Nassau Lawyer

THE JOURNAL OF THE NASSAU COUNTY BAR ASSOCIATION

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Of Note

NCBA Member Benefit – I.D. Card Photo
Obtain your photo for court identification cards at NCBA Tech Center. Cost $10.
January 27, 28 & 29, 2015 • 9 a.m.-4 p.m.

NCBA Committee Meeting Calendar
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Events

JOIN US TO CELEBRATE THE SEASON!

82nd Wassail Celebration
Thursday, December 11, 2014
6:00 p.m. at Domus
$20 pp/ children under 12 free
RSVP Special Events (516)747-4070

NASSAU ACADEMY OF LAW
Bridge the Gap
Saturday & Sunday, January 24-25, 2015 at Domus
See Insert and page 13

WE CARE
Children's Festival
Friday, February 20, 2015 at Domus
See page 18

NASSAU ACADEMY OF LAW
Hon. Elaine Jackson Stack
MOOT COURT Competition
Tuesday & Wednesday
March 24 & 25, 2015 at Domus
Details to follow

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Upcoming Publications Committee Meetings

Thurs., December 11, 2014
Thurs., January 15, 2015
12:45 at Domus

(Seated l-r): Hon. Margarita López Torres, Kings County; Hon. Nora S. Anderson, New York County; Hon. Rita Mella, New York County (standing l-r): John Graffeo, co-chair, NCBA Surrogate's Court Estates and Trusts Committee; Hon. Anthony A. Scarpino, Jr., Westchester County; Hon. Edward W. McCarty III, Nassau County; Hon. Peter J. Kelly, Queens County; Hon. John M. Czygier, Jr., Suffolk County; Chandra M. Ortiz, Dean of the Nassau Academy of Law; and Lori Sullivan, Co-Chair, NCBA Surrogate's Court Estates & Trusts Committee. (Photo by Hector Herrera)

Nassau Academy of Law Hosts All-Star Evening with Metro Area Surrogates

By Valerie Zurblis

On November 5th, for the first time, a rare gathering of seven Surrogates serving in the New York metro region converged at the Nassau County Bar Association for a spirited exchange on procedural and substantive processes involved in Surrogate's Court practice. More than 200 attorneys packed the dining room at NCBA's headquarters in Mineola for "An Evening With The Surrogates," an exceptional program presented by the Nassau Academy of Law, NCBA's educational arm.

"I've seen a good number of events and CLE presentations at the Bar Association and elsewhere over the years, but I have never seen an All Star line-up or anything close to what was put together last night," said one attendee, Francis D. Quigley, Jr. "It just doesn't happen that you see that many judges – especially Surrogates – in one place, answering questions, comparing notes and having a pretty good time at that!"

The esteemed judges discussed their unique perspectives from the bench in the counties of Nassau, Suffolk, Queens, New York, Kings and Westchester. Invited to add their viewpoints were five past Surrogates. Former Nassau Surrogates Hon. C. Raymond Radigan and Hon. John B. Riordan were joined by Hon. Louis D. Laurino (Queens County), Hon. Lee L. Holzman (Bronx County), and Hon. Renee R. Roth (New York County).

"An Evening with the Surrogates" CLE program was presented jointly by the Nassau Academy of Law with the Suffolk Academy of Law and the NCBA and SCBA Surrogate's Court Estates & Trusts Committees. The moderators, Committee Chairs Lori Sullivan and John Graffeo from NCBA and Scott McBride and Robert Harper from SCBA orchestrated the event, along with NCBA Committee Vice Chairs Sally M. Donahue and Dennis Wiley, as well as Brette Haefeli, Law Clerk to Judge Czygier Jr. of Suffolk County

Special thanks to our sponsors who helped make the event possible – Baker Tilly, BNY Mellon Wealth Management, Champion Office Suites, Doyle New York, Echo Appellate Press, Empire Valuations, Jasper Surety, RCJ Valuations and Tristar Court Reporting.

Annual Pro Bono Campaign

Access to Justice Doing The Right Thing

To promote the delivery of competent legal services to all who need them, without regard for the ability to pay and without regard for the popularity of the cause

– from the NCBA Mission Statement

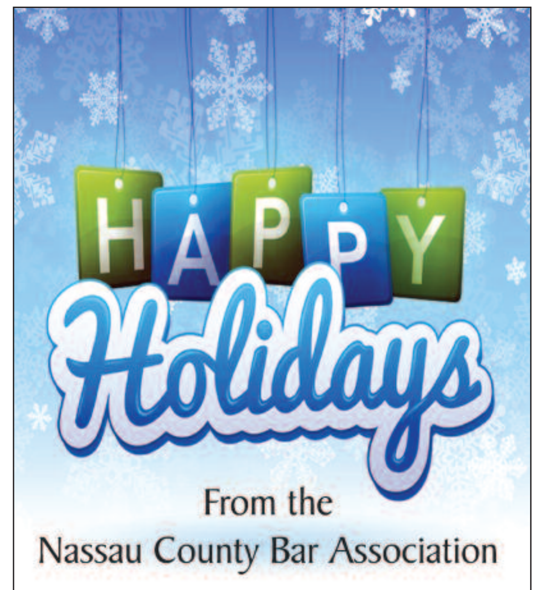
By Valerie Zurblis

The Nassau County Bar Association is dedicated to protecting civil rights and providing access to the legal system for all citizens, and most importantly, for the neediest residents living under the poverty level – the homeless, working poor, single parents with dependent children, people with illnesses, and the elderly. NCBA demonstrates its commitment to help this population through its ongoing partnership with Nassau/Suffolk Law Services and strong support of the Volunteer Lawyers Project (VLP), a not-for-profit program that supplements the civil legal services provided by Law Services' staff with volunteer attorneys from the private bar.

All NCBA members are asked to participate in the Annual Pro Bono Campaign to support VLP. "The Volunteer Lawyers Project has been doing incredible work to help indigent residents in need of legal services," NCBA President John P. McEntee said. "This could not be accomplished without the generous support of time and donations from our membership."

In the past 12 months, VLP's services have benefitted more than 3,000 adults and children, with the active involvement of almost 200 pro bono attorneys. For the most

See Justice, Page 4



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Tax/Commercial/Bankruptcy Law

Driving While Delinquent:

NYS Taxpayers Pulled Off the Road for Back Taxes

Driving is a privilege, not a right. Many people know that the privilege of operating a motor vehicle may be suspended for driving under the influence of alcohol or drugs or for excessive moving violations. However, despite the fact that the law has been in effect for over a year, many New Yorkers still do not know that their drivers' licenses can be suspended for failing to meet their tax obligations.[1]

About 96 percent of taxes are collected from individuals and businesses in New York that voluntarily comply with the tax laws and meet their tax responsibilities each year.[2] In August 2013, to encourage further compliance, Governor Andrew Cuomo announced an initiative to suspend the New York State drivers' licenses of certain tax delinquents.[3] The law allows the New York State Department of Taxation and Finance (the "Tax Department") to request that the New York State Department of Motor Vehicles suspend the drivers' licenses of taxpayers with past-due liabilities of $10,000 or more, the sum to include tax, interest, and penalties.[4] The law, however, does not permit the suspension of commercial drivers' licenses.[5]

Peter J. Graziano

The State normally issues two notices prior to suspending a taxpayer's license. The first notice, sent by the Tax Department, provides the taxpayer with 60 days to reach a resolution regarding the outstanding liabilities.[6] If a resolution is not reached within the 60-day period, the Tax Department will refer the taxpayer to the DMV for suspension.[7] Thereafter, the DMV will issue a second notice that provides the taxpayer with an additional 15 days to reach a resolution with the Tax Department.[8] If the taxpayer again fails to address the outstanding liabilities, the DMV will suspend his or her license.[9]

The license will remain suspended until all liabilities are paid in full or an arrangement to pay them has been reached.[10] Taxpayer whose licenses have been suspended may apply for restricted licenses, which would permit them to drive to and from work and in other limited instances.[11] As one would expect, a taxpayer driving with a license that was suspended as a result of this tax law is subject to arrest.[12]

The Tax Department's new collection tool has clearly paid dividends for the State. The first round of suspension notices was sent out shortly after Governor Cuomo announced the initiative in August 2013.[13] As of March 2014, approximately 6,500 tax delinquents had either paid their tax liabilities in full or made a payment arrangement with the Tax Department.[14] As a result, state and local tax collections from the initiative reached $56.4 million, a sum 34 percent greater than the State's initial estimate of $42 million.[15]

The 8,900 taxpayers who failed to reach a resolution with the Tax Department had their licenses suspended.[16] There are, however, several possible resolutions that may prevent suspension or reinstate a suspended license for taxpayers with outstanding liabilities. Taxpayers may consent to a voluntary income execution, seek an

See BACK TAXES, Page 21

What Everyone Should Know About IRC Section 754 Elections

Partnership[1] taxation is a challenging subject even for seasoned tax practitioners. Non-tax practitioners need not master the esoteric provisions of Internal Revenue Code[2] Subchapter K, which governs partnership taxation, but a foundational knowledge of important concepts found therein can enhance one's practice. One such concept is the election available under IRC Section 754 (the "Election").

Matthew E. Rappaport

The purpose of the Election is to reconcile differences in "inside basis" and "outside basis" that arise due to distribution of partnership assets or transfer of a partnership interest.[3] "Inside basis" is the partnership's basis in each of the assets it owns. "Outside basis" is each individual partner's basis in her partnership interest. At the time the partnership is first formed, inside basis and outside basis will be the same,[4] but subsequent events may render them different. Although any disparity between the two will eventually be corrected naturally without an Election, waiting for the situation to resolve on its own is likely to result in adverse tax consequences.

The most significant tax disadvantage from declining the Election is distorting the timing of gain or loss recognition. If basis differences delay loss recognition or accelerate gain recognition, the taxpayer suffers due to the effects of the time value of money. Furthermore, the taxpayer may not be able to fully utilize capital losses without timing them to occur in years during which the taxpayer has offsetting capital gains.

Evaluating the Merits of an Election

The two common scenarios associated with an Election are the death of a partner and the transfer of a partnership interest, both of which allow for a "step up" in the outside basis of a partnership interest to its fair market value at the time of the decedent's death or the time of the transfer (whichever is applicable).[5] For those non-tax practitioners who often quarterback estate administrations and acquisitions of partnership interests, consider the following when deciding whether to make an Election (or request that the partnership make an Election):

Is there a step up or a "step down" in outside basis? When the new partner's outside basis is greater than the partnership's inside basis, a step up in basis will result. Generally, an Election is advisable when the inside basis will be stepped up.[6] Generally, an Election is inadvisable when the opposite scenario exists and the inside basis would be stepped down; no party will benefit from a decrease in inside basis because it would accelerate the gain from the partnership's sale or exchange of the affected assets.[7] On the other hand, a step up in basis brings with it not only the delay of partnership gains (or acceleration of losses), but also the transferee partner's use of her renewed pro rata depreciation deduction for any depreciable partnership assets.

Keep in mind that the Election is irrevocable. Once the Election is made, it can only be revoked with the

See IRC SECTION 754, Page 15

The Dawn of Economic Nexus in New York: What Out of State Corporations Should Expect in 2015

When Governor Andrew M. Cuomo signed the 2014-2015 budget bill ("Bill") on March 31, 2014,[1] New York joined the increasing number of states that have adopted an economic nexus provision as a basis for taxation of out-of-state corporations. Starting January 1, 2015, New York's revised nexus provisions will include an economic presence component in addition to its current physical presence requirement.[2]

Joseph Leocata

A driving force behind implementing the economic nexus provision is to extend New York's taxing arm to out of state corporations, especially to those businesses that conduct sales solely, or predominately, through the internet. The Bill's economic nexus standard establishes a bright line rule, making a corporation subject to NYS corporate income tax if it derives annual receipts of at least $1 million or more from activity within the state, regardless of whether the corporation has any in-state physical presence.[3]

The silver lining that can be taken from this Bill, if there is one, is that the economic nexus standard will apply only to corporations. Thus, most pass-through entities, such as partnerships and limited liability companies taxed as partnerships, will not be subject to the economic nexus standard. S corporations, however, will be subject to the newly enacted provision.[4] Apparently, the reason for this disparate treatment is that New York is not as concerned with taxing service businesses, many of which do not operate in corporate form, as it is with taxing those entities that sell tangible goods, many of which are not taxed as partnerships.

The beginnings of the economic nexus trend can be traced back to 1993 in the landmark case *Geoffrey, Inc. v. South Carolina Tax Commissioner*,[5] which involved a corporation with a giraffe mascot. In that case, Geoffrey, Inc. ("Geoffrey") was the trademark holding company of the toy retailer Toys "R" Us and did not have a physical presence in South Carolina.[6] The company was incorporated and domiciled in Delaware, and had no employees or property in South Carolina.[7] Geoffrey did, however, execute licensing agreements with Toys R' Us retailers in South Carolina that allowed them to use Geoffrey's trademarks and trade names, including "Toys R' Us," in exchange for a royalty based on a percentage of the retailers' net sales.[8]

The South Carolina Supreme Court held that "by licensing intangibles for use in this State and deriving income from their use here, Geoffrey has a 'substantial nexus' with South Carolina,"[9] that satisfied the

See NEXUS, Page 15

What Lessons Can We Learn From This Fiasco?

FROM THE PRESIDENT

John P. McEntee

On Independence Day in 2004, 37-year-old Shara Lynn Towne was driving alone in her new 2004 Saturn Ion in Visalia, California. Described by one of her five children as the "light switch in any room," Towne was headed to Fresno when her car left the roadway, jumped a curb, and struck a utility pole, killing her instantly. The police investigating the collision could not determine conclusively the cause of the accident, as there were no eyewitnesses and the autopsy showed no evidence of drugs or alcohol usage. The police observed that her air bag failed to deploy, however. Years later, it would be determined that Towne was the first fatality involving a defective ignition switch causing certain General Motors vehicles to stall while in operation, disabling the air bag systems designed to protect front seat passengers.

In February 2014, GM issued its first recall of vehicles equipped with the defective ignition switch, eleven years after it first learned of problems with the switch. The following month, it ordered an internal investigation, led by former U.S. Attorney Anton R. Valukas, to "determine how and why it took so long for GM to recall" vehicles with the defective switch. On May 29, 2014, Valukas issued a 276-page report of the investigation.

The early delays were attributed to ineptitude. When GM engineers began to receive reports about cars stalling because of the movement of the key switch from the Run position into the Accessory position, they were not overly concerned because the cars could still be steered. They classified the issue as one of "customer convenience" rather than safety, as if stalling at highway speeds was a mere inconvenience. In doing so, they failed to consider that losing power meant the driver and front seat passenger also lost air bag protection. As years went by, though, "accidents and fatalities in which airbags did not deploy began coming to GM personnel's attention, including GM's in-house counsel and the engineers who worked with them."

In 2007, a Wisconsin State Police investigator issued a written report on an accident involving a 2005 Chevrolet Cobalt that veered off the road and hit trees, killing 15-year-old Amy Rademaker and 18-year-old Natasha Weigel. The investigator noted that the airbags had failed to deploy, that the ignition switch was in the Accessory position at impact, that federal regulators had publicly-available reports of similar incidents, and that in 2006 GM issued a technical service bulletin to dealers discussing the movement of the ignition switch position from Run to Accessory "due to low key cylinder torque/effect." He concluded correctly that the airbag non-deployment was related to the ignition switch position, a conclusion reached the same year by Indiana University researchers independently researching the same accident. That year, the GM Legal Department received a copy of the Wisconsin State Police report, yet no one at GM would recall reviewing it until 2014.

