forth in *Dhanasar* should make the second employment-based immigrant preference category appropriate to many foreign nationals who previously would not have qualified under the old *NYSDOT* decision. ●

1 In some employment-based Green Card categories, before an employer can file a petition with USCIS to have the worker classified as a immigrant worker, the employer must first apply to the U.S. Department of Labor ("USDOL") for its certification that qualified U.S. workers have been recruited for the position and are unavailable.

The portrait unveiling for Judge McNamara on January 24, 2017 was all about the grandkids.

An Insiders' View

Hon. Stacy L. Pettit, Surrogate
Deborah S. Kearns, Esq., Chief Clerk
Alima M. Atoui, Esq., Law Clerk

Albany County Surrogate's Court

REAL PROPERTY AND ESTATE ADMINISTRATION: A TRAP FOR THE UNWARY

ESTATE ADMINISTRATION AND REAL PROPERTY

Many estates involve the transfer of real property and very often a decedent's home is one of the main assets in the estate. The transfer and administration of real property can be a trap for the unwary and often creates significant tension among estate beneficiaries, intestate distributees and fiduciaries. This article is intended to highlight some of the most common issues seen in Surrogate's Court related to real property.

Specifically Devised Real Property

Title to specifically devised real property vests in the specific devisee immediately upon decedent's death (see Waxson Realty Corp. v Rothschild, 255 NY 332 [1931]; Matter of Payson, 132 Misc 2d 949 [Sur Ct, Nassau County 1986]). Immediate vesting means that an executor does not have the authority to manage the property or pay for the maintenance and upkeep of such property out of estate funds. The specific devisee, rather, is liable for the expenses of maintaining and operating the property from the date of death forward (see Matter of Williams, 71 Misc 2d 243 [Sur Ct, NY County 1972]). Specifically devised real property has priority over other assets with respect to abatement, is not subject to fiduciary commissions and does not carry out income earned by the estate (see EPTL 13-1.3; 26 USCA §§ 662, 663).

In some cases, it may be necessary to sell specifically devised real property for the payment of debts and administration expenses of the estate (see SCPA 1902). Article 19 of the SCPA permits a fiduciary to obtain court approval to divest the beneficiaries of the property and sell real property in certain limited situations discussed herein.

Intestate Distribution

When a decedent dies without a will, real property vests in decedent's distributees at the time of death and, in general, is not subject to estate administration. Article 19 would also apply to property passing in intestacy; thus the administrator can reclaim real property to sell if necessary to pay the debts and administration expenses of the estate.

Real Estate Not Specifically Devised

Real property which is not specifically devised vests in the residuary beneficiaries as of date of death, like specifically devised property (see Matter of Katz, 55 AD3d 836, 836 [2008]). However, EPTL 11-1.1 (b) (5) permits a fiduciary to manage and sell property that is not specifically devised. The authority to sell real property does not have to be expressly stated in the will, but rather may be implied as a necessary component to effectuate decedent's testamentary scheme (see Salisbury v Slade, 160 NY 278 [1899]). In general, courts will not interfere with an executor's decision to sell real property, but if the value of the property in an estate is uncertain, the fiduciary may petition the Court for advice and direction as to the propriety, price, manner and time of sale (see SCPA 2107). A fiduciary may be limited, however, in the ability to sell the real property if the beneficiaries demand the real property in kind (see Matter of Sherburne, 95 AD2d 859 [2d Dept 1983]).

TRAPS FOR THE UNWARY

Mortgages and Liens

Without an express indication in the will to exonerate specifically devised real property from an encumbrance such as a mortgage or lien, a fiduciary is not responsible for the satisfaction of the encumbrance out of estate assets (see EPTL 3-3.6). The encumbrance is chargeable against the property and the beneficiary receives the property subject to the encumbrance. Where property encumbered by a lien or mortgage is transferred to two or more persons, the respective interests in the property share a proportionate share of such debt. Notably, a general provision in a will for the payment of debts is not an indication that such encumbrances be paid by the estate on specifically devised property.

