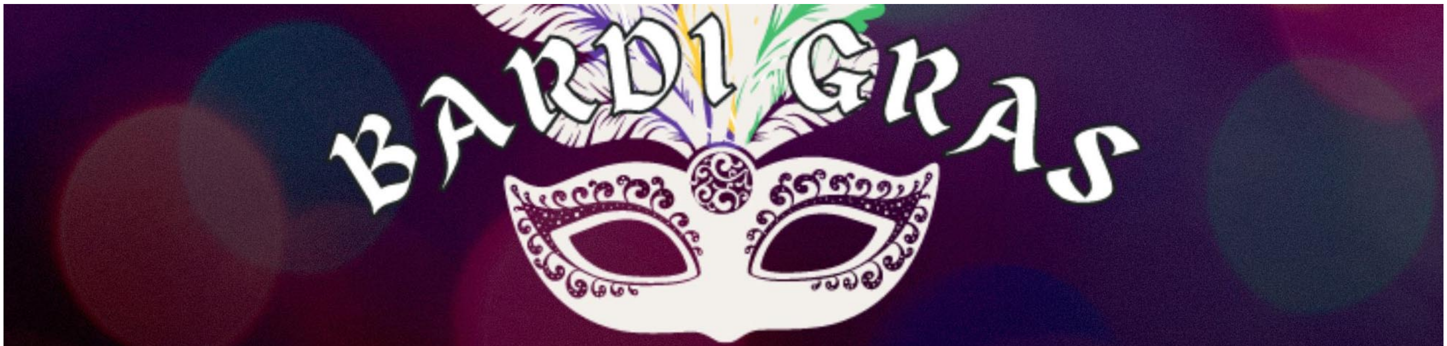
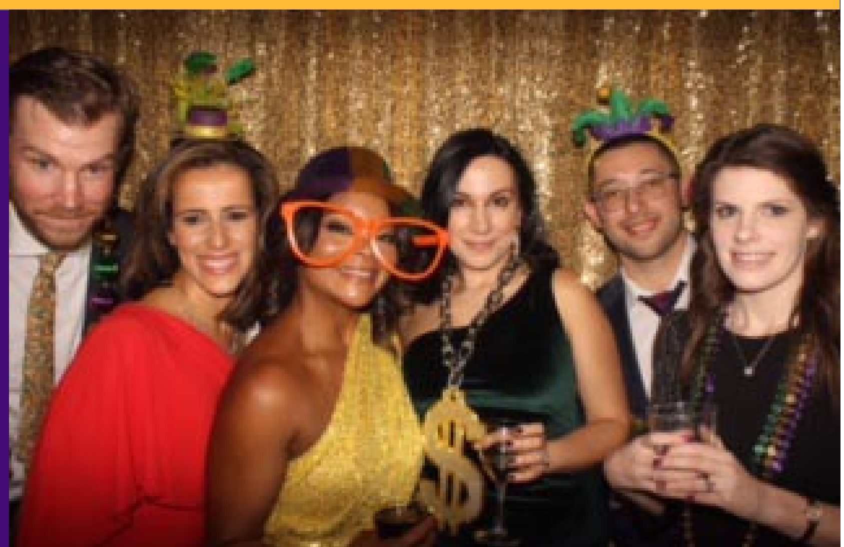
FAIRFAX BAR ASSOCIATION
Serving the Northern Virginia Legal Community

JOURNAL

Newsletter of the Fairfax Bar Association www.fairfaxbar.org Spring 2023



BENCH BAR DINNER DANCE—SATURDAY, MARCH 4, 2023, FAIRVIEW PARK MARRIOTT



please see more photos on pages 7, 10, and 14

President's Column

By Aaron J. Christoff, Esq., President, Fairfax Bar Association

"Why Can't We Be Friends?"

Not long ago I found myself in the thoroughly enjoyable position of pitting two juggernauts of the legal profession (and members of our own Fairfax Bar community) against one another. But this was wholly for laughs and nowhere near a courtroom. The topic you ask? One had the audacity to refer to the other as their "lawyer friend!" I may or may not have been the source of this revelation between them. I'm not sure that really matters anyway, so let's get back to what does.

The "accused' took exception to their relationship being qualified and described that way. As learned through subsequent interrogation, the 'accuser' claimed the intention was more about explaining the context or path that spawned their friendship. I will leave credibility assessments to the reader, and primarily for purposes of self-preservation, their identities will remain concealed. That, combined with the fact that I know they truly are close friends, is why I take the liberty of using their debate to highlight the subject of this article.

You might think that subject is whether you can or should ever trust me with information that can be used against you in a social setting, and that's fair. But no, this is simply the observation of one attorney (who happens to be the one selecting the topic for this article) that many of us seem to be awfully mindful of how and whether we acknowledge the relationships we build in our legal community. Sure, I tease my colleagues through reference to them in this article, but their discussion of what a "lawyer friend" is—whether it's a slight, and whether it should be—was not the first or last time I've heard the talking point. I recall my own recent uses of descriptors like "a Board buddy" (someone I've come to know while serving on the FBA Board of Directors) or one of my "courthouse friends," (any of the clerks who see me more often than they like). So this is not a condition observed in others only.

Beyond the world of the Fairfax courthouse and legal community, many of us have our "soccer buds," or "neighbor friends," especially when we refer to a subset of the population we occasionally interact with because our children participate on the same team, at the same recital, etc. I don't suggest it is necessarily a negative either. Certainly, as our initial 'accuser' claimed, it is an effective way to describe the context of the relationship to someone else. Whether we would choose to hang out with our neighbors if they were not our neighbors, is a fun debate (with people other than our neighbors). But this is an article in the FBA Journal so let's bring it back to all of us.