Also in 2007, the GM engineer responsible for the ignition switch, Raymond DeGiorgio, directed changes to the switch involving an improved plunger. Although DeGiorgio solved the problem for cars built in model year 2008 and thereafter, he told no one at GM of the change, did not document it with a new part number in contravention of GM policy, and thereafter claimed to remember nothing about the change. In 2010, as the accidents, injuries, and lawsuits mounted while GM continued to investigate the problem, an investigation determined to be neither diligent nor incisive, GM received the first of several warnings from outside counsel that it was risking punitive damage awards for repeated instances of airbag non-deployment.

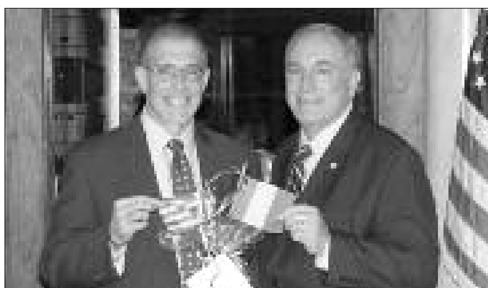
In April 2013, during a deposition of DeGiorgio in an action against GM, DeGiorgio was confronted with what GM's outside counsel described as "bombshell evidence" developed by a plaintiff's expert who took apart both an early switch and a later switch, discovered the improved plunger, "and quickly found the cause it took GM years to determine." Ten months later, after a series of internal meetings, GM finally concluded a recall was necessary.

To date, 30 fatalities and hundreds of injuries have been attributed to the ignition switch defect. Upon the issuance of the Valukas report, 15 GM employees were fired, including three senior in-house attorneys. The Valukas report shows that GM's in-house attorneys were at the center of the ineptitude, settling cases confidentially while failing to raise the continuing air bag non-deployment problem to the General Counsel, resulting in substantial harm to GM and to the public.

What lessons can we learn from this fiasco? Some suggest we ban confidentially provisions in settlement agreements involving unsafe products, which seems sensible even though it might discourage some settlements. Yet, it is not clear from the Valukas report that such a ban would have led to an earlier recall. Rather, we need to consider whether something broader is required where lawyers have unique knowledge of threats to public safety, as no one reading the Valukas report can take comfort in the actions of the GM lawyers. While a client may rightfully demand vigorous representation, it cannot correspondingly expect complicity in malfeasance. Hopefully, the GM ignition switch debacle will spark a discussion on the proper role and duties of lawyers where inaction presents a continuing threat to public safety.

ASSOCIATION NEWS

On November 10th, members of the Nassau County Bar Association attended The New York Bar Foundation Fellows 10th Judicial District Fellow Fall Meeting at Touro Law Center in Central Islip. The guest speaker was Hon. Sol Wachtler, former Chief Judge of the State of New York, who spoke on the subject of "The Veteran and Criminal Justice." (Photo by Hector Herrera)



(l) Justice Peter B. Skelos, Appellate Division, Second Department, presented a CLE course "Brief Writing and Oral Argument in the Second Department - A View From the Bench" to members of the Columbian Lawyers' Association of Nassau County on November 20th. With Justice Skelos is Columbian Lawyers' President, Thomas A. De Maria.

JUSTICE ...

Continued From Page 1

part, these matters involve landlord/tenant (Attorney of the Day Project), bankruptcy, and divorce cases. In addition, VLP hosts a free bankruptcy clinic every other month at NCBA.

VLP is staffed by a full-time attorney, a part-time attorney, and a full-time secretary. This small staff interviews and screens applicants for pro bono services, manages the recruiting of legal volunteers, directs the placement of pro bono cases including follow up and final reporting of case dispositions, and maintains the large client database.

"We cannot neglect our mission to protect the rights of all our citizens," McEntee said. "If you do not have the time to volunteer to take a case, please donate the equivalent of just one billable hour to the effort. There is still so much work to be done and our support will go a long way to help all Nassau residents have access to justice."

The Nassau Lawyer welcomes articles that are written by the members of the Nassau County Bar Association, which would be of interest to New York State lawyers. Views expressed in published articles or letters are those of the authors alone and are not to be attributed to the Nassau Lawyer, its editors, or NCBA, unless expressly so stated. Article/letter authors are responsible for the correctness of all information, citations and quotations.

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Recent Amendments to the Commercial Division Rules

The last twelve months have seen a great deal of change to the rules of practice in the Commercial Division. These rules are intended to streamline cases, reduce costs, and encourage parties to explore opportunities for settlement early in the litigation. This article summarizes those changes and highlights the differences from prior practice.

Matthew F. Didora

The new rules have their origins in the recommendations proposed by The Chief Judge's Task Force on Commercial Litigation in the 21st Century. In the years since the Commercial Division was founded in 1995, the number and complexity of commercial cases have grown dramatically, while the judiciary has been continually hampered by budget cuts and reduced staff. Chief Judge Lippman recognized that reforms were necessary if New York State were to remain the preeminent forum to resolve commercial cases. The Task Force was commissioned to ensure that the judiciary remains at the forefront of how commercial cases are resolved.

The Commission was chaired by Judith S. Kaye, the former Chief Judge, and Martin Lipton, Senior Partner at Wachtell, Lipton, Rosen & Katz, and comprised of leading commercial practitioners, law professors, business executives, and former and current judges (including Nassau County's three Commercial Division justices).

Over the course of many months, the Task Force examined all phases of litigation, and in June 2012 issued a thorough and analytical report recommending a series of procedural and structural reforms intended to ensure the prompt and efficient resolution of commercial cases. In that report, the Task Force endorsed the Chief Judge's legislative proposal to establish a new class of Court of Claims judges to be appointed by the Governor for designation to the Commercial Division, recommended an increase in the monetary threshold and adjustment of the types of cases to be assigned to the Commercial Division, and encouraged an array of procedural reforms designed to reduce delay and eliminate unnecessary costs.

Among the procedural reforms recommended by the Task Force were new rules requiring the earlier assignment of cases to the Commercial Division, expanding the scope of expert disclosure, limiting privilege logs, standardizing practice across counties, reducing the burdens of e-discovery, and improving courtroom efficiency.

Chief Administrative Judge A. Gail Prudenti and the Unified Court System have taken the advice of the Task Force to heart and approved several new Commercial Division rules that improve the manner in which commercial cases are litigated. Below is a summary of the significant recent amendments:

New Rule 11-a: Imposing Limitations on the Number and Type of Interrogatories (effective June 2, 2014)

Under the prior rule, parties had the discretion to serve a virtually limitless number of burdensome interrogatories. Commentators criticized this practice as "a game," whereby parties expended significant amounts of time and money preparing interrogatories that resulted in the exchange of little, if any, useful information.

The new rule is meant to curb such gamesmanship and reduce litigation costs. It imposes a presumptive limit of 25 interrogatories, including subparts, per side. This numerical limitation is based on FRCP 33(a)(1). However, commercial litigants in state court are faced with a further limitation on the subject matter of those 25 interrogatories.

Gracie C. Wright

Unless otherwise ordered by the court, the permissible topics are names of the witnesses with knowledge of information material and necessary to the subject matter of the action, computation of each category of damages alleged, and the existence, custodian, location, and general description of documents and other physical evidence. Contention interrogatories, those seeking the factual basis of the opposing party's claims or defenses, may only be served at the conclusion of other discovery, and at least 30 days prior to the discovery cut-off date.

New Rule 11-b: Limiting Privilege Logs (effective September 2, 2014)

CPLR 3122 requires that any party withholding a document on the ground of privilege must separately list each document withheld and for each identify the sender, recipient, and subject matter of the document, among other things. In commercial cases, this is often a herculean task, and highly expensive for parties.

Under the new rule, the Commercial Division departs from the document-by-document approach and directs the parties to meet and confer early and often to agree on a procedure for handling privileged documents. The preference is for a categorical listing of privileged documents. For each category, the

See RULES, Page 16

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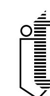
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NYSBA Approves Pro Bono Reporting Resolution

Calls For Mandatory Pro Bono Reporting on an Anonymous Basis Only, Public Reporting of Hours and Financial Contributions on an Aggregate Basis Only and Expansion of the Definition of Pro Bono

By Scott M. Karson

At its Fall 2014 meeting in Albany, the New York State Bar Association House of Delegates approved a resolution which will – hopefully – resolve the ongoing dispute with New York State Chief Judge Jonathan Lippman and the Office of Court Administration over mandatory pro bono reporting.

The resolution, which was offered by NYSBA President Glenn Lau-Kee, proposes that Rule 118.1 of the Rules of the Chief Administrator be amended to (a) "provide for reporting of pro bono hours and financial contributions to the Office of Court Administration by attorneys on an anonymous basis only;" (b) "provide for reporting of pro bono hours and financial contributions by attorneys to the public on an aggregate basis only;" and (c) "provide for additional categories of reportable hours and financial contributions given by attorneys towards pro bono work and other public service."

The resolution is aimed at addressing the principal objections of the organized bar to Rule 118.1, which became effective on May 1, 2013. First, the resolution would provide for anonymous reporting of pro bono hours and financial contributions by attorneys to the OCA. Second, it would provide for reporting of hours and contributions by attorneys to the public on an aggregate basis only. These provisions are intended to satisfy concerns that the reporting requirement as enacted constitutes an invasion of the privacy of lawyers. The amended rule would, if approved, preclude disclosure of information gathered with respect to any individual attorney, including disclosure pursuant to the Freedom of Information Law. There would be no linkage between the number of hours worked, the amount of money contributed and the name of the reporting attorney.

Third, the resolution calls for expansion of the definition of pro bono to include a broad range of activities in which lawyers voluntarily engage that contribute to their communities and to society at large, including discounted fees for poor clients and service to bar associations.

President Lau-Kee reported to the House that his resolution was the product of negotiations which took place at a series of meetings with OCA representatives, including Chief Judge Lippman and Chief Administrative Judge A. Gail Prudenti. Justice Prudenti expressed optimism that amendments to Rule 118.1 proposed by the State Bar would be approved by the Administrative Board of the Courts, which is comprised of the Chief Judge and the four Presiding Justices of the Appellate Divisions.

In other action, the House passed a resolution proposed by the NYSBA Legal Education Committee calling for the OCA to delay implementation of its plan to join 14 other states in adopting a nationally-standardized bar examination, known as the Uniform Bar Exam ("UBE"), in order to allow further study. The resolution was presented by Legal Education Committee Co-Chairs Eileen Millett of Epstein Becker & Green and Patricia Salkin, Dean of Touro College Jacob D. Fuchsberg Law Center.

The NYSBA Nominating Committee announced that Claire Gutekunst had been nominated to run for the office of NYSBA President Elect; Ellen Makofsky (of Nassau County) to run for the office of Secretary; and Sharon Stern Gerstman to run for the office of Treasurer. For the Tenth Judicial District (which is comprised of Nassau and Suffolk Counties), the Nominating Committee selected Scott M. Karson to run for another term as Tenth District Vice President; and John Gross, Marc Gann and Peter Mancuso to run for Tenth District Elected Delegates.

The next meeting of the House of Delegates will be held on Friday, January 30, 2015, at the New York Hilton in Manhattan, in conjunction with the 2015 NYSBA Annual Meeting. The election of the nominees will take place at that meeting and, if elected, they will take office on June 1, 2015.

Scott M. Karson is the Vice President of the NYSBA for the Tenth Judicial District and serves on the NYSBA Executive Committee and in the NYSBA House of Delegates. He also serves as Chair of the NYSBA Audit Committee and is a member and former Chair of the NYSBA Committee on Courts of Appellate Jurisdiction. He is also a former President of the SCBA, a member of the ABA House of Delegates, a member of the ABA Judicial Division Council of Appellate Lawyers and a partner at Lamb & Barnosky, LLP in Melville.

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Working With the Medicare Surtax on Net Investment Income: What Have We Seen?

When we last spoke on this topic, so to speak, it was in the December 2013 issue of The Nassau Lawyer.[1] Although last year's article was published in December, it was submitted prior to the issuance of the final regulations, and additional proposed regulations, on November 26, 2013.[2]

The 2012 and 2013 proposed regulations are "reliance" regulations. Normally, proposed regulations have no standing in the tax world; however, because the Internal Revenue Service stated that the aforementioned proposed regulations can be relied on, you have the comfort of knowing that any action that you take in accordance with the proposed regulations, or final regulations (even if contradictory to the proposed regulations), will be accepted by the IRS.[3]

Net Operating Losses

A major change between the regulations proposed in December 2012 and the final regulations issued in November 2013 has to do with net operating losses (NOLs). This won't affect many taxpayers but it is important to those with NOLs.

The proposed regulations held that net operating losses, no matter when incurred, could not reduce net investment income (NII) because it would be "too difficult" to handle the calculation. After receiving many comments, the IRS thought better of its original view and the final regulations allow the use of an allocated portion of the NOLs, that arose in and after 2013, to reduce investment income. The calculation won't be easy but a good starting point can be found in the instructions[4] (pages 11-12) for Form 8960, Net Investment Income Tax-Individuals, Estates, and Trusts.[5]

State and Local Income Taxes

Here's an annoying issue having to do with state and local income taxes attributable to net investment income. Major tax preparation services and major accounting firms hold different opinions. It has to do with the payment of state/local taxes attributable to 2012 paid in 2013, *e.g.*, the fourth quarter 2012 installment and/or the 2012 balance due paid by April 15, 2013.

The final regulations state that the starting point for the deduction attributable to net investment income tax (NIIT) is the amount described in Internal Revenue Code § 164 (a)(3). That includes state and local income taxes. Some practitioners and CCH's ProFx have taken the position that since the NIIT did not exist in 2012, state/local taxes attributable to that year cannot be considered in the NIIT calculation. Thomson Reuters' GoSystem has not made that distinction. GoSystem relies on the deduction entered on Schedule A (Itemized Deductions) of Form 1040, *i.e.*, the cash basis deduction, and does not distinguish as to what year the tax is being paid for.

Alan E. Weiner

Some writers, and practitioners, have dismissed the issue as a one-off applying only to the 2013 tax year but that may not be correct. Consider the possible effect in future years where, *e.g.*, there are tax litigation costs; fiduciary accounting costs; and other allowable deductions applicable to (spanning) years before 2013 and after 2012.

Since there is nothing contrary in the regulations, and since the IRS had the opportunity to alter its definition before finalizing the regulations, the author believes that GoSystem is correct.[6]

Bernie Madoff (and Other Pre-2013 Ponzi Schemes)

Payments have been made to Madoff investors in 2013 and will continue to be made in subsequent years. Post-2012 recoveries for pre-2013 Ponzi schemes should not be subject to the 3.8% tax on NIIT because the loss was attributable to a deduction taken before the effective date of IRC § 1411. See Federal Register page 72409 (FN 2) for an example of a post-2012 state income tax refund attributable to a pre-2013 taxable year when Section 1411 was not in effect.

This position may seem contradictory to the state/local income tax deduction position above, but it's not. With deductible state and local income taxes, you always will have disparities between the year that income was earned and the year in which the state/local taxes are paid. The regulations resolved that by mandating the use of the cash basis as the starting point. In the Madoff position, the logic is that the recovery is for a deduction taken before 2013.