Property Taxes

A fiduciary may pay taxes assessed on real property prior to decedent's death, however, the intestate distributee or specific devisee must reimburse the estate for the taxes (see SCPA 1811 [2] [b]). An executor does not need prior court approval to pay these taxes (see Matter of Steele, 33 Misc 2d 694 [Sur Ct, NY County 1962]). As in the case of an encumbrance, if decedent's will expressly or by necessary implication indicates that such taxes be paid out of estate funds, reimbursement will not be necessary. Property taxes levied after death are the responsibility of the beneficiaries of the real property.

Ancillary Probate

The probate of a will in New York does not give a fiduciary the authority to dispose of real property in another state. In that case, an ancillary probate will be necessary in the other state. The manner in which such property descends when not disposed of by will is determined by the law of the jurisdiction in which the property is situated (see EPTL 3-5.1 [b] [1]).

Divorce

A divorce or a judicial decree of separation will terminate a joint tenancy between spouses and the spouses become tenants in common (see Kahn v Kahn, 43 NY2d 203 [1977]; EPTL 5-1.4). If the property is not transferred as part of the divorce proceeding, at the death

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SURROGATE'S COURT PROCEEDINGS AND ISSUES (continued)

Continued from page 10

of the first spouse, one-half of the property will pass by such spouse's will or in intestacy. In that case, the surviving ex-spouse could then own the property with a potential unfavorable co-owner.

Anti-Lapse Statute

If a specific devisee predeceases the decedent and there is no survivorship language in the will, EPTL 3-3.3 provides that the property will not lapse, but rather will pass to the specific devisee's issue if such devisee was a brother, sister or issue of decedent. In that case, it is possible that an infant may become an owner of the real property, which will create additional legal hurdles in the management of the property.

Disputes between Living Persons

In some cases, one or more beneficiaries may take up residence in the property, specifically bequeathed or otherwise, to the exclusion of the other beneficiaries. In other cases, a disagreement among the beneficiaries may arise as to the eventual sale of the property. In these cases, the fiduciary or beneficiaries may bring a proceeding to evict a beneficiary from the property or to sell the property. Given that title to real property vests in the ultimate beneficiaries, subject to the fiduciary's right to sell the property to pay debts and expenses, such disputes then become disputes between living parties and the Surrogate does not have jurisdiction over such matters (see SCPA 201). A partition action or other similar action would be brought in Supreme Court.

SCPA ARTICLE 19

Real property may be sold by a fiduciary when necessary to pay administration and funeral expenses, debts existing at decedent's death, estate taxes, payment of any debts or legacies charged on real property, shares of persons entitled to share and for any other purpose the court deems necessary (see SCPA 1902). This is true even when the real property is specifically devised or passes to decedent's intestate distributees. The application to sell real property may be made in an independent proceeding or in a judicial settlement of the fiduciary's account.

If the request to sell real property is made as part of a separate proceeding, the petitioner must serve a citation on all interested persons, including persons entitled to share under the will or by intestacy and guardians of such persons under a disability. The court may also order service on creditors of the estate (see SCPA 1904 [2]). If the request to sell real property is brought in an accounting proceeding under SCPA 2210, process shall issue to all interested persons, including creditors and notice that such relief is being sought must be included in the citation. A fiduciary or any person interested may commence a proceeding to sell real property. Notably, a creditor is not deemed a person interested (see SCPA 103 [39]). Creditors can, however, compel an accounting and request the relief in the petition to compel an accounting.

We hope this is helpful. The facts of each case differ, and the information provided does not apply to any specific case. We may not provide legal advice – only legal information. See you in Surrogate's Court! ●

Hon. John Reilly, Hon. Joshua Farrell, and Hon. Holly Trexler took their oath of office as Albany City Court judges in City Hall.

Hon. William A. Carter was sworn in by Hon. Stephen Herrick at the Albany County Courthouse.

FRUITCAKES, DUMMIES, WHINERS, AND WEASELS: Suppression—shooting the moon or your client in the foot

"Those who cannot remember the past are condemned to repeat it." George Santayana, a Spanish poet and philosopher, coined the phrase over 100 years ago. This is certainly true for most criminal defendants, but for many lawyers, the issue is not forgetting history, but never learning about it in the first place. Who were "Huntley", "Molineux", and "Mapp"? The case of Roland Molineux, decided at about the same time as Santayana's musings, is fascinating. How many attorneys blindly cite his case, but have never taken the time to actually read it? And what about Dollree Mapp? The cops burst into her house supposedly to arrest a robbery suspect, but not finding him, instead seized a collection of pornography squirreled away in an old trunk. This case made the U.S. Supreme Court apply the Fourth Amendment's protection against unreasonable searches and seizures to state cases through the Fourteenth Amendment.