I'll venture to guess if you're reading this article, you spend a significant portion of your waking hours working or otherwise interacting with people about matters pending (or soon to be) in the Fairfax courthouse, and/or being physically present in the courthouse to file, advocate, research, or adjudicate such matters. If true, my next bold prediction is that you regularly see and speak with many of the same people. You may enjoy some of these conversations with some of these people. You might even describe a few of those you regularly encounter, as more than just passing acquaintances.You might fairly refer to these relationships as friendships.

I will not speak for all of you, but to the extent I ever had a social life so robust that it included multiple opportunities each week to go out with friends and make new ones — that ship sailed away many years and a few kids ago. The point is not a sad one or a longing for times past. It is appreciating what we have and recognizing it for what it is. My best friends on this planet are lawyers. They were my best friends before they passed a bar (exam), but our relationships are nothing less now. Many of the other people in my life I consider friends are those I see regularly in the hallways or catchup with before a committee meeting. Maybe that is because more of my time is spent in these settings than anywhere else that is not my house, but that is my reality and has been for years. It

continued on page 12

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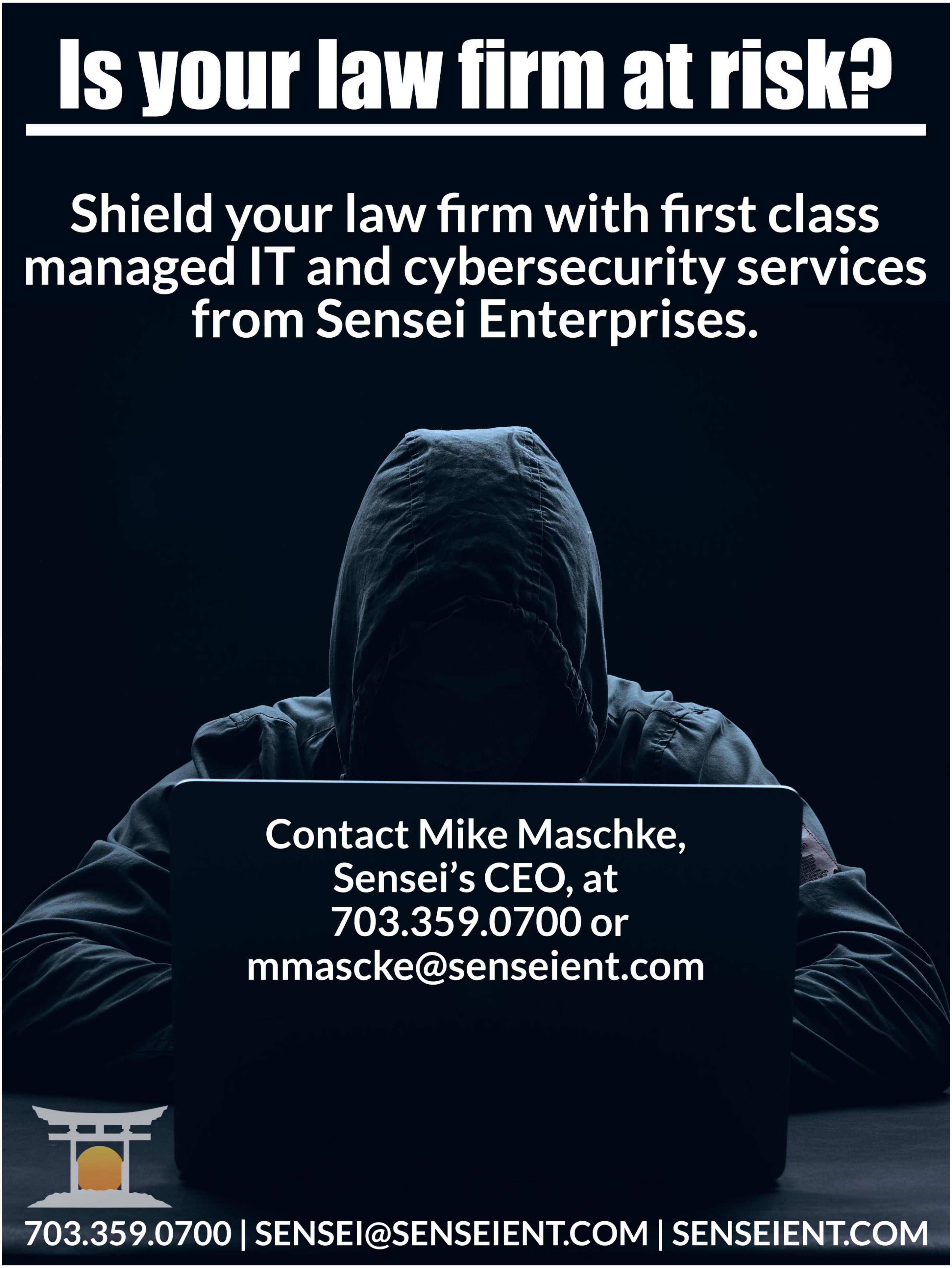
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REFLECTIONS FROM THE FAIRFAX BAR ASSOCIATION *PRO BONO* ADVISORY COMMITTEE

By Cory F. Goriup, Esq., with contributions from Thomas Murgavero, Esq., Hannah Littlefield, Esq., & Melanie Hubbard, Esq.

Those who can do. Those who can do more, volunteer—Author Unknown

One of the benefits of chairing and being a member of the FBA *Pro Bon*o Advisory Committee is getting to know my fellow committee members and learning firsthand the ways in which they "practice what they preach" and make pro bono work a priority in their practice. I recently asked committee members to share some of their most memorable pro bono cases and experiences.