Other issues not mentioned in this article can be found in the American Institute of Certified Public Accountants (AICPA) June 16, 2014 commentary letter to the IRS.[7]

Passive/Nonpassive Activities and Material Participation

This is where the real confusion lies, especially for estates and trusts that

See SURTAX, Page 17

The "Unfinished Business" Doctrine in Law Firm Bankruptcies

The "unfinished business" doctrine is a theory that, if applied, is tailor-made for many bankruptcy trustees. Trustees (and plan administrators) of bankrupt law firms have argued that the profits derived from cases that are active at the time of the dissolution or bankruptcy are property of the law firm's bankruptcy estate. A recovery of such profits can then arguably be made from the firms those attorneys are hired by. This article will examine the "unfinished business" doctrine that has led to the United States Court of Appeals for the Second Circuit and the New York Court of Appeals to weigh in on the subject and what the significance of those rulings are.

Scott Fleischer

Origins of the Doctrine

The Uniform Partnership Act ("UPA") was enacted in 1914 and adopted in New York in 1919. In fact, all states but Louisiana adopted the UPA since its inception. In 1997, the Revised Uniform Partnership Act ("RUPA") was enacted and adopted in New York and nearly all other states thereafter. The "unfinished business" doctrine is not just rooted in one particular section of the UPA or RUPA, but was developed through collective interpretations of many sections.

The seminal case that established the "unfinished business" doctrine is *Jewel v. Boxer*,[1] decided by the California's highest state court. In *Jewel*, a law firm with four attorneys split into two firms. The firm did not have a written partnership agreement, thereby requiring application of the UPA. As expected, when the firm dissolved, there were numerous active cases. To that end, Jewel, one of the partners, sued for an accounting of those cases.

The issue of first impression was, upon dissolution of a law firm, what happens to the profits generated by active cases? For the first time, a court applied what is now known as the "unfinished business" doctrine. The *Jewel* court held that: "in the absence of a partnership agreement, the Uniform Partnership Act requires that attorneys' fees received on cases in progress upon dissolution of a law partnership are to be shared by the former partners according to their right to fees in the former partnership, regardless of which former partner provides legal services in the case after dissolution."[2]

Essentially, the court held that dissolved law firm profits are property of the law firm, not of the partners that will work on those cases post-dissolution. Accordingly, trustees of failed law

See UNFINISHED BUSINESS, Page 19

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In Brief

Member Activities

The Nassau Lawyer welcomes submissions to the IN BRIEF column announcing news, events and recent accomplishments of its members. Due to space limitations, submissions may be edited for length and content.

René P. Fiechter, Nassau County Assistant District Attorney and Director of Community Affairs, was featured in an article in Milieu magazine in advance of the December 11th conference on Youth Sexuality at Hofstra University. Mr. Fiechter currently chairs both the Long Island Youth Safety Coalition, which is hosting the event, and the Nassau County Heroin Prevention Task Force.

Hon. Stephen L. Ukeiley

Past NCBA President **Christopher T. McGrath** and **Robert G. Sullivan** of Sullivan Papain Block McGrath & Cannavo P.C. were selected for inclusion in the 2014 New York Super Lawyers – Metro Edition and The Best Lawyers in America for personal injury litigation. **Deanne M. Caputo** and **Terrence L. Tarver** were named New York Super Lawyers Rising Stars. **John F. Nash** and **Mary Anne Walling** were selected for inclusion in The Best Lawyers in America for personal injury litigation.

Ruskin Moscou Faltischek P.C. attorneys **Mark Mulholland**, **E. Christopher Murray**, **Douglas Good**, **Doug Nadjari**, **Ellen Kessler**, **Melvyn Ruskin**, **Jeffrey Wurst** and **Michael Feigenbaum** were named 2014 Super Lawyers, New York Metro Edition. Attorneys **Jennifer Hartman** and **Jennifer Hillman** were named 2014 Metro Rising Stars.

Alan J. Schwartz, principal of the Law Offices of Alan J. Schwartz, P.C., was elected President of The Accountant Attorney Networking Group and appointed to the Advisory Council of the Art League of Long Island. Mr. Schwartz is also a member of the Board of Directors of the Bar Association.

Jeffrey M. Schlossberg, Of Counsel to Jackson Lewis P.C., was selected to the 2014 New York Super Lawyers list.

Michael L. Moskowitz, a partner in New York City-based Weltman & Moskowitz, LLP, was named a 2014 Super Lawyer in the category of Creditor/Debtor Rights.

Richard N. Tannenbaum of the Law Firm of Richard N. Tannenbaum was selected as a 2014 New York Super Lawyer. Mr. Tannenbaum concentrates his practice in matrimonial and family law. He is also a volunteer musician for Musicians on Call playing piano for bed-ridden children and adults at Memorial Sloan Kettering Cancer Center.

Farrell Fritz P.C. partner **Thomas J. Killeen** was elected to the board of directors of The Maurer Foundation.

Bernard Vishnick, senior partner of Vishnick McGovern Milizio LLP, was elected secretary of the board of directors and executive committee member of the Holocaust Memorial & Tolerance Center of Nassau County, Inc. and first vice president of the Brandeis Association, a bar association of Jewish legal professionals. Mr. Vishnick earned his LLB degree from New York Law School.

Managing partner **Howard Fensterman** and associate **Daniel Smith** of Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara & Wolf, LLP were named honorees at the recent Long Island Business News Leadership in Law Awards.

Bruce A. Barket, **Amy B. Marion** and **Steven B. Epstein**, founding partners of Barket Marion Epstein & Kearon, LLP, were selected to the 2014 New York Metro Super Lawyers list and **Aida F. Leisenring** was selected to the Rising Stars List.

Stagg, Terenzi, Confusione & Wabnik, LLP managing partner **Thomas Stagg** and partner **Debra Wabnik** were once again named New York Metro Super Lawyers for 2014. Mr. Stagg also received Corporate INTL's Global Award for Commercial Lawyer of the Year in New York. Ms. Wabnik was named one of Long Island Pulse Magazine's 2014 Top Legal Eagles.

Alan W. Clark, managing partner and founder of Levittown-based Alan W. Clark & Associates, was named a New York Metro Super Lawyer for the seventh consecutive year. Mr. Clark is also board certified in Medical Professional Liability by the American Board of Professional Liability Attorneys.

Ralph A. Catalano (Professional Liability Defense), **Domingo R. Gallardo** (Civil Litigation Defense), **Gary Petropoulos** (Insurance Coverage) and **Matthew K. Flanagan** (Professional Liability Defense) of Catalano Gallardo & Petropoulos, LLP were named to the Super Lawyers list. **June D. Reiter** (General Litigation) was named to the Rising Star list.

The In Brief section is compiled by the Honorable Stephen L. Ukeiley, Suffolk County District Court and Acting County Court Judge. Judge Ukeiley presides in Suffolk County's Human Trafficking Court and is an adjunct professor at both the Touro College Jacob D. Fuchsberg Law Center and the New York Institute of Technology. He is also the author of The Bench Guide to Landlord & Tenant Disputes in New York.©

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Eastman Kodak: Simultaneous Assumption and Assignment of Real Property Leases Under the Bankruptcy Code

One of the powers afforded to a Chapter 11 debtor under the Bankruptcy Code is the ability to assume or reject its unexpired leases of nonresidential real property. If the debtor opts to assume the lease, the Bankruptcy Code also provides the debtor with the ability to assign the lease to a third party. In most instances, the assumption and assignment of real property leases occur simultaneously.

Veronique Urban

In a matter of apparent first impression, the U.S. Bankruptcy Court for the Southern District of New York recently held that the assumption and assignment of real property leases do not need to occur at the same time. The decision potentially provides debtors with greater control and flexibility when dealing with their landlords and creates an added layer of uncertainty for landlords dealing with tenants under Chapter 11 protection.[1]

The *Eastman Kodak* Facts

On January 19, 2012, Eastman Kodak Company and certain of its affiliates (collectively, the "Debtors") filed voluntary petitions under Chapter 11 of the Bankruptcy Code. On July 17, 2012, within the deadline for assuming real property leases imposed by Section 365(d)(4) of the Bankruptcy Code, the Debtors filed a motion to assume certain of their unexpired leases. The motion provided that the leases were being assumed by the Debtors because such leases were critical to the Debtors' ongoing business operations.

One of the leases that was scheduled for assumption under the motion was a lease between Eastman Kodak Company and ITT Space Systems, LLC (the "Landlord") which had been entered into in 2004 (the "Ground Lease"). The Ground Lease included a provision which prohibited its assignment or sublease without the Landlord's prior written consent. The Landlord did not object to the Debtors' assumption motion.

On August 15, 2012, the court entered an order authorizing the assumption of the leases, including the Ground Lease. The order contained a paragraph which stated: "Nothing included in or omitted from the Motion or this Order…shall impair, prejudice, waive or otherwise affect the rights of the Debtors and their estates … to assign any of the Assumed Leases pursuant to, and in accordance with, the requirements of Section 365 of the Bankruptcy Code."

On December 21, 2012, the Debtors entered into an Asset Purchase Agreement with RED-Rochester, LLC (the "Purchaser") which was subsequently approved by the Court on January 18, 2013. On June 28, 2013, ten months after the entry of the assumption order and more than five months after the entry of the sale order, the Debtors filed a motion with the court seeking to assign the Ground Lease to the Purchaser. The Landlord objected to the assignment of its lease to the Purchaser.

The Question Before the Court

The question before the court appeared to be deceptively simple: does the assumption and assignment of an executory contract or unexpired lease under Section 365 of the Bankruptcy Code need to occur at the same time. The Landlord's position was that a nonconsensual assignment of an unexpired lease cannot occur after assumption, and thus cannot occur outside of the 210-day period set forth in Section 365(d)(4). The Debtors, on the other hand, argued that debtors could utilize the benefits of Section 365(f)(3) to assign contracts free and clear of contractual restrictions on assignment during bankruptcy proceedings but after the date of assumption.

The Governing Law: Bankruptcy Code § 365

The court's analysis in the *Kodak* case focused on the wording used in Section 365 of the Bankruptcy Code, whose intersecting provisions govern the assumption, rejection or assumption and assignment

See *KODAK*, Page 20

Supreme Court Rules Inherited IRAs are Not Protected in Bankruptcy

By Michael L. Moskowitz and Melissa A. Guseynov

On June 12, 2014, in a unanimous 9-0 decision in *Clark v. Rameker*, the United States Supreme Court ruled that inherited individual retirement accounts (IRAs) are not retirement funds within the meaning of the Bankruptcy Code.[1] This decision resolves a split among the federal appellate courts about the status of IRAs that parents leave to their children and others.

The Bankruptcy Code allows debtors to claim certain property as exempt by utilizing exemptions under state law or specifically provided in the Bankruptcy Code, shielding such assets from creditors. However, states can "opt out" of certain exemptions in the Bankruptcy Code and require debtors to use state law exemptions instead. Sections 522(b)(3)(C) and (d)(12)[2] of the Bankruptcy Code allow debtors to exempt retirement funds, even where the state has opted out of the federal exemptions.

Simply put, in determining that inherited IRAs do not constitute retirement funds, *Clark* squarely places funds in inherited IRAs at risk. Put another way, these assets may now be fair game for creditors under federal bankruptcy law.

Clark involved a dispute over whether creditors can reach a debtor's non-spousal inherited IRA in bankruptcy. In 2010, Heidi Heffron-Clark and her husband (the "Clarks") filed for bankruptcy relief under Chapter 7 in the United States Bankruptcy Court for the Western District of Wisconsin. The Chapter 7 Trustee and a judgment creditor objected to the Clarks' claim to exempt an IRA inherited pre-petition from Ms. Heffron-Clark's deceased mother.[3]

Michael L. Moskowitz

In determining that an inherited IRA did not constitute an exempt retirement fund under the Bankruptcy Code, Bankruptcy Judge Martin reasoned that the debtors received distributions from the IRA immediately with no regard to their age, physical health or working status.[4] The Clarks appealed and the United States District Court for the Western District of Wisconsin reversed the Bankruptcy Court's decision.[5] The Trustee and the judgment creditor then appealed to the Court of Appeals for the Seventh Circuit.

Chief Judge Easterbrook, writing for a unanimous Seventh Circuit, reversed.[6] The Seventh Circuit agreed with the Bankruptcy Court's original determination that inherited IRAs are not exempt retirement funds under the Bankruptcy Code. The court explained that once Ms. Heffron-Clark inherited the IRA, many of its attributes were altered. This included the fact that distributions commenced within one year of the original owner's death and were completed within five years. The distinction, said the Seventh Circuit, was that inherited IRAs are not just savings preserved for use after their owners retire.[7] The ruling clashed with a contrary decision by the Fifth Circuit.[8] The Supreme Court ultimately granted certiorari to resolve the conflict.

Justice Sotomayor, writing for the Supreme Court, began by noting that although the Bankruptcy Code does not define "retirement funds," they are "properly understood to mean sums of money set aside for the day an individual stops working."[9] In affirming the Seventh Circuit's decision, the court identified three principal attributes of inherited IRAs that demonstrate such funds are not preserved for retirement, and thus not exempt under Section 522 of the Bankruptcy Code.

See IRAs, Page 17

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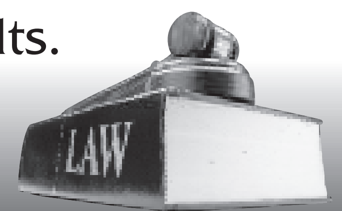

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Pro Bono Attorney of the Month

Wendy Hamberger

By MICHAEL POROPAT, J.D.

It is with great pleasure that Nassau/Suffolk Law Services' Volunteer Lawyers Project (VLP) and the Nassau County Bar Association recognize Wendy Hamberger as our most recent Pro Bono Attorney of the Month. This month's award honors an attorney who has demonstrated great passion and dedication not only by directly providing pro bono legal services to the community, but also by training less experienced attorneys to do the same. Since joining the VLP in 2004, Ms. Hamberger has represented many clients in matrimonial and guardianship matters. Most recently, she has helped establish the VLP's Uncontested Matrimonial Law Initiative to assist clients who for years have been seeking a divorce but cannot afford to hire an attorney to represent them. Hamberger spends countless hours training a team of newer attorneys, guiding and mentoring their representation of the matrimonial clients who are grateful to be moving on with their lives.

Ms. Hamberger helped create the Uncontested Matrimonial Law Initiative in May 2014. The immediate goal was to reduce the substantial waiting list of qualifying low-income plaintiffs. Inspired by the New York State Access to Justice Program, Hamberger originally hoped to provide legal advice to low income clients in uncontested matrimonial cases in Nassau County. At the VLP, she is able to offer direct full representation of her clients. These individuals had been unable to navigate the complicated process of an uncontested divorce pro se, and could not move forward with their lives without legal representation. Ms. Hamberger was able to enlist the assistance of several other attorneys who were enthusiastic about pro bono and interested in developing additional legal skills. Her work has dramatically reduced the number of clients on the waiting list, and she continues to assist clients who need help in this area.

Ms. Hamberger studied Political Science and Economics with a strong interest in Psychology at John Jay College, and graduated from CUNY Law School in 1997. She was admitted to the New York Bar in 1999, and hired as an associate at Levitan & Pardes, PC., working under now Nassau County Supreme Court Justice Sondra Pardes. Her practice focused on matrimonial and employment discrimination law. After taking a few years to raise her children at home, Ms. Hamberger decided to open her own firm focusing on matrimonial law, specifically divorce mediation and assisting pro-se litigants with uncontested divorces. Hamberger feels that her interest in psychology has helped her to better connect with and understand her clients in matrimonial cases.