Clients, confronting suppression issues, often take on the characteristics of wannabe Constitutional scholars. They pour over the few outdated cases they can find on the jail research kiosk, and trade stories with other inmates about cases and results. Sometimes these discussions lead to good questions for their attorneys, but usually, result in a complete misinterpretation of the law. They learn a few key words, but not necessarily how they apply in their own cases. "They never read me my Miranda!" "They never showed me a warrant!" "Why can't I challenge the search of the car if I was the passenger?" "They never saw me throw any gun!" Often these clients can't be dissuaded from their conception of the case, even when you take the time to explain that "Miranda warnings" needn't be given if the police don't ask any questions; that, if the cops have a search warrant, not showing it to you doesn't mean that all of the guns and drugs they found will automatically be suppressed; that you may not have standing to challenge a search if it's not your car and you weren't driving; and that when you toss a gun, or drugs, or a knife, or a bag of something, you're also tossing away your right to complain about the seizure. At the risk of educating a recidivist in how not to do it next time, make it clear that abandonment of a gun, a knife, or drugs, or a hoodie, or a baseball cap is a surefire waiver of their right to complain about a search and seizure because once they toss the stuff they're saying okay to acquisition by the cops.

Suppression issues can be complicated and difficult for non-lawyers to understand. Spend substantial time going over the concepts with your clients or their curious family or friends. You should also be prepared to discuss the procedure of a hearing—the style and attitude of the judge, who will likely testify as a witness, what you think they'll say, and, as always, what's important and what is not. Clients may not understand that hearsay is admissible in suppression hearings. Don't be like many lawyers who know the more open-ended rules but tend to be acquiescent. If you're not up to speed on the "Fellow Officer Rule", check it out. If the testifying officer makes reference to a policy or practice of the police department insist on production of the document and not just his or her word. Suppression hearings are a golden opportunity to shape the case and show the judge, the prosecutor, and of course, your client that you're not rolling over.

Few would argue that what defendants do in the commission of a crime is almost always thoughtless and impetuous. The trick, when it comes to suppression, is to show that the police were even more thoughtless and impetuous. Fundamentally, what courts do when the police overreach has taken the form of exclusion or suppression. The nuances of all possible scenarios fill volumes of treatises. But before you can start your legal research, you need a thorough understanding of the facts of your case. This may come from asking your client more pointed questions than you had in previous meetings—at what point were you handcuffed? What was the sequence of events after the police knocked on your door or pulled you over? Do you remember exactly where your guns or drugs were kept, and does that jive with where the police say they found them? What, if anything, do they know about the informant who was used? Watching interrogation videos (paying specific attention to any Miranda warnings given and your client's behavior) is essential, and allows you to more effectively isolate suppression issues when you cross examine the interrogating officer. Read the call slips and other information you may have glossed over to figure out the timeline. Did the police enter the apartment before the warrant was signed? Do your homework. Advanced preparation is imperative.

A penetrating analysis of how the Fourth Amendment came into being is something that the reader will have to

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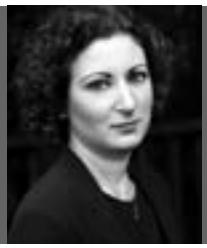

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FRUITCAKES, DUMMIES, WHINERS, AND WEASELS (continued)

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explore on his or her own time, but the concept of "reasonableness" is evident, and indicates that the Founding Fathers didn't think it was okay for the justice system to be unfair—even when you're dealing with a less-than-sympathetic defendant. There was no constitutional formula for explaining how the mandate had to be carried out. Case law and the CPL provide the framework today, but the ingenuity of lawyers fill in the blanks.