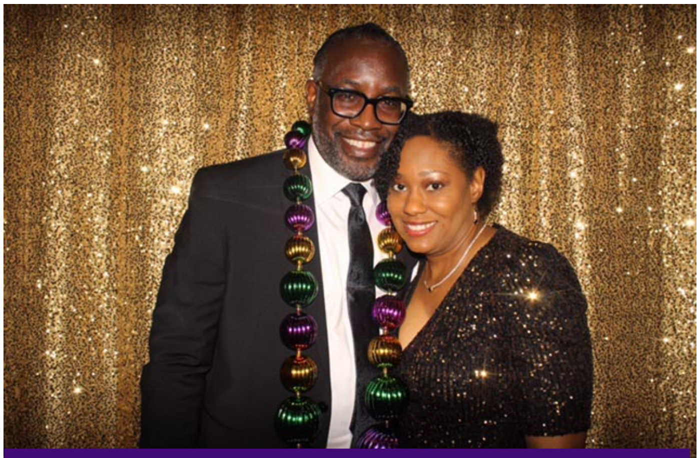
Tom Mugavero, business litigation and employment attorney and past chairperson of the committee, shared his thoughts on participation in the Neighborhood Outreach Program (NOP). This program consists of volunteer lawyers who meet with scheduled clients, by telephone or Zoom (post-Covid), on mutually available dates and times. NOP partners with sites throughout Fairfax County including community centers, family resource centers, and homeless shelters. Volunteer attorneys are trained to supply analysis, answer questions, and provide referral information in civil law matters. The attorney may choose to provide further representation, if they are able, after meeting with the client.

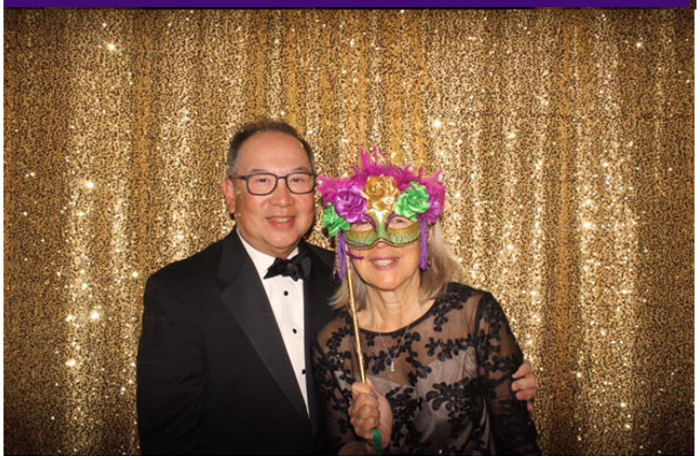
Tom shared that, "One of the most important things we can do for the neighborhood outreach program is not to take on the client's problems, but to show them how they can work through it themselves."Tom has numerous examples of how he assisted NOP clients with utilizing resources to help them work through their employment-related problems, a few of which he shared with me. "The first client, Ms. W, worked for a company and earned both salary and commission. She believed that she was being shortchanged on commissions, and when she complained, she was fired." Tom gave her all the information she needed to make a claim for unpaid wages at the Virginia Department of Labor, as well as the process for filing for unemployment and what to expect as a result of those filings. The second client, Ms. L, believed that she was being subjected to disparate treatment by her supervisor. Ms. L was afraid to go to her company's Human Resources department because she feared retaliation. Tom discussed the importance of using the internal complaint department, and how they could not legally retaliate against her. He then outlined the process for making a complaint in the Fairfax Office of Human Rights, informed the client what she could expect throughout the administrative process, and explained her options in the event of a finding of probable cause. In each of these cases, the client left the interview with Tom more confident in their ability to handle their claims themselves and better prepared to take those claims through the administrative processes.

Hannah Littlefield, committee member, assists clients in guardianship and conservatorship matters in her day-to-day practice. Last August, she had the unique opportunity to assist a *pro bono* client with obtaining a guardianship for her brother. In conjunction with another law firm, Hannah also had the opportunity to assist with family's asylum applications. Hannah's client and her family were forced to flee from Afghanistan in August 2019. As they were in the process of applying for asylum in the United States, it became apparent that the client's brother did not have the capacity to complete the asylum application on his own. The brother of Hannah's client was suffering from a traumatic brain injury, and Hannah helped her become her brother's guardian. The timeline was strict, as the asylum application had to be submitted no later than one year after the family's entrance to the United States. Hannah relayed that "working with this family and the other law firm was an enriching experience on so many different levels. My client invited me into her home with open arms, prepared tea for all of the attorneys, and we all sat and discussed her work with women's rights in Afghanistan." Hannah learned more about the asylum process in the midst of assisting a deserving family to navigate an often-overwhelming court process.

Through the Neighborhood Outreach Program, Melanie Hubbard, a committee member and family law attorney, met with a woman who had a young child with her husband. The client and her husband had already signed a comprehensive settlement agreement when she and Melanie met. The agreement set forth a shared 50/50 custody schedule for their young child. The agreement contained a provision that if a parent moved more than 15 miles from the parents' current school district (or another school district they agreed to move to) then the parent who moved away would automatically have their custodial time reduced to alternating weekends. This drastic reduction in custodial time did not provide the ability to consider the reason for the parent's move or the best interests of the child at the time of the move. The husband did not initially agree to remove the provision from the agreement, and so Melanie agreed to assist the client and see if she could help. Once both parties had legal counsel to assist them, the parties were able to agree to strike the troublesome provision from the agreement. This brought a great deal of relief to the client, and Melanie reported that, "it felt good to be able to assist her in this way."