One of Ms. Hamberger's most rewarding volunteer experiences at the VLP involved an Article 17 guardianship case where a client was fighting for guardianship status of her two children affected by autism. The client was very responsive and dedicated to the process despite many other personal difficulties. Ms. Hamberger was so touched by the client's perseverance despite the unfortunate circumstances that it was easy for her to adopt the client's passion and help her obtain guardianship of the two developmentally disabled children. Ms. Hamberger was amazed at the gratitude her client expressed, and the support she received from the Surrogates Court, which further fueled her drive to help clients in need.

Ms. Hamberger feels that more attorneys should help their community by providing professional pro bono services to clients in need. She challenges other attorneys to be more proactive in their pro bono services. "It's an extraordinarily rewarding experience to help low-income clients who cannot find help elsewhere. These clients desperately need assistance and are so grateful for the help. Nothing is more satisfying than the gratification a person shows after you've helped them when they need it most." Susan Biller, Pro Bono Coordinator of the Volunteer Lawyer's Project, states: "We are grateful to Wendy for her determination and perseverance. She saw a need in the community, and took it upon herself to offer her services to the VLP to address that need. Her willingness to mentor

See PRO BONO, Page 21

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Tax/Commercial/Bankruptcy Law

Eastern District Bankruptcy Court Roundup

The year 2014 produced another round of noteworthy decisions from the Bankruptcy Court in the Eastern District. Here is a look at some of the highlights:

In re: Hartford & York LLC [1]

This was a "single asset real estate case" in which the Chapter 11 was filed less than an hour before a foreclosure sale of the debtor's property. After that Chapter 11 case was dismissed on consent, the sale was rescheduled, and the debtor filed another (*pro se*) Chapter 11 petition less than an hour before that sale. Since the mortgagee only received notice of the filing after the fact, the sale proceeded. The debtor applied to retain counsel after the filing. The court was faced with deciding two issues. First, was the bankruptcy filing a nullity because the debtor (a corporation-like entity) did not have counsel? If so, the foreclosure sale was valid. And, second, was the petition subject to dismissal for lack of good faith?

In what was essentially a two-party dispute, Judge Stong ruled that the filing was not void per se due to the lack of counsel, but only subject to dismissal based on ineligibility (the application to retain counsel after the filing essentially cured that defect). The court further ruled that, based on the factors enunciated by the Second Circuit in *In re: C-TC 9th Ave. Partnership*,[2] the petition was lacking in good faith and, accordingly, the case was dismissed. It was held that the automatic stay would not apply in any refilings within 120 days unless good faith was shown. In addition, the mortgagee's request for nunc pro tunc relief from the automatic stay was denied, since acts in violation of the automatic stay are void even if done unknowingly.[3]

Jeff Morgenstern

Menton v. Serpe [4]

In this matter, the debtor was a pro se attorney defending against an action brought by a former client (also appearing pro se). Prior to the attorney's bankruptcy filing, he had been sanctioned and fined, and a $25,000 judgment had been entered against him for mishandling the former client's bankruptcy case.

When the former client sought to challenge the attorney's bankruptcy filing and his efforts to avoid the money judgment, Judge Grossman concluded that his pleading failed to state a cause of action pursuant to Rules 8 and 12(b)(6) of the Federal Rules of Civil Procedure. The pleading was instead construed as a motion to dismiss the case for "cause" or abuse of process. The Court found that a bankruptcy filing to avoid a judgment is not "cause" to dismiss the case in the absence of a showing of wrongful conduct. It was also noted that the former client may have had a legal malpractice claim, which would not be have been non-dischargeable in bankruptcy in any event.

Saviano v. Tylee [5]

The debtors' former landlord sought to revoke their discharge on the grounds of fraud for failure to list creditors and disclose assets and true income. The landlord had only been added to the list of creditors one day before the discharge was granted, even though a month's rent was owed at the time of the filing. A rent expense of $2,300 was listed despite the debtors having no intention of paying the sum, as they already planned on vacating the premises.

Since the former landlord had no knowledge of the fraudulent information until after the discharge and, therefore, had no time to object, and because the schedules omitted material information and had false information, the discharge was revoked. The court further held that the debtors' reliance on their attorneys in submitting the information to the court was not a valid excuse.

In re: Payne [6]

A Chapter 7 trustee sought to sell the debtor's house subject to all liens and encumbrances to a third-party investor for $17,500. In so doing, the trustee would evict the debtor, despite negative equity in the house of about $190,000. The mortgages had been in default for over a year. The debtor amended his schedules to declare a federal homestead exemption of $22,475.

In what was characterized as a "trustee's short sale", Judge Trust denied the application to sell the house. Since the debtor's exemption of $22,475 exceeded the sales price of $17,500, the proposed sale created no benefit for the bankruptcy estate. It was also noted that the proposed sale would not satisfy any liens, and was effectively a taking of the debtor's possessory interest without compensation. In addition, the court found no authority for the trustee to be able to evict the debtor or charge the debtor rent during the case.

In re: Mannone [7]

This is a companion case to *In re: Payne*, in which the trustee sought to sell the debtor's house for $20,000 subject to liens and encumbrances. The debtor had declared the New York homestead exemption of $150,000. The proposed sale was denied by Judge Grossman since the $20,000 proceeds of the sale would have gone towards the debtor's exemption, leaving no benefit for the bankruptcy estate.

The court held that the value of the house is to be determined by the sales price (*i.e.*, $20,000), not by what is reflected in the debtor's schedules, and that the debtor's exemption was still valid even though the house was "under water."

Zaretsky v. Berlin [8]

In a defamation case litigated in state court involving e-mails to third-parties alleged to be false, an unopposed summary judgment motion was granted against the debtor for the base amount of $1,290,000. A non-dischargeability action was then brought during

See ROUNDUP, Page 22

Young Lawyer of the Month
Rebecca Szewczuk

The Nassau County Bar Association's Young Lawyers Committee (YLC) recognizes the outstanding accomplishments of Rebecca Szewczuk, Esq.

As an associate at Wisselman, Harounian & Associates, P.C., Ms. Szewczuk represents clients in matrimonial and family law proceedings, including but not limited to: domestic abuse, custody, visitation, settlement terms, domestic partnership agreements and pre/post nuptial agreements. Prior to joining the firm in May 2014, Ms. Szewczuk practiced matrimonial and family law as an associate at Mary Ann Aiello, P.C. since September 2009.

Ms. Szewczuk graduated from Villanova University with a Bachelor of Arts Degree in Political Science. She received her Juris Doctor in 2008 from Hofstra University School of Law on a Dean's Scholarship. Shortly after, Ms. Szewczuk was admitted to practice law in New York State in 2009.

Ms. Szewczuk is an active member of the American Inns of Court, the New York State Bar Association, Family Law Section, the Women's Bar Association of the State of New York, the Nassau County Bar Association Matrimonial Committee and the Young Lawyers Committee. Along with her active involvement within the legal community, she was also awarded the 2013 and 2014 New York Metro Super Lawyers Rising Star.

Ms. Szewczuk's publications and speaking engagements include Adoption Denied: A Step Forward for Equality or a Potential Problem for Same Sex Couples?, May 2014; Women's Bar Association of New York Annual Conference: A Discussion on the Challenges Facing Same Sex Couples, June 2013; National Institute of Business: Advanced Family Law, August 2013; and, Protecting our Clients in the Digital Age, May 2012. She is currently assisting on a CLE (Continuing Legal Education) class for the American Inns of Court with Robert Mangi, Kieth Rieger and Michael DiFalco about Cross Examining a Child Custody Expert.

The YLC congratulates Ms. Szewczuk on her accomplishments and contributions to the community and wishes her continued success in her endeavors.

CALL FOR NOMINATIONS

The Nominating Committee welcomes applications for nominations to the following Nassau County Bar Association offices for the 2015-2016 year:

- ❑ **President-Elect**
- ❑ **Vice-President**
- ❑ **Treasurer**
- ❑ **Secretary**

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

The Nominating Committee invites applications for nominations to the following offices of the Nassau Academy of Law for the year 2015-2016:

- ❑ Dean
- ❑ Associate Dean
- ❑ Assistant Dean (3)
- ❑ Treasurer
- ❑ Secretary
- ❑ Counsel

NCBA members interested in applying for any of the above nominations, or in submitting suggestions for such nominations, are invited to submit such information to:
Peter J. Mancuso, Chair, Nominating Committee, NCBA, 15th & West Streets, Mineola, NY 11501 or email: spalley-engel@nassaubar.org.

Deadline for all nominations: January 31, 2015

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COPYRIGHT LAW IN THE ENTERTAINMENT INDUSTRY

With the NCBA Intellectual Property Law and Sports, Entertainment & Media Law Committees

2 Credits in areas of professional practice

Wednesday, January 7, 2015
5:30 PM - 7:30 PM

What is copyright law and how does it apply to the entertainment industry? Ownership of intellectual property continues to be the life blood of the industry and the source of income for many. This program will provide an overview of intellectual property rights with a focus on copyright law and its role in the entertainment industry. Specific topics covered will include copyright protection from an artist's perspective, Grammy Board and Congressional involvement.

Special Invited Guest
GRAMMY-Winning Artist
2012 GRAMMY Hall of Fame Inductee
Gloria Gaynor

OPENING STATEMENTS

With the NCBA Plaintiff's Roundtable & Defendant's Roundtable Committees

2 Credits
Professional Practice or Skills

Tuesday, January 27, 2015
5:30 - 7:30 PM

Come hear the ins and outs of opening statements from two great trial attorneys from both sides of the aisle.

FOR THE PLAINTIFF
Christopher T. McGrath, Esq.
Sullivan Papain Block
McGrath & Cannavo P.C.
New York

FOR THE DEFENDANT
William Croutier, Jr., Esq.
Hammill, O'Brien, Croutier, Dempsey, Pender & Koehler, PC
Syosset

MODERATOR
Terrence Tarver, Esq.
Chair, NCBA Plaintiff's Roundtable Committee

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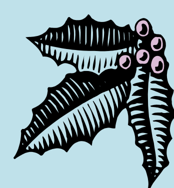

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AM

I DON'T'S AGREE WITH THE NEUTRAL EXPERT... WHAT SHOULD I DO?

December, 11, 2014
8 AM Breakfast; 8:15 AM Discussion

PRESENTER
Harold L. Deiters III
CPA/ABV/CFF, CFE, MAFF, Partner
Baker Tilly Virchow Krause LLP
Melville

MODERATOR
Joseph A. DeMarco, Esq.
Schlissel Ostrow Karabatos, PLLC
Garden City

PM

RECEIVERSHIPS & MONITORSHIPS: THE ROLE OF A FORENSIC ACCOUNTANT

Tuesday, January 6, 2015
5:30 PM Light Supper; 6-7:30 PM Discussion

PRESENTERS
Harold L. Deiters III
CPA/ABV/CFF, CFE, MAFF, Partner
Baker Tilly Virchow Krause LLP, Melville
Brian T. Egan, Esq.
Egan & Golden LLP
Patchogue

MODERATOR
Michael A. Markowitz, Esq.
Hewlett

Free event. Must pre-register.
516-747-4464 Academy@nassaubar.org

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January 7	Copyright Law in the Entertainment Industry	3.0			3	$115	$155	$0	~
January 24-25	Bridge-the-Gap (Under 2 Years/Recent Grads)	7.0	6.0	3.0	16	$265	$265	$265	~
	Bridge-the-Gap (Over 2 Years)	7.0	6.0	3.0	16	$395	$490	$395	~
January 27	Opening Statements	2.0			2	$80	$115	$0	~
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CD and DVD Order Form

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General	Philosophy and Mechanics of Lobbying	1.5		0.5	2	75/95	110/130	4LOBBY1118
Clients	Dean's Hour Collections, Creditors & Your Clients	1.0			1	40/55	75/80	DH100814
Criminal	Criminal Law & Procedure Update 2014	2.5		0.5	3	115/130	150/175	4CRIMUP1024
	Orders of Protection	2.0			2	75/95	110/130	4ORDER1021
	Wild Legal Ride....Nassau's DWI Car Forfeiture	1.0			1	40/55	75/80	DH111314
Ethics	Avoiding Ethical Problems in the Internet Age			2.0	2	75/95	110/130	4ETHICS1202
	Government Ethics in New York			1.0	1	40/55	75/80	DH091814
Elder Law	Uniform Guardianship Act..Article 83	2.0			2	75/95	110/130	4GUARD1203
Estate/Trust	An Evening with the Surrogates	2.0			2	75/95	110/130	4SURROGAT1105
Federal Cts.	Dean's Hour...Wiretapping	1.0			1	40/55	75/80	DH102214
Family	Nassau's Support Magistrates Tell All	2.5		0.5	3	115/130	150/175	4SUPPORT1113
Insurance	Insurance Law Update 2014	2.5		1.0	3.5	115/130	150/175	4INS0617
Labor	Labor Law: You Mean That Can Be A Crime?	2.0			2	75/95	110/130	4LABOR0129
Litigation	Objections!	2.0			2	75/85	110/130	4OBJECT1027
P. Injury	Social Security Disability ...PI Attorneys	1.0			1	40/55	75/80	4DH081714
Tax	Partnership/LLC Agreements	3.0			3	115/130	150/175	4TAX0930
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Committee Reports

Appellate Practice

Meeting Date 10/29/14

Donna Aldea, partner at Barket Marion Epstein & Kearon, LLP, delivered a lecture on the topic of oral argument.

Matrimonial Law

Meeting Date 11/12/14
Chair: John DiMascio, Jr.

Michael J. Langer

The committee's CLE program titled "The Great Debate: Should Attorneys and Litigants Have Access to Forensic Evaluators' Raw Data and Materials?" was presented by Matrimonial Committee Executive Committee Members Rosalia Baiamonte, Esq., Samuel J. Ferrara, Esq. and Jennifer Rosenkrantz, Esq..

The feature, "A New Case from a New Face," was presented by Amanda L. Carlson, Esq., an associate at Langione, Catterson & LoFrumento LLP, who discussed a recent case from Kings County Supreme Court, *Braha v. Braha*, 45 Misc.3d 1211(A) (Sup. Ct., Kings County 2014), in which Justice Jeffrey S. Sunshine denied a motion to set aside a prenuptial agreement where it was claimed the parties tore up their agreement and threw the pieces into the ocean while on their honeymoon cruise shortly after the wedding.

The next committee meeting scheduled for December 10, 2014, is the holiday party featuring live music, open bar and buffet dinner.

Labor and Employment Law

Meeting Date 11/12/14
Chair: Jeffrey Schlossberg

Speakers Bryan Arbeit and Rick Ostrove delivered a lecture regarding recent Second Circuit cases in employment law and employment discrimination.

Corporation Banking & Securities Law

Meeting Date 11/13/14

The committee meeting featured a presentation by Bryan I. Reyhani, Esq. on "Bitcoin, What It Is And Why It Should Be On Your Radar," which covered numerous topics including legal issues and regulations related to Bitcoin and how Bitcoin is impacting various industries.

The next committee meeting to be held December 9, 2014, will feature a panel discussion on shareholder disputes, to be moderated by Peter A. Mahler and will include Nassau County Commercial Division Justices Stephen A. Bucaria, Timothy S. Driscoll and Vito M. DeStefano, who will share their experiences and insights on best practices regarding the litigation and settlement of shareholder disputes, business divorces, derivative actions, books-and-records proceedings, and other types of litigation among co-owners of closely held business entities.

Plaintiff's Roundtable

Meeting Date 11/18/14
Chair: Terrence L. Tarver

The speaker for this meeting was NCBA Past President, Christopher T. McGrath, who, among other things, is Board Certified in Civil Trial Advocacy by the National Board of Trial Advocacy. Mr. McGrath highlighted key points of trial preparation, including subpoenas, marked pleadings, and notices of intention.