At a trial, the prosecution bears the burden of proof; in a suppression hearing, all they have to do is go forward to establish legality. Once done, which is usually as easy as rolling out of bed, the ball is in your court. Rarely will putting on a defense be a good idea at a suppression hearing, but don't ignore novelty or chance taking. If you think having your client testify makes sense, go for it. Most importantly, don't get pushed around by the judge. Challenge the ordinary. In a recent Wade hearing, the judge actually granted the lawyer's application to call the witnesses who identified the defendant via a photo array to testify, not merely accepting the characterizations of the police as to what actually happened. Guess what? The charges of attempted murder and robbery were dismissed against one of the defendants, and the other was acquitted after a trial. Just because the court's usual practice was to rely on the cops and not insist on the DA calling the witnesses during hearings doesn't mean that a motion to do something different should not be made.

While we may have never actually heard the phrase spoken or reduced to print—judges are people, too. How often have you heard a judge say that he or she doesn't credit the testimony of the detective or the cop? Infrequently or never, probably. Know what you're up against, and make sure your client understands the probable outcomes.

Clients, dragged from the jail to the courthouse in the contemporary version of a chain gang have every reason to be wary about the judge, the cops, and you—their lawyer. One way to gain a client's confidence is to make him or her a participant in the hearings, even if he or she is not going to take the stand. Always request the removal of handcuffs. They're not permitted at trial, so why at a hearing? Give your client a legal pad and a pen and encourage the taking of notes. Don't let him or her jab you in the side with an elbow or worse, try to talk to you as you're doing your best to listen to the testimony being given or what the judge is saying. Instead, have him or her write the question, observation, or point they'd like made on the pad and slide it over to you. Sometimes they are actually useful. Another helpful technique is to have a colleague or intern sit next to the client during the hearing to answer all of the client's questions and make him or her feel involved, while you are able to focus on the task at hand.

After a suppression hearing, it's generally best to ask the judge for time to submit a written memorandum of law. This allows you to get a copy of the transcript to refer to specific statements that were made during the hearing, think about the issues a bit more than you may have before the hearing, and do more legal research. Not only is written argument with case citations often helpful to the judge, but it's something to send to your client—another example of how hard you're fighting for them.

When you have a client who has jumped on the suppression bandwagon and understands the game plan going into a suppression hearing, you must also make clear to him or her what will likely happen if you lose the hearing. Remember, most of the time you need to raise his or her confidence in your performance and lower expectations of what a judge may be willing to do to the defendant's benefit. In many cases, it makes no sense to go to trial once a judge decides to uphold a search—the drugs were found in your client's car or the gun was found in his or her bedroom, so going to trial with no chance of success and risking a larger sentence is foolhardy and might constitute ineffective assistance of counsel. The DA may still allow your client to accept an earlier proffered plea offer, but don't bank on it. On occasion, if your work at the suppression hearing gives the prosecutor cause to be concerned about an appeal or worse, an adverse suppression ruling, something realistic might be thrown on the table in exchange for a waiver of appeal. Typically, the plea offer gets jacked up, the price to be paid for asserting Constitutional rights.

You must also be sure to explain to your client that even though the suppression hearing may not have resulted in suppression, you have preserved issues for appeal, and had a preview of the officers' testimony at trial (if you go that route). Clients don't like to talk about the appeal, since discussing it seems to indicate to them that you think they'll lose at trial. Explain that you're not giving up on the case, but looking to protect them wherever you can.

The art of advocacy may be traced back to medieval times when knights mounted steeds and tilted at each other for the hand of a fair maiden or the bigger chunk of land two feudal lords each claimed. Suppression hearings are occasions for strident advocacy. Get the judge's attention! Get the Appellate Division's attention if the hearing judge isn't buying your arguments. Be an advocate! Suppression hearings are opportunities not to be lost, and in almost every case where there is a search, seizure, or interrogation, there are significant legal issues to pursue. As Kurt Vonnegut quipped, "I've got news for Mr. Santayana: we're doomed to repeat the past no matter what. That's what it is to be alive." ●

False Claims Act Settlements Reflect Impact of 'Yates Memo'

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In 2015, the DOJ issued what is now known as the "Yates Memo,"[1] a policy statement calling for individual officer and employee accountability in civil and criminal investigations involving corporations. The Yates Memo signals the DOJ's shift from focusing solely on corporate entity liability to individual wrongdoing, in response to criticisms that the DOJ did not hold individuals accountable after the 2008 financial crisis. As a result of these directives that are outlined in the Yates Memo, the United States Attorney's Manual has been revised to incorporate this focus on individual accountability and coordination of parallel civil, criminal, and agency investigations. Although it is too early to assess the full impact of the Yates Memo, and it unclear whether the Trump Administration will continue this policy, the recent announcement of settlements in two *qui tam* cases demonstrate its impact:

***United States v. North American Health Care, Inc.*, 14-cv-02401 (N.D. Ca.)**

Whistleblower filed a *qui tam* action under the False Claims Act alleging Medicaid/Medicare fraud through the submission of claims for unnecessary rehabilitation therapy services. After the defendant company's motion to dismiss was denied, a settlement was announced pursuant to which the chairman of the board agreed to pay $1 million and a senior vice president agreed to pay $500,000, along with a corporate settlement of $28.5 million.[2]

***United States ex rel. Michael K. Drakeford v. Tuomey Healthcare System, Inc.*, 12-cv-2219 (D.S.C.)**

Whistleblower filed *qui tam* action under the False Claims Act alleging Medicaid/Medicare fraud based on "sweetheart deals" between the hospital and referring physicians. After a decade of litigation, a jury awarded a $237.4 million judgment against the corporation. The DOJ subsequently settled with the corporate entity for $72.4 million but continued to pursue its case against the former CEO individually, leading to a $1 million settlement against him two years after the company settled.[3]

As can be seen from the above cases, it is now much more difficult to resolve matters with a sole corporate plea or settlement and instead, an individual, usually the owner or president of the company, may also have to take individual criminal and/or civil responsibility regardless of whether he or she engaged in or knew of the specific underlying conduct charged. Moreover, employees and officers now must disclose information concerning any relevant conduct of anyone else in the company to qualify for cooperation credit. The threat and promise of individual liability gives the government a substantial amount of leverage when negotiating pleas and settlements as the stakes against employees and officers are much higher.

This new reality requires companies and defense counsel to take a proactive approach to possible violations. Companies should review their current compliance program (or have one implemented if one does not exist) to ensure adequate policies and procedures are in place for avoiding, detecting, and reporting potential violations. At the outset of a federal investigation, counsel should be involved immediately and interviews of all involved employees should be conducted (keeping in mind the potential need for *Upjohn*[4] warnings). Counsel should assume that even when the investigation appears to be strictly civil in nature, there is a criminal prosecutor who has been briefed on the case and is working concurrently with the civil division until counsel has been advised otherwise.

These Yates Memo initiatives are intended to deter future illegal activity, incentivize changes in corporate behavior, ensure that proper parties are held responsible for their actions, and promote confidence in the justice system. However, these goals need to be balanced with the consequences that may result from the forceful priorities the Yates Memo demands: empty pleas, more cases going to trial, higher costs to litigants and taxpayers, and the perceived overreaching by the DOJ in its all or nothing approach to cooperation credit. ●

1 The "Yates Memo," so named for its author Deputy Attorney General Sally Yates, can be found online at: https://www.justice.gov/dag/file/769036/download.

2 *See* https://www.justice.gov/opa/pr/north-american-health-care-inc-pay-285-million-settle-claims-medically-unnecessary.

3 *See* https://www.justice.gov/opa/pr/former-chief-executive-south-carolina-hospital-pays-1-million-and-agrees-exclusion-settle.

4 *See Upjohn Co. v. United States*, 449 U.S. 383 (1981). *Upjohn* warnings are given when, prior to interviewing an employee, corporate counsel advises that he or she represents the company, and not the employee individually.

PRACTICING LAW & WELLNESS

IS THERE A MAGIC WAY TO LOSE WEIGHT?

Around the New Year is resolution time and a large number of people who are making resolutions focus on weight loss. Losing weight can do wonderful things for the body. In my years practicing as a nutritionist, I saw blood pressure drop, diabetes become controlled and knee pain disappear all from weight loss. And, it does not take a 50 pound drop to see the benefits. Sometimes only a 20 or 25 pound loss can make a difference. Here is my best advice about weight loss:

1. Don't start working on weight loss until you are ready. If you are working on a stressful case, have a new baby in your family or have parents who are in need, now is not the time. It doesn't matter that it's January: wait.
2. Don't go on a "diet". If you don't see an attempt to lose weight as a complete change to how you eat and exercise for the rest of your life, don't bother starting. Yo-yo dieting is bad for the body and that is exactly what will happen if you see your changes as temporary.
3. Choose changes to your diet that you can live with. Forget about low carb, low fat, eating grapefruit all day or having soup for every meal. Find a way to eat less. There are lots of ways to do that. Reduce sugary foods, reduce sugary drinks, eat more vegetables and fruit instead of high calorie snacks, stay away from restaurant food etc. Find where you can cut something out or reduce it. Your tastes will adjust to change!
4. Never forget the value of exercise. It not only burns calories, it keeps you away from food. Find a way to keep exercising in winter. Early morning mall walking is cheap and easy. Find a friend to join you on the track at a gym. Do something daily.
5. Consider a nutritionist. A professional who can help you evaluate your diet, work with you on changes and keep you accountable can be extremely helpful. Most insurance plans will pay for at least a few visits to see someone.
6. Lastly, make your expectations reasonable. Treat your body kindly. Expect challenges. Keep moving forward. ●

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BENCH & BAR IN THE NEWS

James E. Hacker, Esq. has become a Fellow of the American College of Trial Lawyers, one of the premier legal associations in North America. The College is composed of the best of the trial bar from the United States and Canada. James is the managing partner at E. Stewart Jones Hacker Murphy, LLP. He has been practicing law for 32 years and devotes his practice entirely to civil litigation. He attended Hamilton College where he is an Alumni Trustee and Albany Law School where he will chair the Board of Trustees in 2017. He is the President of the Albany County Bar Association and a Regional Vice President of the New York State Trial Lawyers Academy. He is on the Board of Directors of The Legal Aid Society for Northeastern New York and is a past President of the Capital District Trial Lawyers Association.

Jason Little, Esq. has been announced as a new partner in the Albany based law firm Deily & Glastetter, LLP. Jason Little practices in the firm's Commercial Law and Litigation department representing national, regional and local clients in various pre-litigation, litigation and post-litigation matters. Jason's practice focuses on complex commercial litigation, commercial lending, workouts and dispute resolution, and commercial bankruptcy matters. Jason also advises clients on various business and transactional matters, commercial loans and workouts, internal compliance and control, and strategizing cost effective business solutions to litigation.

Lemery Greisler LLC, has announced the promotion of **James E. Braman** to Member. James E. Braman has 30 years' experience practicing law in the Capital Region. His practice includes counseling home builders, developers and lending institutions in commercial real estate and residential real estate transactions, including matters related to real estate law, corporate law, and regulatory compliance. Mr. Braman is admitted to practice law in the State of New York and is a member of the New York State Bar Association and the Albany County Bar Association.

Lemery Greisler LLC has announced the promotion of **Peter M. Damin** to Member. Peter M. Damin focuses his practice in the areas of commercial litigation, bankruptcy, commercial loan workouts and foreclosure. A significant portion of his practice is devoted to representing banks, financial institutions and private lenders in commercial fore-

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Albany County Bar Association Board Installation January 19, 2017

CLASSIFIED

In Search of Last Will & Testament – The Law Office of Heidi A. Gifford is in search of a LW&T for: Rose Marie Lamorella, 32 Circle Drive, East Berne, New York 12059. If you have any information, please contact Tish at tkarpoy@frontiernet.net.

Maguire Cardona, PC, a law firm in Albany with an emphasis on civil litigation seeks an immediate full-time associate attorney. Duties include the drafting discovery and pleadings, motion practice, depositions and preparing for trial. Three (3) or more years of litigation experience preferred. To apply, email a cover letter and resume to tony@maguirecardona.com.

Housing Staff Attorney – White Plains, NY – Legal Services of the Hudson Valley – We have an immediate opening in our White Plains office for a full time staff attorney to work on housing matters. The attorney will also serve low-income individuals and families with matters including eviction, unlawful lock-outs, habitability issues and succession rights challenges. Duties of the Position: individual case work, administrative advocacy and litigation in city courts and justice courts, including appellate practice, and education and outreach efforts directed at community members, advocates and service providers. http://bit.ly/2jWplfL

Deily & Glastetter, LLP has an immediate opening for a full-time experienced legal secretary in the firm's Commercial Litigation department. Under the direction of the Department Manager and Partners, this position provides varied confidential legal secretarial support to multiple attorneys. Responsibilities of this role include, but are not limited to, creating a variety of legal documents, dictation, e-filing court documents, researching rules and procedures for various courts, tracking cases, scheduling and calendaring court date. For more information on qualifications and to learn how to apply, please visit www.deilylawfirm.com/careers.