Do you want to feel good? To learn more about an area of law? To give back to your local community? There are so many ways and opportunities to do so, and you do not have to be a committee member to join us in these activities (although we do welcome members with open arms!). Opportunities abound through the Northern Virginia Pro Bono Law Center (learn more here: Northern Virginia Pro Bono Law Center: For the Lawyers and Paralegals - Fairfax Law Foundation) including, but not limited to volunteering. ■





GENERAL DISTRICT COURT COMMITTEE UPDATES

By Brian T. Kennedy., Esq., Chair, General District Court Committee

The General District Court needs your help to protect the rights of some of the most vulnerable people in our community. For months, the Court has been looking for attorneys who are willing to serve as (1) guardians *ad litem*, for adults, and (2) attorneys for people in mental health civil commitment proceedings. Both of these roles are little known by many in the Bar, but they serve a critical role to ensure that people in precarious situations are protected when they are before the Court.

The first thing many people worry about when they see a plea like this is that they have no experience in this area. This is a legitimate concern as we all have the duty to be competent for our clients. No one is going to let you start taking these cases without understanding the requirements and responsibilities of the job, however. For mental health commitments, there are a small number of dedicated lawyers who have done this work for years who are willing to advise and mentor attorneys who are willing to do the work. The same is true for GAL appointments. The FBA also has offered CLEs for GALs and there are other resources available to help learn.

Next, people wonder about the pay. No one is going to tell you that these types of appointments result in good money. It is paid at a court appointed rate, so no one will be paying for a yacht by taking these cases, to say the least. We encourage you to think about these appointments as an opportunity to help others on a "low-*bono*" basis. The people you will be helping include members of the armed forces who are deployed and people experiencing an acute mental health emergency, among others.

Finally, appointments as GAL or as an attorney in a mental health commitment proceeding are not simply things that would make the case better; they are legally required roles without which the court cannot proceed in these important cases. All cases that require these appointments have a profound impact on the people who are appearing before the court. Having a lawyer fill these necessary roles will have a direct, important, and positive impact on our community and our Courts.

In 1999, Justice Sandra Day O'Connor wrote "Certainly, life as a lawyer is a bit more complex today than it was a century ago. The ever-increasing pressures of the legal marketplace, the need to bill hours, to market to clients, and to attend to the bottom line, have made fulfilling the responsibilities of community service quite difficult. But public service marks the difference between a business and a profession. While a business can afford to focus solely on profits, a profession cannot. It must devote itself first to the community it is responsible to serve. I can imagine no greater duty than fulfilling this obligation. And I can imagine no greater pleasure." 87 Or. L. Rev. 385, 391 (1999). In a post-pandemic world, this is likely even more true than it was 25 years ago. The business needs are great, but the societal need is greater.

The General District Court needs the help of professionals willing to devote themselves to this important community service. You will not be called on to serve every day.You will not be paid much, but you will not walk alone. Your colleagues will help you help others, and we can live up to the noble goals of our profession that purport to set lawyers apart.

If you are interested in serving, please contact Colleen O'Connor COConor@lsnv.org and Bryan Kennedy bkennedy@vadefenders.org and we can put you in touch with the court and get you information about how to sign up and get the training you will need to get started. ■

INSIGHTS INTO THE COLLABORATIVE PROCESS FROM DIVORCE COACH, PATRICE GARVER, PH.D.

By Christine Hissong, Esq., Chair, Alternative Dispute Resolution Section

I recently had the privilege of talking with Patrice Garver, Ph.D.[1] about her work as a Collaborative Divorce Coach, what compelled her to seek Collaborative training, and what, from her perspective as a mental health professional, are the most beneficial aspects of the Collaborative Process for divorcing families. The following is an excerpt from that conversation.

Christine:
In what areas of study did you receive your Masters and Ph.D.?

Patrice:
My Ph.D. is in developmental psychology, and I have three Masters: one in assessment and learning; one in family systems and trauma; and the third is in developmental clinical psychology.

Christine:
In what areas do you currently specialize?

Patrice:
All aspects of helping the family system and adults. I counsel clients who are in the process of thinking about separation, who have separated, and where one party is still holding on and traumatized by the fact that their life will be different. I counsel them during their divorce process, and at the end, I work with restructuring families. I have an extra certification pertaining to resist-and-refuse cases. My Masters in family systems and trauma and cognitive behavioral therapy really come into play when there is a lot of fracturing in the family system. I no longer work with young children unless I see them while serving as a child specialist in Collaborative cases.

Christine:
What experience do you have with psychological evaluations?

Patrice:
I started out as a psychologist in the school system before I shifted to the private sector. I did a lot of psychological evaluations, especially [for] kids who were neuro-atypical or kids with learning differences, at the request of pediatricians and neurologists, for about 23 years.

Christine:
What piqued your interest in the Collaborative Process?

Patrice:
When I veered away from testing and got into family systems, I began working with families dealing with trauma and divorce, and this is what lead me to Collaborative. I would wonder why things are so much worse for people after they go to court. Why is the family and the children so traumatized after they've been in court? It takes a long time to go through the court process and afterward they are not better, they're worse, and I'm dealing with the fallout and trying to help them put the pieces together, to tolerate this state, and to move on. Some parents spent hundreds of thousands of dollars, they suffered financial trauma, and I'd think, there has to be a better way. This is a sad thing, it's uncoupling and restructuring, and there has to be a better way. A friend went through a Collaborative Divorce, and I started researching, and I said, this is it. Early on, I had a Collaborative Case that involved adultery, and there was an apology that was made during the case, and it was truly transformative, that demonstrated, for me, the power of the Collaborative Process. Going through a divorce is hard, not a fun experience, people don't plan to divorce, but Collaborative makes it less tough.

Christine:
How is the Collaborative Process appropriate for parties with mental health challenges?