The next meeting is scheduled for January 27, 2015.

Condemnation Law and Tax Certiorari

Meeting Date 11/21/14
Chair: John V. Terrana

The committee had several speakers for this meeting. Martin Valk, co-chair of the Committee and Bureau Chief of the Tax Certiorari Department of the Nassau County Attorney's Office, delivered a presentation on bonding necessary to pay tax refunds. Michael Schroeder spoke about the history of Small Claims Assessment Review Proceedings. Robin Laveman, Counsel to the Nassau County Assessment Review Commission (ARC) discussed the issues ARC encounters in processing assessment challenges and settlements of both commercial and residential property tax grievances.

Education Law

Meeting Date 11/20/14
Chair: Douglas E. Libby

Committee members Candace J. Gomez, Esq. of Lamb & Barnosky and Rebecca Sassouni, Esq., gave a presentation on recent significant decisions from the Second Circuit involving special education.

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

NCBA Committee Meeting Calendar • Dec. 15, 2014- Jan. 14, 2015

Questions? Contact Stephanie Pagano (516) 747-4070 spagano@nassaubar.org

Please Note: *Committee Meetings are for NCBA Members. Dates and times are subject to change.*

Monday December 15

Senior Attorney
12:30 p.m.
Charles E. Lapp, III

Attorney/Accountants
12:30 p.m.
Neil D. Katz

Tuesday December 16

Veterans Military Law
12:30 p.m.
Edward Cunningham

Commercial Litigation
12:30 p.m.
Kevin Schlosser

Wednesday December 17

Elder Law, Social Services & Heal Advocacy
8:00 a.m.
Paul Hyl/Moriah Adamo

Municipal Law
12:30 p.m.
Liora Ben-Sorek, Lisa Cairo

Thursday December 18

Civil Rights
12:30 p.m.
Jason Starr

Tuesday January 6, 2015

Ethics
5:30 p.m.
Omid Zareh

Wednesday January 7, 2015

Hospital & Health Law
8:30 a.m.
Geoffrey Kaiser/Kevin Mulry

Supreme Court
12:30 p.m.
Steven Cohn/Alan W. Clark

Thursday January 8, 2015

Technology & Practice Management
8:00 a.m.
John P. Whiteman, III

General/Solo/Small Firm Practice
12:30 p.m.
Gary Port

Community Relations & Public Education
12:45 p.m.
Adam D'Antonio

Family Court Law & Procedure
5:30 p.m.
Mark Green

Friday January 9, 2015

Access to Justice
12:30 p.m.
Steven Leventhal

Tuesday January 13, 2015

Women In The Law
12:30 p.m.
Barbara Gervase/Amy Hsu

Environmental Law
12:30 p.m.
Kenneth Robinson

Labor & Employment Law
12:30 p.m.
Jeffrey Schlossberg

Wednesday January 14, 2015

Construction Law
12:30 p.m.
Vincent Pallaci

Alternative Dispute Resolution
12:30 p.m.
Elizabeth Donlon

Criminal Court Law & Procedure
12:30 p.m.
Brian Griffin

Association Membership
12:45 p.m.
Marc Gann/Geoffrey Prime

Matrimonial Law
5:30 p.m.
John P. DiMascio, Jr.

** Committee Chairs and Co-Chairs denoted in Italic.*

IRC SECTION 754 ...

Continued From Page 3

approval of the Internal Revenue Service.[8] The IRS will not revoke the Election solely because it would result in a mandatory step down in inside basis.[9] Acceptable grounds for revocation include an unmanageable administrative burden or a change in nature of the partnership's business.[10] If the partnership's assets are substantially likely to fluctuate or decline in value with time, carefully consider whether the Election will be a sound decision over the long term.

Weigh the administrative burden of the Election. In a partnership with relatively few members (such as a family limited partnership), transfers of partnership interests are typically uncommon, so an Election is unlikely to prove onerous for the partnership's attorneys and accountants. For partnerships with more members and/or frequent transfers of partnership interests, an Election can result in a nightmarish scenario for the partnership's attorneys and accountants. In addition to considering whether the Election itself will be worth the trouble, drafters of governing agreements should explore the option of prohibiting the Election in the terms of such an agreement. Provisions prohibiting Elections have been used in partnership agreements for large professional firms and hedge funds to prevent overburdening the attorneys and accountants with tracking the Election's numerous and complex tax consequences.

Making and Implementing the Election

If the practitioner and the client have weighed the considerations involved and would like to proceed with the Election, the partnership must make the Election by appending a statement to the partnership's federal income tax return (IRS Form 1065) declaring the partnership's intention to make the Election.[11] Although the statement may be signed by any partner,[12] the practitioner must also reconcile this rule with the terms of the partnership's governing agreement and the designation of a tax matters partner.[13] Once the Election is made, it is effective for the taxable year of the corresponding return and all subsequent years unless revoked with the consent of the IRS.[14]

The Election should always be applied to the partnership by an experienced tax professional or professionals because the mechanics of applying the Election are governed by arcane provisions of the Code. The Election is applied differently depending on whether the Election was made pursuant to (1) a distribution of partnership assets (a "Distribution") or (2) a transfer of a partnership interest, such as a transfer upon death of a partner or a sale or exchange (a "Transfer").

The most notable difference between the two scenarios is that a Distribution Election benefits all of the partners because the inside basis adjustment is allocated among all partnership assets and the partners' capital accounts;[15] on the other hand, a Transfer Election only benefits the transferee partner because the inside basis adjustments are effectively segregated to ensure that they only apply to the transferee partner.[16]

For purposes of both a Distribution Election and a Transfer Election, the partnership must first calculate the difference between inside basis and outside basis,[17] and the partnership must then allocate the basis difference among the partnership's assets.[18] A costly administrative aspect of allocating the inside basis adjustment is that each of the partnership's assets must be valued separately.[19]

Because of the many factors inherent in deciding whether to make an Election, Congress foresaw the possibility that partners may disagree about the subject. IRC § 732(d) was enacted as an alternative to Section 754 in case the transferee partner wants the benefit of the Election but does not have the support of her fellow partners. When a transferee partner makes a Section 732(d) election, she enjoys the benefit of the basis adjustment for any partnership assets distributed within two years of her acquisition of her partnership interest.[20]

While the Election is a complex technique that should only be applied to the partnership by a tax professional or professionals, non-tax practitioners would be well served familiarizing themselves with the fundamental tenets of the Election. The responsibility to identify the need for an Election often falls to the professionals overseeing the acquisition of a business or the administration of an estate, especially when the matter is not large enough to merit independent tax counsel, and introductory knowledge of the Election enhances such professionals' representation of their clients. If an Election is appropriate and favorable for a client, the tax advantages derived therefrom could be significant, even when considering the cost and trouble of the attendant administrative burden.

Matthew E. Rappaport is an Associate at Karol & Sosnik P.C., where he concentrates his practice in matters of Taxation, Estate Planning, and Business Planning. He serves as the Co-Vice Chair of the Nassau County Bar Association's Tax Law Committee.

1. All references to a "partnership" herein implicate a tax partnership, a category which includes several corporate entities: a general partnership, a limited partnership, a limited liability partnership, a limited liability limited partnership, and a limited liability company taxed as a partnership.
2. *See generally* 26 USC, hereinafter "IRC."
3. *See* IRC § 754. When the differences in basis stem from a distribution of partnership property, inside basis is adjusted under IRC § 734. When the differences in basis stem from a transfer of a partnership interest, inside basis is adjusted under IRC § 743. The mechanics of these adjustments are similar but not exactly the same.
4. The aggregate concept of partnership taxation views the partnership as the aggregate of all of its partners. *See* Partnership–Audit Technique Guide, ch. 1, available at http://www.irs.gov/Businesses/Partnerships/Partnership---Audit-Technique-Guide---Chapter-1---Basic-Principles-(Rev.-3-2008) (last visited Nov. 16, 2014). If one subscribes to the aggregate concept, the inside basis and outside basis of a partnership should always be the same, so adjustments to reconcile basis should be mandatory. However, from a policy standpoint, such mandatory adjustments would probably overburden the Internal Revenue Service.
5. *See generally* IRC §§ 1012, 1014.
6. The mitigating factors that may render an Election inadvisable are described below.
7. While the new partner would also enjoy the benefit of an offsetting loss, she must wait until she disposes of her partnership interest to recognize the loss. Subsequent events may further complicate the recognition of any offsetting loss by the new partner; examples include partnership mergers, partnership divisions, or death of the new partner prior to disposition.
8. Treas. Reg. § 1.754–1(c)(1).
9. *Cf. id.*
10. *Id.*
11. Treas. Reg. § 1.754-1(b)(1). Note that the specific requirements for the Election statement are contained therein.
12. *Id.*
13. *See* § 6231(a)(7); *see also* 26 CFR § 301.6231 (a)(7)–1, 2.
14. IRC § 754; Treas. Reg. § 1.754-1(a).
15. *See generally* IRC § 734; Treas. Reg. § 1.734-1; *see also* Treas. Reg. § 1.704-1(b)(2)(iv)(m) (4)-(5).
16. *See generally* IRC § 743; Treas. Reg. § 1.743-1.
17. *See generally* Treas. Reg. §§ 1.734-1, 1.743-1.
18. Allocation is governed by § 755 and the corresponding Treasury Regulations.
19. *Cf.* Treas. Reg. 1.755–1(d). Since the allocation is made based on fair market value of the partnership's assets in both scenarios, the partnership must ascertain the fair market value of each asset as of the effective date of the basis adjustment.
20. IRC § 732(d); Treas. Reg. § 1.732–1(d)(1)(iii). Under limited circumstances, she can also enjoy the basis adjustment to properties distributed outside of the two-year window. *See* Treas. Reg. § 1.732–1(d)(4). Note that the § 732(d) election has no effect on the other partners because the adjustment is made only to the distributed assets, which are no longer property of the partnership, and the remaining partnership assets are unaffected.

NEXUS ...

Continued From Page 3

requirements of the Due Process and Commerce Clauses of the United States Constitution, and thus subjected Geoffrey's royalty income to South Carolina's income tax.[10]

Noting that "Geoffrey's reliance on the physical presence requirement [used in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), to establish nexus for sales tax purposes] ... is misplaced,"[11] the court concluded that an out of state corporation "need not have a tangible physical presence in a state for income to be taxable there."[12] This decision started a chain reaction, with other states, such as Oregon,[13] Michigan,[14] and California,[15] and now New York, adopting an economic, or similar, nexus standard that does not require a physical presence requirement to establish a sales tax nexus.

For corporations that are domiciled in New York, it will be business as usual. These corporations will still be subject to corporate income tax because of the physical presence standard. Out of state corporations, however, will feel the brunt of the Bill, as they are the ones affected by the economic nexus standard. No longer will the excuse of never stepping foot in New York be enough to avoid the corporate income tax. A corporation can be in a different time zone, or even in another country, but as long as it derives at least $1 million of annual receipts from New York customers, it will be subject to corporate income tax.

The new economic presence nexus has financial implications that could significantly alter, or potentially harm, an out of state corporation's bottom line. For those existing out of state corporations that do not conduct business in New York but intend to in the future, or those that are currently transacting business in New York, they would be wise to analyze the impact that the economic nexus standard will have on their businesses and to determine whether there are options available to minimize such impact.

For example, as stated earlier, the economic nexus standard applies to corporations only. Out of state businesses that are in the beginning stages of formation and intend to conduct business in New York may consider forming an entity other than a corporation, especially if at least $1 million in annual receipts will be received from New York customers. Even existing corporations may decide to restructure their form of organization to a limited liability company, although the tax implications associated with restructuring need to be considered.

Additionally, an out-of-state corporation can rely on the protections of Public Law No. 86-272, which protects an out-of-state corporation from in state income tax if the corporation's only in state activity is solicitation of orders by corporate representatives for sales of tangible personal property, which orders are sent outside the state for approval or rejection, and if approved, are filled by shipment or delivery from a point outside the state.[16] Corporations that adhere to these strict requirements will be immune from income taxation, regardless of nexus, economic or otherwise.

Although New York's economic nexus standard has not yet taken effect, its constitutionality is likely to be challenged. Notwithstanding its bright-line rule, New York's economic nexus standard exposes out-of-state corporations to the imposition of income tax when they have no physical presence in the state. This raises the same, or similar, concerns as the ones that were presented in *Geoffrey* concerning the Due Process and Commerce Clauses, *i.e.*, a "minimal connection" and "substantial nexus," respectively, between the out of state corporation and the state before the state may subject the corporation to its income taxation. Whether New York's economic nexus standard will withstand constitutional challenges remains to be seen.

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1. N.Y. Laws 2014, S. 6359, c. 59.
2. *See* N.Y. Tax Law § 209.
3. *See* N.Y. Tax Law § 209.1(b). "Receipts" mean the receipts that are subject to New York's apportionment rules and "receipts within the state" means the receipts included in the numerator of the apportionment factor. Ibid.
4. *See* 20 NYCRR § 1-3.1. A corporation that is a partner in a partnership, however, is subject to the corporate income tax if the partnership is "doing business, employing capital, owning or leasing property… or deriving receipts from activity in [New York]." N.Y. Tax Law § 209.1(f).
5. *Geoffrey, Inc. v. South Carolina Tax Comm'r*, 313 S.C. 15 (1993).
6. *Id.* at 16.
7. *Ibid.*
8. *See id.* at 17.
9. *Id.* at 23 24.
10. *See ibid.*
11. *See Geoffrey*, 313 SC at 23 24 (inferring that the physical presence requirement applies only to sales and use taxes and that it does not extend to other types of taxes).
12. *Id.* at 23.
13. *See* Ore. Reg. OAR § 150 317.010(2).
14. *See* MCL 208.1200(1).
15. *See* Cal. Rev. & Tax. Code § 23101(b).
16. Public Law No. 86 272, § 101(a)(1),73 Stat.555 (1959), 15 USC § 381(a)(1).

RULES ...

Continued From Page 5

producing party must provide a certification setting forth with specificity those facts supporting the privilege or protected status of the information and describing the steps taken to identify the documents.

Parties not willing to abide by this categorical approach must be prepared to put their money where their mouth is. The new rule allows the Court to direct the party insisting upon a document-by-document log to pay the producing party's costs of production, including attorney's fees.

New Rule 11: Governing Discovery of Electronically Stored Information from Nonparties (effective September 2, 2014)

E-discovery practice is expensive. For parties to a litigation, those costs are bad enough. For non-parties who are dragged into others' dispute, bearing those costs is even worse.

To address this situation, a new rule was passed that governs the manner in which parties obtain e-discovery from non-parties. The rule requires parties and non-parties to adhere to the Commercial Division's Guidelines for Discovery of Electronically Stored Information ("ESI") from Nonparties, which are found in Appendix A to the Rules. Those seeking ESI from non-parties are encouraged to reasonably limit the requests so as not to impose any undue burden on the producing non-party. All involved are advised to engage in discussions as early as possible to limit any disputes concerning the requests or manner of production. Motion practice should be a matter of "last resort."

While much of the Guidelines are written as recommendations, the drafters specifically imposed cost-shifting by directing that the "requesting party shall defray the nonparty's reasonable production expenses," which may include counsel and consultant fees, business disruption costs, and other costs.