Associate Attorney – Cullen and Dykman LLP seeks a senior associate with 4+ years of finance transactional experience. The position may be located in our Albany office. The ideal candidate must have strong academic credentials, excellent drafting skills and a proven track record in a finance transactional practice. Prior experience in a large law firm setting is preferred. The attorney will negotiate and draft complex financial lending transactions. Interested candidates who meet these qualifications should mail or email their resumes to Donna Larkin, Cullen and Dykman LLP, 99 Washington Avenue, Suite 2020, Albany, New York 12210, dlarkin@cullenanddykman.com

ADVERTISING POLICY FOR THE ACBA NEWSLETTER

Advertising & articles appearing in the ACBA Newsletter does not presume endorsement of products, services & views of the Albany County Bar Association.

2017 Rates and Deadlines: Albany County Bar Association Rates: Member: $50 in our classified section (approximately 30-40 words) additional fees will be incurred as the number of words increase. Non-member: $100 in our classified section (approximately 30-40 words) additional fees will be incurred as the number of words increase. There is an additional $10 charge for Blind Ads. Seminars announced: $60 (approx. 30-40 words).

The rates for all photo ready ads are: full page (8.5" x 11") = $550; half page (7.5" x 5") = $375; Quarter page (3.5 " x 5") = $300; Business card size (3.5 " x 2 .5 ") = $200.

Classified Advertising Policy: All ads must be prepaid and in writing. We also hold the right to edit all ads. For display advertising rates and information, please call (518) 445-7691. All ads must contain wording "Paid Advertising" at the top. It shall be the policy of the Albany County Bar Association that no advertisement should indicate any preference, limitation, specification, or discrimination based on color, handicap, religion, sex, national origin, or age.

Change of Scene and Bench & Bar in the News: Provided at no cost to our members and inclusion is limited to ACBA Members. All notices must be submitted in writing. E-mail is preferable.

Deadline: *Please note change: The third Friday of the prior month. E-mail ad copy and remit payment to Albany County Bar Association, 112 State Street, Suite 1120, Albany, NY 12207. We also take credit cards, call (518) 445-7691.

BENCH & BAR IN THE NEWS (continued)

Continued from page 15

closures, actions on notes, guarantees and security agreements, actions for the replevin and seizure of collateral, judgment enforcement, loan workouts, and in all aspects of bankruptcy cases.

McNamee, Lochner, Titus & Williams, P.C., a full-service law firm headquartered in Albany, N.Y., announces that the attorneys of Fox & Kowalewski, LLP, one of the leading public construction law firms in New York State, have now joined their firm. The combination will augment and strengthen McNamee's current construction law practice while also enabling the provision of a broader range of legal services to the clients of Fox & Kowalewski, LLP.

The firm of Thuillez, Ford, Gold, Butler & Monroe, LLP, is pleased to announce that **Molly C. Casey, Esq.**, is the newest partner in the firm. Molly joined the firm in 2012, and concentrates her practice in the areas of civil litigation and appellate defense, with a particular focus on medical malpractice defense.

CALENDAR OF EVENTS

Please visit albanycountybar.com to register **and** learn more about our upcoming events!

Feb 8	Court of Appeals Dinner
Feb 17	Albany Law School and ACBA Albany Devils Hockey Game Networking Event
Feb 28	New York's Official Common Law: Publication and Legal Research and Writing Resources CLE
March 2	BEYOND UNCONTESTED PROBATE – Practicing in Surrogate's Court CLE
March 28	Fireside Chat with Court of Appeals Alumni CLE
Apr 27	Mediation Panel CLE and Reception
May 4	Law Day Run Against Domestic Violence

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And "like" us on Facebook
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albanycountybar.com
acba@albanycountybar.com
(518) 445-7691

NEW MEMBERS

The ACBA welcomes the following new members:

Ferraro, Amodio and Zarecki CPAs

Steven Grasso

Elizabeth Yoquinto

Keri L. Vanderwarker

Kerry Mierzwa

Aaron DePaolo

Benjamin Wilkinson

Matthew W. O'Neil

David B. Morgen

Matthew J. Leonardo

Patricia C. Sandison

Holly A. Trexler

Nathaniel Nichols

Myleah Misenhimer

Cassandra Gipe

Lindsey Dodd

The views expressed in the letters and columns reflect the opinions of the authors and may not reflect the views of the Association, its Officers, Directors or Members. Opposing viewpoints are always welcome and can be emailed to: acba@albanycountybar.com.