Patrice:
Despite mental health challenges, when each party is able to participate as a team member, the Divorce Coach can help them to have a voice and to allow their partner to have a voice. We develop a dynamic with the parties that when they feel vulnerable or when their emotions get too big, the coach can help them to be aware of that. If there are mental health concerns, and we can help them manage it and tolerate the tension, Collaborative is a great fit. The beauty is that the parties have agency, and they have an equal voice.

Christine:
What is a Divorce Coach's role with the clients during the Collaborative Process?

continued on next page

INSIGHTS INTO THE COLLABORATIVE PROCESS...
continued from previous page

Patrice:
I wear several hats. Some I wear more than others depending on the dynamic of the clients. If there are children, a big part of my role is to get to know the children, get to know the family and to help them navigate from a one home situation to a two home situation, by talking about co-parenting and their immediate needs and then delving into the parenting plan. If I am a single coach, I meet with them and go over how I can help them through the process, which is the parenting piece, preparing for meetings, giving them knowledge about the Collaborative Process, and at any time they need, I give them extra support to process things. I also meet with them individually to get a sense of where they're coming from and who they are, and I share that information with the team as a different lens for the attorneys to hear that. If there are mental health concerns like anxiety or bipolar, for example, that's a really important issue to talk about and plan with the team. I share with the team so we can prepare for how that might show up in the meetings with the parties. I love that the whole team, attorneys, and even financial neutrals, have that emotional piece in mind – this is another reason I've become so committed to Collaborative.

Christine:
How do you maintain neutrality in a one-coach model Collaborative case?

Patrice: The needier client/spouse can sometimes require more attention, so I have to be really careful to balance the time and do check ins. It is more challenging when one of the parties has more mental health concerns than the other. I have to be careful to allocate the time between them. It's easier when there are children involved because we can focus on them partnering as co-parents and shifting them to wearing their parenting hats versus their spouse hats.

Christine:
How do you work with the other Divorce Coach in a two-coach model Collaborative case?

Patrice:
We brief before coach meetings and we debrief after coach meetings. We talk about what needs to be shared with the full professional team. We plan, talk, and share information regularly between meetings.

Christine:
From your perspective as a mental health professional, what do you consider to be the most beneficial aspects of the Collaborative Process for divorcing families?

Patrice:
The multidisciplinary team is key. This allows for the individualized and flexible nature of the Collaborative Process, because we look at the case from the emotional, financial, and legal points of view. Another benefit is that the attorneys don't go to Court, and that is powerful. The planning among the Collaborative professionals is so important and we don't get that in any other process.

Christine:
Is there anything that you would really like parties and practitioners alike to be aware of when considering a Collaborative divorce?

Patrice:
It's important to understand that at the beginning, the Collaborative Process may seem overwhelming with all the different professionals who can be involved, and the different meetings. But, once the process gets started and we begin to develop language for the Agreement, it is actually very efficient, and any anxiety about the process lessens. The Collaborative Process involves more than just getting the case done, it addresses the particular needs and interests of the parties and the family. ■

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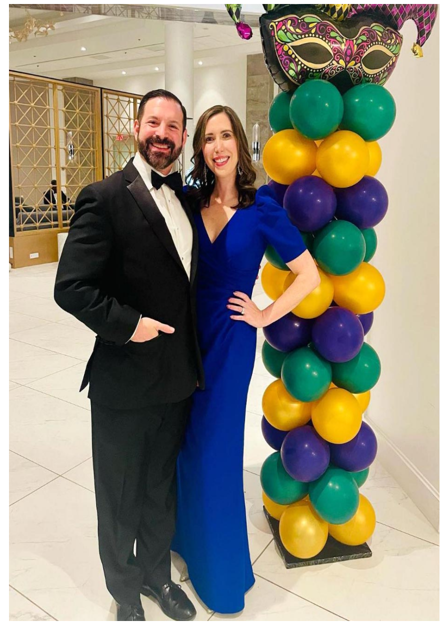
[1]Patrice Garver, Ph.D., www.drpatricegarver.com, drpatricegarver@drpatricegarver.com, 703-291-6058
Divorce Mediation Associates, www.divorcemediationassociates.com, 703-665-7592



NEW MEMBERS

January

Christopher Bullard
Nila Carter
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Stacy Harris
Timothy Lynch
Rebecca Simpson
Jason Weiss
Homer Winter
Sandra Zegarra

February

Reta Arbusto
Janelle Blanchette
Stephanie Bortnick
David Bybee
Paul Dean
Daniel Goldman
MorganeMurawiec
John Pennington
Jennifer Reinkober
Barry Zweig

THE FAMILY LAW SECTION

By Mary C. Huff, Esq,, and Lauren W. Smith, Esq., Co-Chairs

The Family Law Section of the Fairfax Bar Association (FBA) was created by the FBA to enhance its members' knowledge of the law and court procedures. To that end, the Family Law Section holds monthly meetings. Each meeting addresses a substantive topic that impacts the practice of family law, and we often apply for CLE credit for those meetings.Since the pandemic, our meetings have been mostly virtual, generally on the second Monday of every month at 6:00 PM or on a Thursday at 12:00 or 12:30 PM. Each month, in advance of the meeting, members are emailed a description of the topics to be covered at the next meeting as well as information regarding the presenters.

The Family Law Section ensures that our members are as well informed as possible about practicing before the Fairfax Courts. Every year we circulate the newest law clerk checklists. We also endeavor to provide our membership with the opportunity to meet new Circuit Court and Juvenile and Domestic Relations Court Judges and to hear about their experiences, beliefs, preferences, and insights about family law. We held our first in-person meeting since the pandemic this year, and our had the opportunity to meet with the newest Circuit Court Judges: Hon. Tania M. L. Saylor; Hon. Christie A. Leary. and Hon. Manuel A. Capsalis, along with the Chief Judge, Hon. Penney S. Azcarate. This year we also provided an update from the Department of Child Support Enforcement.