New Preliminary Conference Form (effective June 2, 2014)

The new Preliminary Conference form that has been adopted for use in the Commercial Division contains more robust sections dealing with e-discovery and expert discovery. For example, counsel must certify that they have fulfilled their meet-and-confer obligations imposed by Rule 8 and indicate that they have a plan in place for preserving and producing electronically stored information. The new form includes additional time for parties to identify experts, exchange reports, and depose experts.

This is a drastic change from prior practice, which only provided for limited (and mainly useless) expert discovery authorized by CPLR § 3101(d). The new rule brings the Commercial Division in line with federal practice and provides parties with an opportunity to meaningfully educate themselves as to the adversary's expert testimony in advance of trial.

Amendment to 22 NYCRR § 202.70(d)-(e): Assignment and Transfer of Cases to the Commercial Division (effective September 2, 2014)

Previously, a party wishing to have a case assigned to the Commercial Division simply had to submit a request with the RJI – whenever that occurred. Now, parties must be more pro-active when seeking assignment to a commercial part. This rule recognizes the benefits that came with early judicial involvement and enforcement of the Commercial Division rule.

22 NYCRR 202.70(d) requires that any party seeking assignment of a case to the Commercial Division must do so within 90 days following service of the complaint. Failure to meet this deadline precludes a party from seeking assignment of the case to the Commercial Division, except a party may request that the Administrative Judge assign a case to the Commercial Division after this period upon a showing of "good cause." The determinations of the Administrative Judge are final and not subject to further review or appeal.

For cases not initially assigned to the Commercial Division, but where the RJI was filed within the 90 day window, a party has ten days from receipt of the RJI to request assignment to a commercial justice.

New Rules to Promote Early Resolution of Disputes

Recognizing that the overwhelming majority of commercial cases settle before trial, the Commercial Division has adopted several new rules that are intended to bring about early, or at least quicker, resolutions of disputes.

First, a pilot program is currently underway in New York County (Rule 3) that automatically refers every fifth case filed to mediation, unless all parties stipulate that mediation should not proceed or any party make a "good cause" showing as to why mediation would be ineffective or unjust. The rule requires that the mediation take place within 180 days of assignment to a Commercial Division justice. This pilot has been underway in New York County only a few months. Practitioners in Nassau County should be on the lookout to see if it crosses the river in the near future.

The Commercial Division recognizes that limited discovery is oftentimes necessary to facilitate a settlement. Therefore, Rule 8(a) has been amended effective as of September 2, 2014 to require parties to consult prior to both preliminary and compliance conferences about "any voluntary and informal exchange of information that the parties agree would help aid early settlement of the case."

Finally, where an early settlement is not achieved, the Commercial Division has adopted a voluntary accelerated adjudication procedure (Rule 9, effective June 2, 2014). All non-class action commercial cases are eligible, provided all parties consent.

A case proceeding through the accelerated process must be trial ready within 9 months of the filing of the RJI. To facilitate that, the parties further agree to a waiver of numerous substantive rights, such as the right to a trial by jury, claims for punitive or exemplary damages, and the right to interlocutory appeal. Discovery in an accelerated action is also limited. No more than seven interrogatories and five requests to admit may be served, and absent a showing of good cause, no more than seven depositions limited to seven hours in length per side may be conducted.

Furthermore, documents requested by the parties are limited to those relevant to a claim or defense in the action and will be further restricted in terms of time, subject matter, and persons or entities to which the requests pertain. Unless the parties agree otherwise, electronic discovery should be in a searchable format and the description of custodians from whom electronic discovery is sought must be narrowly tailored to include "only those individuals whose electronic documents may reasonably be expected to contain evidence that is material to the dispute."

The rule also permits the court to deny requests when the costs and burdens of e-discovery are disproportionate to the nature of the dispute, the amount in controversy, or to the relevance of the materials requested. The court may also order disclosure on the condition that the requesting party advance the reasonable cost of production to the other side.

Conclusion

These new rules demonstrate that the Court System is dedicated to ensuring a first-rate Commercial Division. As commercial cases continue to grow, look for further alterations and additions to the Rules to meet the changing environment of commercial litigation.

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SURTAX ...

Continued From Page 7

own business interests. If an estate/trust is a 'material participant' in the business, the income derived therefrom is not subject to the 3.8% surtax. For a refresher course on passive activities and material participation, see IRS Publication 925, Passive Activity and At-Risk Rules.[8] Since the estate/trust is inanimate, whose participation do you look at in determining whether the 500-hour test for material participation has been met?

When the regulations for passive activities were issued in 1988, the IRS did not spend any time on estates and trusts because it wasn't a big issue; however, the Medicare surtax rules under Section 1411 are heavily dependent upon the passive activity rules and now it is a big issue. The IRS takes the position in a private letter ruling and Technical Advice Memoranda[9] that you only can count the hours spent by the fiduciary in their capacity as a fiduciary irrespective of whether the fiduciary also is an employee or manager in the business.

The Tax Court has taken a different view. In *Frank Aragona Trust v. Commissioner*,[10] the court held that the trust was a "real estate professional" based upon the activities of the trustees as both trustees and employees of the limited liability company in which the trust had an interest. The court did not opine as to the activities of non-trustee-employees. The term "real estate professional" is a term of art in the tax world, and the principles involved also come under the same code section and regulations as "material participation."

At this point, practitioners may be able to use the decision as authority for taking a similar position in a similar fact pattern where the fiduciary serves in a dual capacity as both fiduciary and employee/manager of the entity, thereby escaping the 3.8% surtax based upon material participation. The IRS has yet to decide if it will appeal the decision and/or issue a non-acquiescence (*i.e.*, a "we don't agree with the decision") putting taxpayers on notice that it will litigate the issue further. In the meantime, the IRS has listed "material participation by trusts" as a priority project in its 2014-2015 Priority Guidance Plan. While that would indicate a sense of urgency, the IRS has not yet assigned a Treasury person for the project and the timing for issuance is uncertain.

The IRS encourages the receipt of comments, and the AICPA has weighed in in its letter of September 22, 2014.[11] The points raised, inter alia, include "Count the combined activities of any trustee or executor who, under local law, has fiduciary duties and responsibilities with respect to the trust or estate, irrespective of the capacity in which the individual is performing those activities and irrespective of whether the individual also owns an interest in the same trade or business."

Recordkeeping

In the area of "material participation," keeping contemporaneous records and retaining proof of hours worked is critical. Here's a recordkeeping reminder for all tax matters quoted from page 1 of the Form 8960 instructions (FN 3):

> For the NIIT, certain items of investment income and investment expense receive different treatment than for the regular income tax. Therefore, you need to keep all records and worksheets for the items you need to include on Form 8960. Keep all records for the entire life of the investment to show how you calculated basis. Also, you will need to know what you did in prior years if the investment was part of a carryback or carryforward.

Section 1411 Oddities

David Kirk, formerly of the IRS, was a principal author of the Section 1411 regulations. In a presentation in July, he pointed out the following incongruities in the estates and trusts area. If you or the accountant arrive at an odd conclusion, it may be accurate, or maybe not. Remember, 2013 was the first year for this surtax. It may be years before the issues are litigated and resolved. Here, briefly, are the anomalies.

Normally, if the estate/trust has zero taxable income, it has no tax – but not necessarily with the 3.8% surtax. That's because the deductions for regular tax purposes don't dovetail with deductions allowed under the Section 1411 regime. For example, real estate taxes are allowed as a deduction in calculating the regular income tax but might not be an allowable deduction when calculating the tax on net investment income because the property was not held for rental or investment.

Another oddity pointed out by Kirk had to do with a terminating trust and excess deductions passed out to the beneficiaries. Since some of the deductions might not be listed in the regulations as allowable in calculating net investment income, the estate/trust could wind up with NII.[12]

This next point is especially irksome. It has to do with the calculation of the NIIT for a simple trust, *i.e.*, one that is required to annually distribute its fiduciary accounting income. As a result, the only income item remaining in the trust would be a capital gain, if any. Assume that the trust has interest income, tax exempt income, a capital gain and allowable NII deductions. It is possible that the adjusted gross income of the trust will result in a NIIT greater than would have been applicable if only the capital gain was considered. How can that be when the statute says that the 3.8% tax is applied on the lesser of:

(A) the undistributed net investment income for such taxable year, or

(B) the excess (if any) of —

(i) the adjusted gross income (as defined in section 67(e)) for such taxable year, ...[13]

Allocating Expenses in the Trust World

Subject to the rules relating to the allocation of expenses between taxable and tax exempt income, trusts are permitted to allocate expenses to various types of income in any manner chosen by the fiduciary (providing the trust instrument does not direct otherwise). The fiduciary, however, cannot allocate the same expense one way for regular tax purposes and a different way for NII purposes.

Capital Gains

Normally fiduciaries cannot distribute capital gains to beneficiaries unless the governing instrument, or local law, provides otherwise. Therefore, capital gains will get trapped at the estate/trust level and, because of the low threshold for being subject to the 3.8% net investment income tax (taxable income of $12,150 for 2014 and $12,300 for 2015), almost always will be subject. However, in the world of "total return," "power to adjust," and "unitrust", capital gain distributions to beneficiaries may be possible. Whether it is allowable or wise to do so requires thoughtful consideration.

Conclusion

Every article should have a conclusion but this one doesn't because there are too many unknowns and much work to be done by the IRS, perhaps Congress, and eventually the courts. It's okay if you didn't understand the issues brought out in this article. The key words herein will cause you to be able to seek an answer because you will have recognized the problems brought out above.

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1. http://rmfpc.com/wp-content/uploads/2013/12/Jon_Ruiss_Nassau Lawyer_Dec2013.pdf.
2. http://www.gpo.gov/fdsys/pkg/FR-2013-12-02/pdf/2013-28410.pdf; http://www.gpo.gov/fdsys/pkg/FR-2013-12-02/pdf/2013-28409.pdf.
3. The IRS has published easy-to-read frequently asked questions at http://www.irs.gov/uac/Newsroom/Net-Investment-Income-Tax-FAQs.
4. http://www.irs.gov/pub/irs-pdf/i8960.pdf.
5. http://www.irs.gov/pub/irs-pdf/f8960.pdf.
6. *See* 2013 Instructions for Form 8960 (FN 3) at 14 ("The ... items that may be allocated between net investment income and excluded income are: State, local, and foreign income taxes deducted on Schedule A (Form 1040), line 5 (or Form 1041, line 11), ...").
7. http://www.aicpa.org/Advocacy/Tax/Downloadable Documents/AICPA%20Section%201411%20Comment%20Letter%20FINAL%20Dated%2006162014.pdf.
8. http://www.irs.gov/pub/irs-pdf/p925.pdf.
9. http://www.irs.gov/pub/irs-wd/0733023.pdf; http://www.irs.gov/pub/irs-wd/1029014.pdf; http://www.irs.gov/pub/irs-wd/1317010.pdf.
10. 142 T.C. No. 9, Mar. 27, 2014.
11. http://www.aicpa.org/Advocacy/Tax/DownloadableDocuments/ AICPA-comments-on-trusts-and-estates-material-participation-submit-92214.pdf.
12. For individuals and estates/trusts, only expenses enumerated in the regulations are allowed. They are investment interest expense, investment advisory and brokerage fees, expenses related to rental and royalty income, tax preparation fees, fiduciary expenses (in the case of an estate or trust), and state and local income taxes to the extent "reasonably" allocated to gross investment income.
13. IRC § 1411(a)(2).

IRAs ...

Continued From Page 9

First, an inherited IRA account holder may not invest any additional funds into the account.[10] In contrast, holders of traditional IRAs and Roth IRAs, are encouraged to make regular contributions over time and are penalized for early withdrawals prior to retirement.[11] Second, unlike traditional IRAs and Roth IRAs, the holder of an inherited IRA must withdraw the entire account balance within five years of the original owner's death or take minimum distributions annually.[12] Lastly, in contrast to conventional IRAs, the holder of an inherited IRA may withdraw the entire balance for any purpose at any time without penalty.[13]

After examining these differences, as well as the objective of Bankruptcy Code exemptions, the Supreme Court determined that inherited IRAs represent vessels of wealth "that can be freely used for current consumption, not funds objectively set aside for one's retirement."[14] Otherwise, Justice Sotomayor said, nothing would prevent someone seeking bankruptcy relief from using the entire balance of an inherited IRA "on a vacation home or a sports car immediately after her bankruptcy proceedings are complete."[15] In fact, the court pointed out that if funds in inherited IRAs were deemed to be exempt, rather than provide debtors with a "fresh start," the Bankruptcy Code would be furnishing debtors with a "free pass."[16]

Notably, *Clark* does not speak to IRAs inherited by a spouse. However, speaking for the court, Justice Sotomayor noted that there are special tax rules for IRA spousal beneficiaries, including the ability for a surviving spouse to "roll over" the IRA funds into his or her own IRA account.[17]

Still, *Clark* does not preclude states from providing a property exemption to inherited IRAs under state law. Individuals with IRAs considering bankruptcy relief should consult with bankruptcy professionals in order to fully understand their options under operative state and federal law, as this ruling will have a significant impact on future retirement and bankruptcy planning.

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1. *Clark v. Rameker*, 134 S.Ct. 2242 (2014).
2. The language of Sections 522(b)(3)(C) and (d)(12) is identical.
3. *Clark*, 134 S.Ct. at 2245-46.
4. *See In re Clark*, 450 B.R. 858 (Bankr. W.D. Wis. 2011).
5. *See In re Clark*, 466 B.R. 135 (W.D. Wis. 2012).
6. *In re Clark*, 714 F. 3d 559 (7th Cir. 2013).
7. *Id.* at 562.
8. *See In re Chilton*, 674 F. 3d 486 (5th Cir. 2012).
9. *Clark*, 134 S.Ct. at 2246.
10. *Id.*, citing 26 U.S.C. § 219(d)(4).
11. *Id.* at 2247. Both traditional IRA and Roth IRA account holders are subject to a 10% penalty if withdrawals are made before reaching the age of 59 1/2. *Id.* at 2245.
12. *Id.* at 2247 (internal citations omitted).
13. *Id.*, citing 26 U.S.C. § 219(d)(4).
14. *Id.* (internal citation omitted).
15. *Id.* at 2248.
16. *Id.*
17. *Id.* at 2245.

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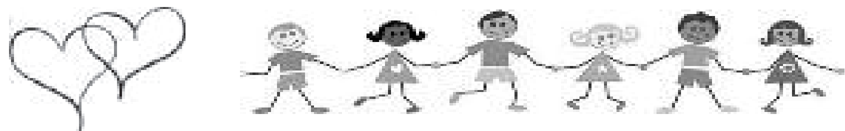

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UNFINISHED BUSINESS ...

Continued From Page 7

firms have argued that these profits are property of the bankruptcy estate, recoverable for the benefit of creditors.

Jewel Waivers

After *Jewel* brought the "unfinished business" doctrine to the forefront in law firm bankruptcies, law firms began to test out ways in which to avoid this result. One may wonder why law firms that are not in bankruptcy would even care about what happens to fees from clients should their firm dissolve. However, law firms that hire attorneys from firms in bankruptcy certainly have a vested interest – those firms want to be able to take on the attorney's clients and freely collect those fees, which application of the doctrine would prevent.

In response to *Jewel*, law firms began executing what are now known as "*Jewel* waivers." A *Jewel* waiver is when a law firm waives its right to pursue its partners for the profits earned on their "unfinished business", thereby seeking to preclude the application of the "unfinished business" doctrine.