Albany County Bar Association's
Committee on Attorneys in Public Service
Commitment to Excellence and
Trailblazer Awards
2017 Application

Criteria

- Must be an attorney admitted to practice in the State of New York in good standing with the Bar – need not n be a member of the ACBA;
- *Excellence* - Must be an attorney dedicated to public service with more than 10 years of experience working in state, local or federal government or in the not-for-profit sector;
- *Trailblazer* - Must be an attorney dedicated to public service with 10 years or less of experience working in state, local or federal government or in the not-for-profit sector;
- Notable accomplishments or contributions to public service, such as, but not limited to; those relating to the implementation of a program, passage of legislation, administration of a program or service or achievement in the area of regulation, enforcement or service delivery, significant case outcome, etcetera;
- Notable accomplishments or contributions within the community;
- Notable contributions to promoting choosing careers in public service.

Please fill out this form and email it, along with the nominee's resume and 2 letters of support to aclapinski@gmail.com by March 15, 2017. Incomplete applications will not be considered.

Name of Nominee:

Nominee's Address:

Nominee's Email Address:

Nominee's Daytime telephone number:

Cellular telephone number:

Nominee's Law School and Year of Graduation:

Nominee's Employer:

Nominee's Years in Service/Award Sought:

****

The following material must be submitted along with this application:

- Name, address, email and telephone number of the person nominating the candidate
- Resume of the nominee
- Two thoughtful and separate short statements of support. These statements should be no more than 500 words explaining the nominee's commitment to public service and specific accomplishments that have had a significant impact on public service, program or service delivery or industry regulation.

Albany County Bar Association
112 State Street | Suite 1120
Albany, NY 12207
ALBANYCOUNTYBAR.COM

UPCOMING CLE EVENTS

New York's Official Common Law: Publication and Legal Research and Writing Resources CLE

When: Tuesday, February 28, 2017
Time: 9:00-10:30 AM
Where: 112 State Street, Room 930, Albany NY
Presenter: William J. Hooks, Esq.

This FREE 75-minute program is presented by the Law Reporting Bureau (LRB), an agency of the Court of Appeals that edits and publishes the Official Reports of New York court decisions (NY3d, AD3d, Misc 3d, NY Slip Ops) – the only court approved, official version of New York case law. The presentation provides a description of the print and online Official Reports and the features that distinguish them from unofficial versions, and a demonstration of the research and writing tools that are available on the public-access LRB website (http://www.nycourts.gov/reporter/), including a legal research portal that allows no-cost, instantaneous access to online legal source material for case law, statutes, the NYCRR (current and archival coverage) and village, town and city codes, and many other state, federal and international sources. Additional topics include privacy concerns in opinion publication and the "right to be forgotten"; an introduction to the Official Style Manual – an alternative to the Blue Book that is New York specific and utilized extensively by the courts and increasingly by other government agencies and practitioners; solutions to the more common citation and legal writing errors we encounter in our work; and a discussion of the process employed to select trial court opinions for publication, their role in the common law system, and how to submit a decision that you believe should be published. 1.5 Skills credits.

Beyond Uncontested Probate – Practicing in Surrogate's Court CLE

When: Thursday, March 2, 2017
Time: 11:30 AM Lunch Buffet, 12:00 PM CLE Program
Where: Italian American Community Center | 257 Washington Ave Ext | Albany
Presenter: Hon. Stacy Pettit

Join us for lunch and a program focused on the ins and outs of Surrogate's practice, including but not limited to select probate issues, administrative issues, estate administration issues, guardianships and adoptions, accounting issues, and ethics and attorney fees in Surrogate's Court. 0.5 Ethics and 1.5 Professional Practice credits available.

Register at albanycountybar.com