In addition to keeping our membership abreast of what is happening within the Fairfax court system, the Family Law Section assists our members with staying updated on the law. Family law generally arises out of state law, so it is critically important that our members are apprised of the most recent developments in the Virginia Legislature, the Court of Appeals of Virginia, and the Supreme Court of Virginia. Therefore, we provide a legislative update every April to keep our membership informed as to recently introduced bills that impact the domestic relations practice, the progress of the bills, and whether they are enacted into law. We also share and comment on important family law decisions issued by the Court of Appeals and the Supreme Court of Virginia.

In addition to those regularly recurring topics, the Family Law Section hosts presentations on nuanced areas of the law and other specialty issues for our membership. This year we provided continuing legal education classes regarding funding college in divorce and ethical issues in Family Law. We are also hosting a two-part seminar on financial literacy for family law attorneys. All topics have been selected to help our members remain the most sophisticated domestic relations attorneys in Virginia and simultaneously improve the methods of practice for those who directly impact families and children.

Please contact Mary C. Huff mhuff@bklawva.com or Lauren W. Smith aurenwallersmith@gmail.com with any requests for Section meeting topics. ■

President's Column

continued from page 2

doesn't change the fact that I enjoy the people and the interactions. I don't need to qualify you as a "legal buddy" or "courthouse friend." I can just acknowledge we're buds.

My choice of topic and writing in this article are a somewhat convoluted effort to acknowledge and thank a friend, Sonya Duchak! By the time this is published, I expect her retirement will be effective, but I know her presence as a fixture at the 5th floor conciliation table every Friday will already be missed. I count Sonya among the friends I've made during/because of my time spent at the courthouse. I know with certainty I'm not the only who made a point of volunteering an hour or so on Fridays at least a few times a year, largely because I knew I'd get to spend most of that time chatting with Sonya. She always remembers the last few conversations you had and is ready with follow-up questions to keep the conversation going, no matter the number of weeks between intervals. She's exceedingly patient and understanding and grateful all at once. You never walked away from Sonya believing she didn't appreciate the help you provided, or fearing she thought you should have done more (even though she always does more herself). Most remarkably, she is seemingly always positive despite spending so much of her time coordinating and facilitating us through the weekly contested motions dockets.

If you are or have been a lawyer, judge, law clerk, or party in the Fairfax Courthouse in the last 25 years, there is a very good chance that Sonya did something to make your job better and/or your time at the courthouse easier -- almost certainly more than once. Thank you Sonya! You will be missed, and you will remain a friend to the FBA community even from Chicago! ■

Upcoming Events/CLEs

Fairfax County Specialty Treatment Dockets CLE
Presented by the FBA Criminal Practice Section
Wednesday, April 12, 2023
4:00 PM - 6:30 PM
2.5 (1.0 Ethics) MCLE Credits *(Pending)*
Fairfax County Courthouse (Courtroom TBD)
Free to attend for FBA Criminal Law Section Members
$87.50 FBA Non-Section Members/$125 Non-Members
Distinguished Panelists:
Hon. Susan F. Earman, Moderator, Fairfax County General District Court
Hon. Dontae L. Bugg, Fairfax County Circuit Court
Hon. Grace B. Carroll, Fairfax County Circuit Court
Hon. Tina L. Snee, Fairfax County General District Court
Michelle Cowherd, LPC, Fairfax County Mental Health Docket Coordinator
Brooke Dembert, LCSW, Veteran's Treatment Docket Coordinator
Jennifer Fuller, Drug Treatment Court Coordinator
Thomas Spahn, Esq., McGuire Woods LLP

Fairfax Circuit Court: E-Filing Tips & Ethical Considerations CLE
Thursday, April 13, 2023
4:00 PM - 5:30 PM
1.5 MCLE (0.5 Ethics) Credits *(Pending)*
Cisco WebEx
$30 Per Registrant
Speakers:
Hon. John M. Tran, Fairfax County Circuit Court
Gerarda Culipher, Esq., Clerk's Office, Fairfax County Circuit Court
Jason Gonzalez, File & Serve Express
Robert Rodriguez, File & Serve Express

Circuit Court Committee Meeting
Wednesday, April 15, 2023
1:00 PM - 2:00 PM

Cocktails with the Fairfax Circuit Court Judges
Thursday, April 20, 2023
5:00 PM - 7:00 PM
Auld Shebeen
3971 Chain Bridge Rd., Fairfax, Virginia 22030
$5 Young Lawyer Section Members/$10 Non-Members

Using Social Media & Electronic Evidence in Court CLE
Tuesday, April 18, 2023
4:00 PM - 6:00 PM
2.0 MCLE Credits *(Pending)*
Fairfax County Courthouse, 4th Floor Jury Assembly Room
$40 FBA Young Lawyers/$70 Regular Members
Please join the Fairfax Young Lawyer's Section for its Spring CLE focusing on the collection and use of social media & other electronic evidence in the courtroom. Our presenters will provide insight into using this type of evidence in various practice areas, and answer any questions concerning how electronic evidence can help (or hurt) your cases.
Speakers:
Hon. Stephen C. Shannon, Fairfax County Circuit Court
Hon. John M. Tran, Fairfax County Circuit Court
Bryan T. Kennedy, Esq., Fairfax Public Defender's Office
Michael C. Maschke, Esq., CEO, Sensei Enterprises, Inc.
Stephanie J. Smith, Esq., Cooper Ginsberg Gray PLLC

Legislative Update CLE
Presented by the FBA Family Law Section
Thursday, April 20, 2023
12:30 PM - 1:30 PM
1.0 MCLE Credits *(Pending)*
Cisco WebEx
Free to attend Family Law Section Members
$35 FBA Non-Section Members/$50 Non-Members.