Although these could, in theory, be used as a preventative measure before a law firm faces financial trouble, *Jewel* waivers became known by their "last-minute" use – they were often inserted into a firm's partnership agreement just before the firm dissolved and subsequently filed for bankruptcy. As *Jewel* waivers were utilized more often, the Bankruptcy Court for the Northern District of California addressed the topic with two decisions – one in 2009[3] and another in 2011.[4]

First, in *Brobeck*, the Chapter 7 trustee attacked a last-minute *Jewel* waiver attempt by setting forth two arguments – that the waiver was against public policy and that it was a fraudulent conveyance. Interestingly, the court ruled against the trustee on the public policy argument but agreed with the trustee's assertion that the waiver was a fraudulent transfer. The court's decision to apply the "unfinished business" doctrine focused on the fact that the firm waited until it was insolvent to agree to the waiver.

Two years later, in *Heller*, the same court confronted an adversary proceeding initiated by the plan administrator for an "unfinished business" claim. The law firm defendant set forth four assertions as to why the court should dismiss the plan administrator's "unfinished business" claim. The court considered each argument but rejected the defendant's assertions by holding that: i) *Jewel* applies under California law; ii) the *Jewel* waiver was a transfer of the partners' property interests; iii) the new firms could be liable as transferees of profits; and iv) California's attorney ethics rules did not prevent the enforcement of the doctrine.

These two cases, at least in California, evidenced that the "unfinished business" doctrine was alive and well. However, New York had not yet broached this topic until two decisions by the United States District Court for the Southern District of New York came down in 2012, setting a path to the Second Circuit and New York Court of Appeals.

Coudert and *Thelen*: The Second Circuit Questions the Doctrine

In the bankruptcy case of *Coudert Brothers LLP*, one adversary proceeding in particular[5] is instructive as to the Southern District's treatment of the "unfinished business" doctrine. In 2005, Coudert dissolved under the terms of its partnership agreement. In doing so, the equity partners adopted a "Special Authorization" in which the firm's Executive Board was thereafter permitted to execute a *Jewel* waiver. Many firm partners were hired by other firms and, naturally, brought their clients' cases.

In 2006, Coudert filed for Chapter 11 and Development Specialists, Inc. ("DSI") was appointed as the administrator of the estate. In one adversary proceeding, the Southern District granted summary judgment on an "unfinished business" claim commenced by DSI. On May 24, 2012, the court issued an opinion that active matters with pending hourly fees are presumed to be property of the dissolved firm's bankruptcy estate.[6] Once again, the "unfinished business" doctrine was upheld.

In the bankruptcy case of Thelen LLP, many adversary proceedings were initiated by Yann Geron, the Chapter 7 trustee. One, however, was litigated and decided by the Southern District.[7] True to form, as Thelen dissolved in 2008, the partners executed a *Jewel* waiver in which they waived any right to the profits from active cases that their attorneys took to other firms.

In 2009, Thelen filed for Chapter 7. The trustee filed one adversary proceeding against Seyfarth Shaw LLP, a law firm that hired 11 of Thelen's former partners, asserting that the *Jewel* waiver was a fraudulent conveyance because the firm did not receive any consideration for executing it.[8] However, in conflict with the Southern District's decision in the *Coudert Adversary* case, the same court held, on September 4, 2012, that under New York law, the "unfinished business" doctrine did not apply.[9] Consequently, profits of a dissolved law firm were not considered property of the firm's bankruptcy estate.

On November 15, 2013, the Second Circuit came down with a decision on appeal of the *Thelen Adversary* and *Coudert Adversary*.[10] The court agreed with the Southern District in holding that New York law governed the dispute, but it did not fully address the merits. Instead, the Second Circuit remanded the case to the New York Court of Appeals to answer "two unresolved questions of New York law regarding the applicability and scope of the 'unfinished business' doctrine."[11]

The Court of Appeals Rejects the Doctrine

On July 1, 2014, the Court of Appeals finally addressed the merits of the "unfinished business" doctrine under New York law.[12] In analyzing the merits of the doctrine, the Court of Appeals reviewed much of the jurisprudence discussed above, focusing on the *Coudert Adversary* and *Thelen Adversary*, the appeals of which were combined in the Second Circuit.

The two "unresolved questions" that the Second Circuit directed the Court of Appeals to answer were: i) whether, under New York law, a client matter billed hourly is the property of that law firm; and ii) if it is property of the firm, what a "client matter" is defined as and how damages would be calculated.

As it turned out, the court's clear holding precluded the need to consider the second question. Judge Read's unanimous decision answered the first question in the negative – under New York law, a client matter that is billed hourly is not property of that firm. At that moment, the "unfinished business" doctrine was stopped dead in its tracks.

First, the decision examined nearly one hundred years of case law on the doctrine. In doing so, the court examined the definition of "property" under New York Partnership Law. It turns out that the Partnership Law does not define property, but instead provides default rules for how property is divided in a law firm dissolution. The court cited a Court of Appeals case from 2013 in which they explained that the "expectation of any continued or future business is too contingent ... and speculative to create a present or future property interest." This is the case because clients have always had the absolute right to terminate the attorney-client relationship, leaving only the obligation to pay for the value of completed services.[13]

Next, the court contemplated public policy considerations and concluded that treating a dissolved firm's profits as partnership property is unjust, thereby rejecting the trustee's assertion that the "unfinished business" rule is congruent with New York public policy.[14]

Significantly, the Court of Appeals also addressed the validity and effectiveness of *Jewel* waivers. Without regard to whether the "unfinished business" doctrine applies, the court shot down the argument that a *Jewel* waiver could protect a firm from attack by a bankruptcy trustee. In doing so, the Court summarily dismissed this claim, holding that the "unfinished business" doctrine "simply does not comport with our profession's traditions and the commercial realities of the practice of law today, a deficiency beyond the capacity of a *Jewel* waiver to cure."[15]

The Court of Appeals' decisive and clear decision is an indication that the "unfinished business" doctrine is not alive and well in New York, and likely will not be in the near future. In fact, Judge Read's decision might even put a stop to much of the *Jewel* litigation in New York. Certainly now, law firms hiring new lawyers are breathing a collective sigh of relief that the profits derived from those clients' cases are safe to collect.

Scott Fleischer is a Bankruptcy Associate at LaMonica Herbst & Maniscalco, LLP in Wantagh and a former Senior Associate Editor of the Hofstra Law Review.

1. *Jewel v. Boxer*, 156 Cal. App. 3d 171 (1984).
2. *Id.* at 174.
3. *Greenspan v. Orrick, Herrington & Sutcliffe LLP* (*In re Brobeck, Phleger & Harrison LLP*), 408 B.R. 318 (Bankr. N.D. Cal. 2009) ("Brobeck").
4. *Heller Ehrman LLP v. Arnold & Porter LLP* (*In re Heller Ehrman LLP*), Adv. P. No. 10-3203DM, 2011 WL 1539796 (Bankr. N.D. Cal. Apr. 22, 2011) ("Heller").
5. *Development Specialists, Inc. v. K & L Gates LLP* (*In re Coudert Brothers LLP*), 477 B.R. 318 (S.D.N.Y. 2012) (*"Coudert Adversary"*).
6. *Id.* at 326.
7. *Geron v. Robinson & Cole, LLP* (*In re Thelen LLP*), 476 B.R. 732 (S.D.N.Y. 2012) (*"Thelen Adversary"*).
8. *Id.* at 736-37.
9. *Id.* at 741.
10. *Geron v. Seyfarth Shaw, LLP* (*In re Thelen LLP*), 736 F.3d 213 (2d Cir. 2013) (*"Thelen Appeal"*).
11. *Id.* at 216.
12. *Matter of In re Thelen LLP*, 2014 NY Slip Op 04879 (July 1, 2014).
13. *Id.* at *28.
14. *Id.* at *31-32 (It "would have numerous perverse effects, and conflicts with basic principles that govern the attorney-client relationship under New York law and the Rules of Professional Conduct." Further, New York has a "strong public policy encouraging client choice and, concomitantly, attorney mobility.").
15. *Id.* at *33.

WE CARE participated in the **Light The Night Walk**: **Taking Steps to Cure Cancer**, in Eisenhower Park, on October 18, 2014. Light The Night Walk is a fundraising campaign of The Leukemia & Lymphoma Society (LLS) which brings together families and communities to honor blood cancer survivors, as well as those lost to the diseases, and shine a light on the importance of finding cures and providing access to treatments for blood cancer patients. (photo by Hector Herrera)

KODAK ...

Continued From Page 9

of real property leases. Section 365(a) of the Bankruptcy Code provides broad authority for the trustee or Chapter 11 debtor to, subject to the bankruptcy court's approval, assume or reject any executory contract or unexpired lease of the debtor.

Section 365(d)(4)(A) of the Bankruptcy provides that if a debtor does not assume its unexpired nonresidential real property leases by either the date that is 120 days after the date of the order for relief[2] or the date of the entry of an order confirming a plan, whichever is earlier, then such unexpired real property leases will be deemed rejected.

Section 365(d)(4)(B) then provides that the 120-day period may be extended for 90 days on the motion of the trustee, debtor or lessor for cause but that any subsequent extension will only be granted upon the prior written consent of the lessor. The debtor, assuming it obtains the 90-day extention, therefore has 210 days to assume its unexpired real property leases without requiring consent of the affected landlord.

Section 365(f)(1) provides authority for a debtor or trustee to assign a lease to a third party. To assign the lease, Section 365(f)(2) of the Bankruptcy requires that the trustee or debtor assume the lease in accordance with the provisions set forth in Section 365, and also provide the landlord with adequate assurance of the proposed assignee's future performance of the lease.

Lastly, Section 365(f)(3) allows the debtor or trustee to assign the lease notwithstanding any contractual prohibits on assignment. The policy behind this provision is to maximize the value of the debtor's estate for the benefit of creditors by rendering unenforceable anti-assignment provisions that would impair the debtor's ability to sell the lease.

The Court's Analysis

With no applicable cases on point on this issue, the court began its analysis by reviewing the plain meaning of the statute.

First, the court looked at the language of Section 365(f)(2), which the Landlord argued required the simultaneous assumption and assignment of the lease because that section uses the present tense of the verb "to assume" (assignment is authorized if the trustee "assumes such contract or lease"). The court, however, found that the plain meaning of the statute does not support any requirement for simultaneous assumption and assignment. Rather, the court found that "there is no authority that use of the present tense in this instance requires simultaneous assumption and assignment. The words of the statute, reasonably interpreted, do not require it."[3] Instead, the only requirement imposed by Section 365(f)(2) is that the assumption must occur before the assignment. The court then looked at the other provisions of Section 365 and reiterated its belief that "assumption and assignment are independent concepts."[4]

The court also reviewed Section 365(d)(4), which provides a deadline on the assumption of a lease but is silent on any deadline with respect to the assignment of such lease. It noted that Congress enacted Section 365(d)(4) in order to "limit the discretion of judges to extend time to assume or reject certain commercial contracts and to provide landlords with greater certainty as to such tenancies."[5] Interpreting Section 365(d)(4) to permit the assignment of a lease outside of the 210-day deadline for assumption, in the court's opinion, "reasonably balances the goal of providing protection to landlords and the goal of maximizing the value of a debtor's estate."[6]

The Landlord also argued that allowing debtors to assume a lease and then subsequently assign the lease outside of the 210-day period was unfair to landlords. The court did not find this argument persuasive, stating that even if such a ruling were unfair, "the disruption of non-debtors' expectations of profitable business arrangements is common in bankruptcy proceedings."

The court also noted that the Landlord would suffer no harm from the assignment since the Ground Lease would continue post-assignment on its present terms and since the Purchaser could provide adequate assurance of its future performance as required under Section 365(f)(2)(B) of the Bankruptcy Code. In addition, the assignment of the Ground Lease should not have come as a surprise to the Landlord since the assumption order clearly included a provision which reserved the Debtors' rights to subsequently assign the assumed leases in accordance with Section 365.

Lastly, the Landlord argued that the Ground Lease was assumed *cum onere* (Latin phrase meaning that the lease was assumed subject to all of its burdens). The Landlord pointed out that the Ground Lease contained an anti-assignment provision and that the Debtors could therefore not assign the Ground Lease without the Landlord's prior written consent.

The court, however, found that a debtor that is still in bankruptcy continues to enjoy the benefits provided to it under the Bankruptcy Code, including Section 365(f)(3), even if the lease has already been assumed. Such provision allows the debtor or trustee to assign a contract notwithstanding an anti-assignment clause in the contract.

The court therefore entered an order granting the assignment of the Ground Lease to the Purchaser over the Landlord's objection.

The Potential Implications of *Kodak*

It has been over a year since the court in *Kodak* entered its decision, but to date there have been no cases, whether positive or critical, that have made reference to the *Kodak* decision. It therefore remains to be seen whether the assignment of a lease after the assumption of such lease free and clear of contractual anti-assignment provisions will be supported by other bankruptcy courts.

As an initial matter, the decision appears to provide debtors with more flexibility with respect to the treatment of their executory contracts and unexpired leases in bankruptcy. Debtors, especially large retail debtors who may be parties to hundreds of real property leases, may see the outcome of the *Kodak* case as one that is decidedly in their favor. While such debtors will still face the pressure of determining which leases they must assume or reject by the deadline imposed by Section 365(d)(4), it may not be necessary for them to also immediately decide whether those assumed leases should be assigned. This breathing room will allow debtors to take a more critical look at the leases they have assumed to determine the best strategy for maximizing their estates.

On the other hand, landlords may resent the uncertainty created by the *Kodak* decision in that their leases may be assumed and then assigned at any later point in a debtor's bankruptcy case. This may cause landlords who are involved in those bankruptcy cases that linger for years in bankruptcy to feel like they are caught in an endless game of limbo. Such landlords may take comfort in knowing that, on assumption, the landlord obtains a cure of defaults and reinstatement of the lease; any subsequent defaults or rejection by the debtor will provide the landlord with an administrative expense claim for some of its damages. In addition, any subsequent assignment of the lease would still require that the proposed assignee provide adequate assurance of its future performance.

Lastly, it is possible that the result in *Kodak* may have been avoided if the Landlord had objected to the provision of the assumption order that specifically reserved the Debtors' rights to assign the Ground Lease.

Veronique Urban is an associate in the Bankruptcy & Creditors' Rights practice group of Farrell Fritz, P.C. in Uniondale, New York.

1. *In re Eastman Kodak Company*, 495 B.R. 618 (Bankr. S.D.N.Y. 2013) ("*Kodak*").
2. The date of the "order for relief" is different in a voluntary bankruptcy case from an involuntary bankruptcy case. In a voluntary bankruptcy case, such date is the date that the debtor filed its bankruptcy case. In an involuntary bankruptcy case, such date is the date that the court determines that the debtor is generally not paying its debts as such debts become due. *See* 11 U.S.C. § 303(h).
3. *Kodak*, 495 B.R. at 622.
4. *Id.*
5. *Id.*
6. *Kodak*, 495 B.R. at 623.
7. *Kodak*, 495 B.R. at 624 (internal citations and quotations omitted).

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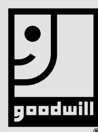

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BACK TAXES ...

Continued From Page 3

Installment Payment Agreement (IPA), or proffer an Offer in Compromise ("Offer").[17] While consenting to an income execution, entering into an IPA, or submitting a good faith Offer will prevent suspension and generally halt further collection action, interest and penalties will continue to accrue.