13th Annual Heroes vs. Villains 5k and Kids' Fun Run
Sunday, April 23, 2023
8:30 AM - 11:00 AM
Fairfax Corner
4100 Monument Corner Drive, Fairfax, Virginia 22030
Registration Fees: 5K: $40/Fun Run: $20

Law Day Weiner Roast
Monday, May 1, 2023
4:30 PM - 8:30 PM
Weiner, Spivey & Miller PLC
10605 Judicial Drive, Suite B6, Fairfax, Virginia 22030
To RSVP, please visit https://www.wsminjurylaw.com/lawday

Jury Voir Dire CLE – Save the Date
Thursday, May 4, 2023
4:30 PM - 6:30 PM
Fairfax County Courthouse (Courtroom TBD)
$70 FBA Members/$100 Non-Members
Distinguished Panelists:
Hon. David A. Oblon, Fairfax County Circuit Court
Elaine Bredehoft, Esq., Charlson Bredehoft Cohen Brown & Nadelhaft, P.C.
Carla Brown, Esq., Charlson Bredehoft Cohen Brown & Nadelhaft, P.C.

Debt Collection Defenses and Other Consumer Protections (Webinar)
Presented by the Northern Virginia Pro Bono Law Center
Monday, May 8, 2023
2:00 PM - 5:00 PM
3.0 MCLE Credits *(Pending)*
Free, in exchange for participation in 3 client intake session in the coming year and representation of those clients, as necessary, in conjunction with Legal Services of Norther Virginia.
Speakers:
Hon. Michael Lindner, Fairfax General District Court
Denise Pitts, Esq. Legal Services of Northern Virginia
Connell Loftus, Esq. Harris Loftus PLLC

Law Practice Management Social
Wednesday, May 10, 2023
4:30 PM
Hamrock's Restaurant, 3950 Chain Bridge Road
Fairfax, Virginia 22030

Fairfax Circuit Court: E-Filing Tips & Ethical Considerations CLE
Thursday, May 11, 2023
4:00 PM - 5:30 PM
1.5 MCLE (0.5 Ethics) Credits *(Pending)*
Cisco WebEx
$30 Per Registrant
Speakers:
Hon. John M. Tran, Fairfax County Circuit Court
Gerarda Culipher, Esq., Clerk's Office, Fairfax County Circuit Court
Jason Gonzalez, File & Serve Express
Robert Rodriguez, File & Serve Express

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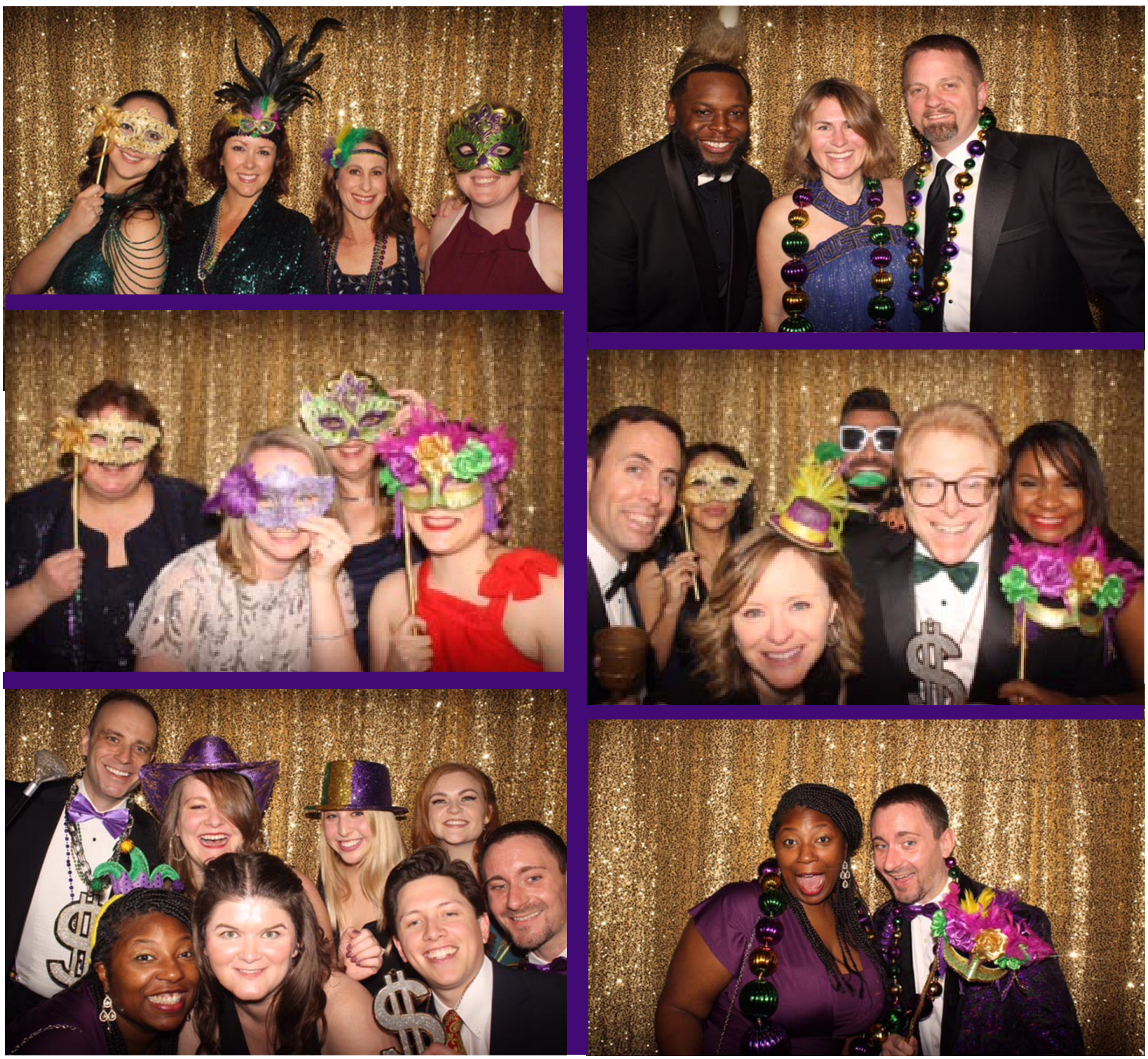
23rd Annual Spring Golf Tournament
Friday, May 12, 2023
11:30 AM - Until
Westfields Golf Club
13940 Balmoral Greens Avenue, Clifton, Virginia 20124
$175.00 Per Person
(includes: Greens Fee, Cart, Lunch at the Grill, Buffet Dinner, and Prizes)
Silent Auction to benefit the Fairfax Law Foundation