An income execution is a levy that is placed on a taxpayer's wages and is similar to a wage garnishment.[18] The Tax Department will send a First Service Income Execution to the taxpayer that requests the taxpayer voluntarily submit up to 10 percent of his or her wages.[19] If the taxpayer fails to satisfactorily respond within 20 days of receiving the correspondence, a Second Service Income Execution is sent to the taxpayer's employer requiring that up to ten percent of the taxpayer's wages be surrendered to the Tax Department.[20]

To avoid suspension or to reinstate a suspended license, taxpayers may consent to the income execution after receiving the First Service Income Execution.[21] Generally, the income execution remains in effect until the outstanding liabilities are paid in full or the 20-year statute of limitations on collections has expired.

Another payment arrangement that will prevent suspension or reinstate a suspended license is an IPA that allows the taxpayer to make monthly payments until the liability is paid in full.[22] In most cases, taxpayers are required to submit information and documentation regarding their financial condition before the Tax Department will make a determination as to whether their request for an IPA should be approved.[23] Preparing the required information for submission and waiting for the Tax Department to evaluate the IPA request may take longer than the 60 days available to a taxpayer facing suspension. It may be advantageous for the taxpayer to request a voluntary income execution before pursuing an IPA in such cases.

Taxpayers who cannot afford an IPA or a voluntary income execution can submit an Offer in Compromise to the Tax Department. The Offer in Compromise Program allows taxpayers to make a lump-sum payment based on their financial situation. The one-time payment may be less than the taxpayer's total outstanding liabilities, but it has the effect of satisfying the obligation in full.[24] It is up to the Tax Department to determine whether or not to accept such an Offer. The Tax Department will determine "an amount that it realistically expects could be collected within a reasonable period of time from the taxpayer's assets."[25]

Offers are typically utilized by financially distressed taxpayers with overwhelming tax liabilities. These taxpayers submit Offers when it is highly unlikely that they will be able to pay the amount in full within the 20-year statute of limitations the State has to collect tax liabilities. In 2011, the Offer in Compromise Program was expanded to include taxpayers against whom collection in full of any tax liability will cause undue economic hardship.[26]

The threat of losing their licenses has compelled so many New Yorkers to address their outstanding tax liabilities and generated so much revenue for the State that it is not unrealistic to think the State may look to implement similar laws in other areas, such as with respect to professional licenses. Those individuals with outstanding tax liabilities may want to reconsider their financial priorities and reach a resolution with the Tax Department to avoid facing such repercussions.

Peter J. Graziano is an associate with the Melville tax law firm of Tenenbaum Law, P.C., www.litaxattorney.com, (631) 465-5000, pgraziano@litaxattorney.com. His practice focuses on the resolution of Federal and New York State tax controversies. Peter is a recent graduate of Quinnipiac University School of Law, where he participated in the tax resolution clinic.

1. N.Y. Tax Law § 171-v.
2. Press Release, Governor Cuomo, Governor Cuomo Announces Initiative to Suspend Driver Licenses of Tax Delinquents Who Owe More Than $10,000 in Back Taxes (Aug. 5, 2013).
3. *See id.*
4. N.Y. Tax Law § 171-v(1).
5. *Id.*
6. N.Y. Tax Law § 171-v(3).
7. *Id.* § 171-v(4).
8. *See* Press Release, Governor Cuomo, *supra* note 2.
9. *See* N.Y. State Dept. of Taxation & Fin., Technical Mem. TSB-M-13(4)I (2013).
10. N.Y. Tax Law § 171-v(3)(d).
11. *See* Press Release, Governor Cuomo, *supra* note 2.
12. *Id.*
13. *Id.*
14. Press Release, Governor Cuomo, Governor Cuomo Announces Initial Results of Tax Scofflaw Driver License Suspension Initiative (Mar. 17, 2013).
15. *See id.*
16. *See id.*
17. *See* N.Y. Tax Law § 171-v(3)(b).
18. N.Y. State Dept. of Taxation & Fin., Publication 125: The Collection Process (2002).
19. *Id.*
20. *Id.*
21. N.Y. Tax Law § 171-v(3).
22. N.Y. Tax Law § 171-v(2)(b); Publication 125, *supra* note 18.
23. Publication 125, *supra* note 18.
24. N.Y. State Dept. of Taxation & Fin., Publication 220: Offers in Compromise Program (2008).
25. *Id.*
26. *See* N.Y. State Dept. of Taxation & Fin., Technical Mem. TSB-M-11(9)C (2011).

PRO BONO ...

Continued From Page 10

newer attorneys allows us to grow our program of volunteer attorneys and thus help many more clients."

In addition to her law practice, raising her three children and her passion for providing pro bono services to clients in need, Ms. Hamberger also enjoys a night at the opera and is an avid fan of the New York Knicks.

Ms. Hamberger is best known to the Volunteer Lawyer's Project for her hard work and determination to help low-income Long Island residents with their matrimonial cases. Her dedication and professionalism are unmatched and we are very proud to honor Ms. Wendy Hamberger as Pro Bono Attorney of the Month.

Ms. Hamberger wishes to thank her team of co-workers for their tremendous work and assistance in providing pro bono services.

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ROUNDUP ...

Continued From Page 11

the debtor's bankruptcy case on the grounds of "willful and malicious injury" under 11 USC §523(a)(6). Judge Grossman held that while the doctrine of res judicata barred re-litigation of the debtor's liability and the finding of damages, the state court's findings were insufficient to establish the Bankruptcy Code's requirement of "willful and malicious intent" to render the debt non-dischargeable. However, upon review of the record, the Court did eventually find such "willful and malicious intent."

Bank of India v. Gobindram [9]

In an action to block the debtor's discharge due to errors in the schedules, the debtor blamed his counsel and claimed that he had relied on counsel to accurately complete them. The debtor further claimed that this negated any fraudulent intent on his part. The debtor, a sophisticated businessman, acknowledged that he had not read the schedules before authorizing his counsel to file the case.

As to the question in the Statement of Financial Affairs regarding payments to creditors in the 90 days prior to bankruptcy, the box "None" was checked, despite the fact that the debtor had made such payments from tax refunds he had received. In an e-mail to counsel, the debtor wrote that the draft of the petition sent to him "looked fine and that he had read everything" (quoting for the court's decision). The debtor also admitted at trial that if he had read the schedules, he would have known they were incorrect, but that nevertheless he signed them and thereby acknowledged that he had read them and that they were correct.

Judge Grossman ruled against the debtor, opining that the "advice of counsel" defense fails if the debtor did not provide the required information, and did not show attention to the detail and accuracy in answering expected of a similarly situated person. This amounted to a reckless disregard for the truth, and even errors by counsel in preparing the schedules did not insulate the debtor from his responsibility to assure that the information was accurate.

The court went on to state that the "advice of counsel" defense is only available if it was needed to ascertain what had to be disclosed; if such advice was unnecessary to determine that, then a "knowingly false" disclosure or omission is not excused. Here, the debtor did not need the advice of counsel to answer the question correctly, so the claimed "reliance on counsel" was not a reasonable excuse. The debtor had sufficient time to review and correct any errors made by counsel.

Estate of Ruffini v. Norton Law Group PLLC [10]

This was an action to recover about $46,000 in pre-petition legal fees paid for mortgage modification and foreclosure proceedings as being in excess of the reasonable value of the services performed. An initial retainer agreement provided for a flat fee of $3,300 for mortgage modification and loss mitigation. The court ruled that all sums billed to the debtors on an hourly basis in excess of $3,300 were recoverable as fraudulent conveyances.

A second retainer agreement related to defense of a foreclosure proceeding provided for hourly billing and a minimum of $5,000 in fees. Since the debtors contended that this retainer was not explained to them, it was unenforceable under state law; the court also found that the law firm breached the agreement by failing to provide basic services and by failing to keep the debtors informed as to the status of the case in violation of the rules of ethical conduct. All sums paid to the firm under that retainer were also recoverable, as the law firm provided no services of reasonably equivalent value.

Agai v. Antoniou [11]

Objections to the debtor's discharge were brought on various grounds based upon deposits by the debtor of his paychecks to his wife's bank account to avoid garnishment, and his failing to disclose those transfers and the existence of that bank account. The debtor directed his employers to make his paychecks payable to his wife, who did not work, or he cashed them and deposited the cash into his wife's account. The debtor had taken his name off of the account in 2010 after creditors obtained sizable judgments against him. Over $130,000 of paychecks or cash were deposited in the wife's account from March 2010 to July 2012. W-2 statements for those earnings were issued in his wife's name, although the income was actually earned by the debtor.

Despite the debtor's contention that this income was used to pay his family's living expenses, Judge Craig concluded that this activity constituted transfers of property by the debtor while retaining a beneficial interest, coupled with a continuing concealment of the funds.[12] The court found an "intent to hinder, delay, or defraud creditors" under §11 USC 727(a)(2), despite the fact that 90% of the debtor's paychecks would have otherwise been exempt from execution under CPLR 5205. The claim that the funds needed to be protected in order to cover family living expenses was not a justifiable explanation, and summary judgment was granted to the objecting creditors on several grounds under Section 727(a).

1256 Hertel Ave. Associates LLC v. Calloway [13]

This is a recent decision by the Second Circuit Court of Appeals in which the debtor filed for bankruptcy in 2009. One of two judgments against her was filed in 2003 in the amount of $4,682. The debtor declared the homestead exemption, which at that time was $50,000 based upon an amendment that took effect in August 2005.

The issue was whether that 2005 amendment should apply retroactively to the pre-existing judicial lien, which the debtor sought to avoid based upon about $25,000 in equity in her house. The judgment creditor argued that the exemption should only apply to the extent of $10,000, which is what it was at the time the judgment was obtained, and that retroactive application would amount to an unconstitutional "taking of property" under the Fifth Amendment. The 2005 amendment took effect immediately, but did not specify whether it was designed to protect the debtor's homestead from all obligations, even those pre-existing.

The Bankruptcy Court held that the 2005 amendment increased the amount of the exemption as against all creditors and obligations regardless of when their judgments were perfected, and that judicial liens are not vested property interests. This ruling was made by the District Court and then affirmed by the Second Circuit. As a result, the debtor was able to avoid the creditors' judicial lien.

Jeff Morgenstern, Esq. maintains an office in Carle Place, New York where he concentrates in bankruptcy, creditors' rights, and commercial and real estate transactions and litigation.

1. 2014 Bankr. Lexis 997 (Bankr. E.D.N.Y. Mar. 31, 2014).
2. 113 F. 3d 1304 (2d Cir. 1997).
3. *Rexnord Holdings Inc. v. Bidermann*, 21 F. 3d. 522 (2d Cir. 1994).
4. Adv. Case No. 12-8426 (Bankr. E.D.N.Y. Apr. 29, 2014).
5. Adv. Case No. 11-9488 (Bankr. E.D.N.Y. Apr. 24, 2014).
6. 512 B.R. 421 (Bankr. E.D.N.Y. May 30, 2014).
7. 512 B.R. 148 (Bankr. E.D.N.Y. May 20, 2014).
8. 513 B.R. 430 (Bankr. E.D.N.Y. June 19, 2014).
9. 2014 Bankr. LEXIS 2808 (Bankr. E.D.N.Y. June 20, 2014).
10. 2014 Bankr. LEXIS 733 (Bankr. E.D.N.Y. Feb. 25, 2014).
11. 2014 Bankr. LEXIS 3458 (Bankr. E.D.N.Y. Aug. 14, 2014).
12. The court noted that while some of the activity initially took place outside the statutory one-year period, if the Continuing concealment" existed within the critical year, that element will still be satisfied.
13. 423 B.R. 627, aff'd 2012 U.S. Dist. LEXIS 190411 (2012), aff'd 2014 U.S. App. LEXIS 14860 (2d Cir. Aug. 1, 2014).

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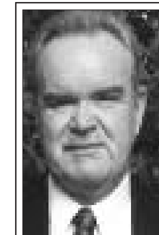

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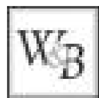

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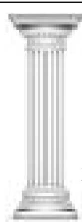

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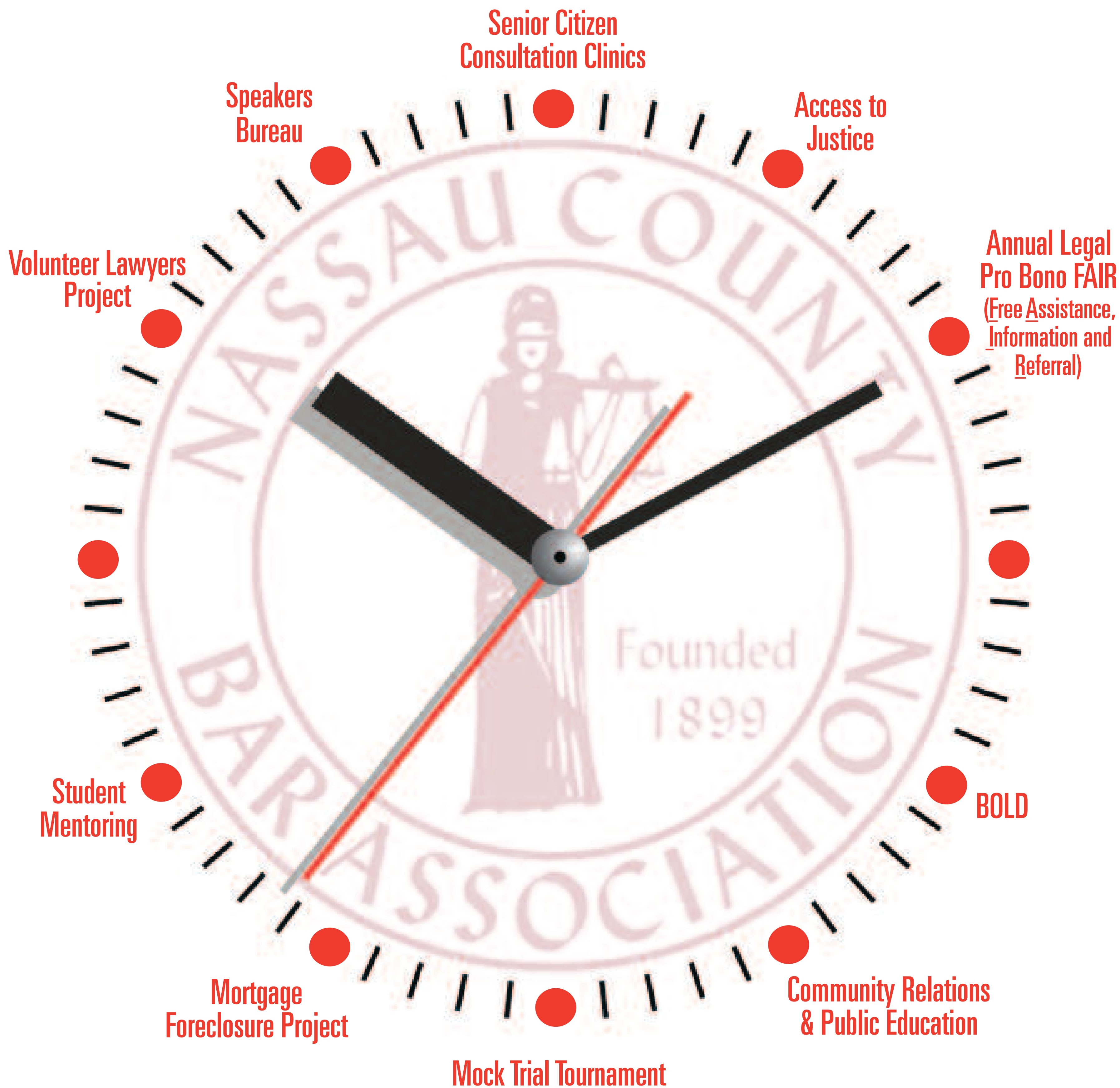

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