Spousal Support CLE
Presented by the FBA Family Law Section
Monday, May 15, 2023
12:00 PM - 1:00 PM
1.0 MCLE Credit *(Pending)*
Cisco WebEx
Free for Family Law Section Members/$35 FBA Non-Section Members/$50 Non-Members

VA vs DC Comparative Civil Procedure CLE
Thursday, May 18, 2023
4:30 PM - 6:00 PM
1.5 MCLE Credits *(Pending)*
Distinguished Panelists:
Tracy Buck, Esq., Offit Kurman P.C.
Ian Thomas, Esq., Offit Kurman P.C.



APPLICATION OF THE DISCOUNT RATE IN LOST PROFITS LITIGATION

Arthur Weiss, Esq., Chair, Business Law Section

Lost profits can arise in a variety of circumstances ending up in court. They can arise from a business tort, an accident, an insurance claim, or a breach of a lease covenant. The well-known standard for proof of the amount of lost profits is "reasonable certainty." They need not be proven with specificity, as these matters require a host of assumptions that make pinpoint accuracy very unlikely. But rather than impose such a burden on plaintiffs' attorneys and their experts, the law requires only reasonable certainly as held by a multitude of Virginia cases.

Litigating a lost profits case can involve past losses, future losses, or both. In the case of future losses, the calculation requires the use of a discount rate to compute the value of those losses today rather than at some future time (i.e., the present value of the loss). A loss projected for three years from now will not have the same value as a loss last year.Money has time value, which must be considered in a demand for future lost profits. Determining an appropriate discount rate and justifying that before the finder of fact often requires an expert witness who specializes in finance or economics.

A brief look at the math will show why arguing about discount rates is important for both sides of the case. Assume that all parties agree that in year three a company's projected loss is $1,000,000 in net profits. The parties also agree on the definition of net profits and on all the tax consequences involved in that calculation. The question is, how much is that million dollars worth today? For that we need a discount rate. Using the standard present value formula, a million dollars discounted at 10% three years from now is $751,314. At 15% the value is $657,516—a difference of almost a hundred thousand dollars. Plaintiff's expert defends 10% while the defense expert justifies 15%.

What is the discount rate anyway? How is it computed? How can two highly trained finance professionals arrive at such disparate results? Simply put, the discount rate is a measure of risk. It goes by several other names—the "cost of capital" or the "required rate of return." If the risk of a given cash flow or sequence of cash flows is perceived by investors to be very high, they will demand a higher rate of return by using a higher discount rate, thereby reducing the present value to reflect the higher risk. This is why a treasury bond backed by the full faith and credit of the United States pays lower interest than a corporate bond backed by the promise of the company to pay the interest on time, every time.

Risk, like lost profits, appears in many guises. Market risk, liquidity risk, company-specific risk, and inflation risk all factor into the computation of the discount rate, which is supposed to reflect the risk that the million dollars would have materialized three years from now if the intervening tort, accident, or breach had not occurred.

Let's examine a hypothetical case—a shopping mall owner breaches a lease covenant with an existing tenant under which it covenants not to lease to a competing business for five years. One year after signing the lease, the mall owner rents to a competing business. Tenant sues and seeks future lost profits for the remaining four years of the covenant. It is clear that these profits must be discounted, but at what rate? Ten percent? Twenty percent? As we saw above, the difference is substantial.

One oversimplified way to look at it is to ask the question—how much would a risk-averse investor pay for a single payment of a million dollars from this particular business three years from now? Valuation analysts will examine, among many other factors, the past financial history of the business, national and local trends in the industry, neighborhood conditions, and contractual obligations of the business—all with the intent to assess the risk that the future cash flow projection is reasonable.

The current lease on this business expires in six months this a risk factor? Does the lease contain a renewal option? If not, what is the likelihood that the mall owner will extend the lease? And on what terms? This single factor may or may not have an effect on future cash flows and if it does, how will the cash flow in year three be affected? Is company profitability dependent upon a key employee or owner? Will she be there three years from now? If she is going to retire next year, this would be of great interest to defense counsel as he would now demand a higher discount rate to reflect the higher risk to the anticipated payout in three years. How is the industry doing? Is this business well positioned to endure if the industry faces a downturn? How has it performed in past industry cycles? Are there any contingent liabilities that may affect the ability to generate net profits of a million dollars in three years? Many company—specific risk factors will play into the discount rate, and who better to ferret out these risk factors than attorneys who deal with risk on a daily basis? Businesses come and go, but risk factors, are always here. Anyone remember Osborne Computers? I didn't think so. ■

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